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# THE SUPREME COURT JOURNAL

*Edited by*

K. SANKARANARAYANAN, B.A., B.L.

1963

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# THE SUPREME COURT JOURNAL

II]

JULY

[1963]

## NOTES OF RECENT CASES.

[SUPREME COURT.]

*S. J. Imam, J. L. Kapur, K. Subba Rao*  
and *J. R. Mudholkar, JJ.*  
11th December, 1962.

*Pooran Chand v.*  
*Motilal.*

C.A. No. 624 of 1962.

*Delhi and Ajmer Rent Control Act (XXXVIII of 1952)—Transfer of Property Act (IV of 1882), section 106—Section 115, Civil Procedure Code (V of 1908).*

Applying *Hari Sankar v. Rao Girdhari Lal Chowdhury*, (Civil Appeal No. 94 of 1959 decided on 5th December, 1961), the Court held : "It is clear from the observations of Hidayatullah, J., and those of Beaumont, C. J., which the former has fully extracted, that the power of the High Court under section 35 of the Delhi and Ajmer Rent Control Act is wider than that under section 115 of the Code of Civil Procedure, though it cannot be equated to that of its jurisdiction in an appeal. It is neither possible nor advisable to define with precision the scope and ambit of section 35 of the Act, but it should be left to the High Court to consider in each case whether the impugned judgment is according to law or not, as explained by this Court in the said decision.

Bearing in mind the view expressed by this Court we shall proceed to consider whether the High Court had acted within its jurisdiction.

It is, therefore, manifest that the appellant never denied that the term of the lease was not for one year. The High Court was, therefore, justified in considering the point, because the validity of the notice depended upon the term of the tenancy and also because the question of the term of the tenancy depended solely on the construction of the lease deed. On the basis of the lease deed the High Court held that the term of the lease is only for one year and it had expired by efflux of time. The document says that the house had been taken on rent for one year by the first party and ends thus. 'If the rent falls into arrears then the second party shall be jointly and severally entitled to eject me namely the first party before the expiry of the term of tenancy and realise the rent due.' It is, therefore, manifest that the lease was for a period of one year and that it is not a monthly tenancy. As the term fixed under the deed had expired, the appellant was not entitled to any statutory notice under section 106 of the Transfer of Property Act, 1882.

In this view, the High Court was certainly right in setting aside the decree of the Civil Judge for the Civil Judge refused to pass an order of eviction on a wrong legal basis that the appellant was a monthly tenant, ignoring the express term in the lease deed itself. As the decree was not 'according to law' the High Court in exercise of its jurisdiction under section 35 of the Act, was certainly within its rights to set aside the said decree."

*G. C. Mathur*, Advocate, for Appellant.

*B. D. Sharma*, Advocate, for Respondents.

*G.R.*

*Appeal dismissed.*

[SUPREME COURT.]

P. B. Gajendragadkar, K. N. Wanchoo,  
M. Hidayatullah, K. C. Das Gupta and  
J.C. Shah, JJ.

25th January, 1963.

*Madhya Bharat Gambling Act (LI of 1949) (Samvat 2006)—Criminal Procedure Code (V of 1898), section 439—Articles 13, 19 and 21 of the Constitution of India (1950)—Definitions of "Gaming" and "Gaming House".*

Though the word used in section 6 of the Gambling Act is "suspecting" in actual proof this suspicion must be demonstrated to be reasonably based. The safeguards, thus, are (a) the existence of credible information, (b) the seizure of articles suspected to be instruments of gaming which bear out the information on which action is taken, and (c) proof to the satisfaction of the Court that there are reasonable grounds for holding that the articles seized are instruments of gaming. Once the house is shown to the satisfaction of the Court to be a gaming house the law leaves any one found in it during any gaming, to explain his presence on pain of being presumed to be there for gaming.

Considering the fact that gambling is an evil and it is rampant, that gaming houses flourish as profitable business and that detection of gambling is extremely difficult, the law to root out gambling cannot but be in the public interest. Such a law must of necessity provide for special procedure but so long as it is not arbitrary and contains adequate safeguards it cannot be successfully assailed. In our opinion the Act with which we are concerned contains sufficient safeguards to ensure that there is no danger to any one except to those who are proved to the satisfaction of the Court to keep a gaming house or who can be presumed unless the contrary be proved to be there for the purpose of gaming. We are satisfied that the impugned provisions are constitutional.

C. L. Sareen and R. L. Kohli, Advocates, for Appellants.

I. N. Shroof, Advocate, for Respondent.

G.R.

*Appeal dismissed*

[SUPREME COURT.]

P. B. Gajendragadkar, K. N. Wanchoo  
and K. C. Das Gupta, JJ.

25th March, 1963.

The Akola Electric Supply Co. v.

J. N. Jaraie.

C.A. No. 637 of 1962.

*Industrial Disputes Act (XIV of 1947)—C. P. & Berar Industrial Disputes Settlement Act, 1947—Gratuity to the employees.*

Distinguishing *Indian Hume Pipe Co. v. Its Workmen*, 1960 S.C.J. 550 : (1960) 2 S.C.R. 32 and *Bharatkhand Textile Mfg. Co., Ltd. v. Textile Labour Association*, (1960) 3 S.C.R. 329 from the present case the Court held : "We are unable to see however anything in these decisions of this Court to assist such a plea. In neither of these cases nor in any other case that we know of had this Court to consider the question of a gratuity scheme in an industry which is going to close in the near future or has already been closed. Indeed, we know of no case in which an Industrial Tribunal has ever framed a gratuity scheme for an industry which was not expected to carry on or has ceased to carry on its business. In all the cases that have come before Industrial Tribunals or this Court, gratuity schemes asked for or allowed have been in industries which were expected to carry on for a fairly long time. One of the important factors which requires consideration in deciding on the propriety of a scheme of gratuity is the ability of the industry to bear the additional financial burden and in deciding this question it has been repeatedly pointed out the burden from year to year has to be considered after taking into account the average number of retirements likely to take place in a year.

We have therefore come to the conclusion that the Industrial Court acted wrongly in directing any gratuity to be paid by the Company to its employees."

M. C. Setalvad, Senior Advocate (Sardar Bahadur, Advocate, with him), for Appellant.

S. A. Sohoni and Ganpat Rai, Advocates, for Respondents.

G.R.

*Appeal allowed.*

# The Supreme Court Journal (Reports)

II]

JULY

[1963

## THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—S. K. DAS, M. Hidayatullah, K. C. Das Gupta, J. C. Shah  
and N. Rajagopala Ayyangar, JJ.

R. P. Kapur and others

.. Petitioners\*

v.

Sardar Pratap Singh Kairon and others

.. Respondents.

*Criminal Procedure Code (V of 1898), Sections 551, 154, 156 and 157—Investigation of cognizable offence (on complaint received by Chief Minister, and forwarded by him, to them) by superior Police officers in C.I.D.—Legality—Constitution of India, 1950, Article 14—If violated.*

An Inspector of Police in the Criminal Investigation Department was superior in rank to that of an officer in charge of a Police Station and under section 551, Criminal Procedure Code, he could exercise the powers of an officer in charge of a Police Station throughout the State. Section 154 of the Code does not say that an information of a cognizable offence *can only be made* to an officer in charge of a Police Station. That section merely lays down, *inter alia*, that every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a Police Station shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information shall be signed by the person giving it and the substance thereof entered in a book to be kept by such officer in such form as the State Government may prescribe in that behalf. Section 156 gives power to an officer in charge of a Police Station to investigate without the order of a Magistrate any cognizable case which a Court, having jurisdiction in the local area, etc., would have power to enquire into or try. Section 157 lays down the procedure which an officer in charge of a Police Station must follow where information of a cognizable offence is made.

Where a complaint of a cognizable offence is made to the Chief Minister who forwarded the same to the Additional Inspector General of Police who passed necessary orders thereon directing investigation by a Superior Police Officer, it cannot be said that any unfair discrimination had been made against the persons against whom the complaint was made. This cannot be said to amount to adopting a procedure unknown to law or even to unequal treatment so as to attract Article 14 of the Constitution.

The initiation of the case is not illegal nor is investigation vitiated by discrimination.

In executive as well as judicial administration justice must not only be done but it must appear that justice is being done. Where allegations as to the circumstances in which the Chief Minister made certain orders are made "an affidavit from the Chief Minister would have cleared much of the doubt which in the absence of such affidavit arose in this case."

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

A. S. R. Chari, Senior Advocate (S. N. Andley, J. B. Dadachanji, Rameshwar Nath and P. L. Vohra, Advocates of M/s. Rajinder Narain & Co., with him), for Petitioners.

S. M. Sikri, Advocate-General, H. S. Doabia, Additional Advocate-General and M. S. Pannu, Deputy Advocate-General for the State of Punjab (D. Gupta, Advocate, with them), for Respondents.

The Judgment of the Court was delivered by

*S. K. Das, J.*—This is a writ petition. The three petitioners before us are (1) R. P. Kapur, a member of the Indian Civil Service, who before his suspension was serving as a Commissioner in the State of Punjab, (2) Sheila Kapur, his wife, and (3) Kaushalya Devi, his mother-in-law. They have moved this Court under Article 32 of the Constitution for the enforcement of their rights under Articles 14 and 21 of the Constitution, which rights they say have been violated by the respondents who are the State of Punjab, Sardar Pratap Singh Kairon, Chief Minister thereof, and certain officials, police, administrative and magisterial, who have been conducting, or are connected with, the investigation or inquiry into a number of criminal cases instituted against the petitioners. We shall refer to some of these officials later in this judgment in relation to the part which they have played or are playing in those criminal cases.

Briefly stated the case of the petitioners is that petitioner No. 1 had the misfortune to incur the wrath of the Chief Minister of the State. It is alleged that the Chief Minister was annoyed with petitioner No. 1, because the latter did not show his readiness to give evidence for the prosecution in a case known as the Karnal Murder Case (later referred to as the Grewal case) in which one D. S. Grewal, then Superintendent of Police, Karnal, and some other police officials were, along with others, accused of some serious offences. That case was transferred by this Court to a Special Judge, at Delhi, who commenced the trial sometime in May/June, 1959. Petitioner No. 1 was at the time Commissioner of Ambala, and he alleges that he was told by the Chief Minister that it was proposed to cite the Deputy Commissioner and the Deputy Inspector-General of Police as prosecution witnesses in the said case and it would be in the fitness of things that petitioner No. 1 should also figure as a prosecution witness; to this suggestion petitioner No. 1 gave a somewhat dubious reply to the effect that his appearance as a prosecution witness might or might not help the prosecution. Another reason for the displeasure of the Chief Minister, as alleged in the petition, related to certain orders which petitioner No. 1 had passed as Commissioner, Patiala Division, in a revenue case known as the Sangrur case. We shall presently give more details of that case, but it is enough to state here that the allegation is that in that case petitioner No. 1 passed certain orders, involving the disposal of properties worth about Rs. 9 lacs, which were adverse to one Surinder Singh Kairon, son of the Chief Minister. It is stated that as a result of the displeasure which petitioner No. 1 had incurred for the two reasons mentioned above, a special procedure was adopted in the investigation of the criminal cases instituted against the petitioners; and some new cases were started through the instrumentality of the C.I.D. Police with a view to subject the petitioners to harassment and persecution. The substantial allegation, to quote the language of the petition, is that

“a special procedure or rather a technique has been devised for circumventing the mandatory provisions of the law (meaning the Code of Criminal Procedure) as regards the petitioners, two of whom are ladies and who are being dragged about unnecessarily because they happen to be related to petitioner No. 1.”

It is stated that there has been a deliberate departure from the normal and legal procedure in the matter of institution and investigation of criminal cases against the petitioners—a departure said to be the result of “an evil eye and unequal hand” which the petitioners allege constitutes a denial of the right of equal protection of the laws guaranteed to them under Article 14 of the Constitution. The special procedure or technique of which the petitioners complain is said to consist of several items, such as (1) entertainment of a criminal complaint personally by the Chief Minister; (2) institution of complaints by the C.I.D. Police; (3) registration of first informations after such complaints; (4) investigations in advance of the complaints; (5) investigation by specially chosen (hand-picked as learned Counsel for the petitioners has suggested) C.I.D. officials, not necessarily of high rank, who have no power to investigate; (6) the arrangement of a special C.I.D. squad to “unearth something” against the petitioners, etc. In the petition four criminal cases were referred to as illustrative

of the special procedure, said to be unwarranted by law, adopted against the petitioners, and in a supplementary petition filed on 9th June, 1960, some more cases were referred to. After we had conveyed to learned Counsel for the petitioners that we could not consider the supplementary petition which the respondent had no opportunity of meeting, the supplementary petition was withdrawn. Therefore, we do not propose to say anything about the cases which are referred to in the supplementary petition. The four cases mentioned in the original petition are—

(1) F.I.R. No. 304 of 1958, given by one M. L. Sethi, referred to hereinafter for brevity as Sethi's case ;

(2) F.I.R. No. 39 of 1959 instituted on the complaint of one M. L. Dhingra, called hereinafter as Dhingra's case ;

(3) F.I.R. No. 135 of 1959 instituted on the complaint of the Civil Supply Officer, Karnal, the accused in this case being the State Orphanage Advisory Board of which petitioner No. 1 was Vice-President at the relevant time and Kartar Sing, farm manager of Kaushalya Devi, called the Orphanage case ; and

(4) F.I.R. No. 26 of 1960, instituted on the complaint of Daryao Sing, D.S.P., C.I.D., Karnal, (one of the respondent police officials) in which there are three accused persons including petitioner No. 1, called for brevity the Ayurvedic Fund case.

We may say at once that we are not concerned with the merits of any of the aforesaid cases : that is a question which will fall for consideration if and when the cases are tried in Court. Therefore, nothing said in this judgment shall be construed as affecting the merits of the cases. Two questions have been posed before us in relation to these cases : one is if in the matter of institution and investigation of these cases a special procedure unknown to law has been adopted ; and the other is if the petitioners have been singled out for unequal treatment in administering the law relating to the institution and investigation of criminal cases in the State. The two questions are in one sense connected, for if a special procedure unknown to law has been adopted against the petitioners, that by itself will be a denial of the right of the equal protection of the laws. Learned Counsel for the petitioners has, however, argued the second question somewhat independently of the first question, and he has submitted that even if the procedure adopted against the petitioners is warranted by law, it is a departure from the normal procedure and has been adopted with "an evil eye and unequal hand" so as to put the petitioners to harassment and persecution. We shall consider both these questions in relation to the procedure adopted in the four cases referred to above.

It is necessary to state that the petition has been contested by the respondents. The Chief Minister has himself made no affidavit in respect of the allegations made against him ; but affidavits in reply have been made by the Chief Secretary and the Home Secretary to the Punjab Government and some of the respondent officials. To these affidavits we shall advert later in somewhat greater detail. We shall also have something to say about the failure of the Chief Minister to make an affidavit. It is enough to state here that the respondents have seriously contested both the allegations made on behalf of the petitioners, namely, (1) that a special procedure unknown to law was adopted against them or (2) that the procedure adopted was motivated by "an evil eye and unequal hand" so as to persecute and harass the petitioners. The respondents have said that the procedure adopted was warranted by law and the employment of the C.I.D. officials in the investigation of the cases against the petitioners was due to the special nature of the cases. The respondents have also contested the correctness of the allegation that petitioner No. 1 had incurred the displeasure of the Chief Minister on account of the two reasons stated in the petition. In brief, the claim of the respondents is that there has been no violation of the rights of the petitioners guaranteed under Articles 14 and 21, and there are no grounds for interference by this Court under Article 32 of the Constitution. It has been stated on behalf of the respondents that in the two cases called Sethi's case and Dhingra's case, the petitioners had moved the High Court without success for quashing the proceedings and in Sethi's case, an appeal to this Court against

the order of the High Court also proved unsuccessful. It is also pointed out that a petition made by petitioner No. 1 in the High Court for proceeding by way of contempt of Court against the Chief Minister on some of the allegations now raised or allegations similar in nature, was dismissed *in limine* and the learned Advocate-General of the Punjab has taken us through the order of the High Court in respect of some of the allegations made.

Having stated the respective cases of the parties before us, we shall proceed now to a more detailed examination of the procedure adopted in the four cases instituted against the petitioners. But before we do so, it is necessary to say a few words about Grewal's case and Sangrur case which are stated to furnish the reasons why petitioner No. 1 incurred the displeasure of the Chief Minister. It is alleged that in Grewal's case petitioner No. 1 was asked to give evidence for the prosecution, but he gave a dubious reply which displeased the Chief Minister. It is worthy of note, however, that the trial in Grewal's case began in May-June, 1959; Sethi's complaint was made in December, 1958 and Dhingra's in February, 1959. Obviously, those two cases could not be the result of any refusal by petitioner No. 1 to give evidence in Grewal's case. On 28th May, 1959, petitioner No. 1 wrote to the Chief Secretary about Sethi's case and Dhingra's case, but no allegation was made therein against the Chief Minister. What the petitioner wanted then was that an opportunity should be given to him to explain his position. On 9th June, 1959, petitioner No. 1 again wrote to the Chief Secretary about the complaints of Sethi and Dhingra—again there was no allegation against the Chief Minister. On 29th June, 1959, petitioner No. 1 filed two petitions in the Punjab High Court for quashing the proceedings in Sethi's case and Dhingra's case; in this petition an allegation was made that powerful influences were operating against the petitioner "to harm him and debar him officially" and Sethi's case and Dhingra's case were the result of such influences, but there was no specific mention of Grewal's case and of any request to the petitioner to give evidence in that case. It was for the first time on 20th July, 1959, when the petition for contempt proceedings was filed that a specific allegation against the Chief Minister was made in paragraphs 35 to 37 thereof (this is Annexure I to the present petition). This petition was dismissed *in limine*, the High Court saying that it was not *prima facie* satisfied that the allegation was made out. We do not think that petitioner No. 1 has been able to advance his case any further in spite of the fact that the Chief Minister has made no affidavit, a matter to which we shall advert later.

As to the Sangrur case, that was also referred to in the petition of 20th July, 1959 and the High Court did not accept the allegation of petitioner No. 1. What happened in that case was this. The late Sardar Mukan Singh of Sangrur left two widows, Sardarni Pritam Kaur and Sardarni Pavitar Kaur. Sardarni Pavitar Kaur had three daughters one of whom was married to Surinder Singh Kairon, son of the Chief Minister. The Sangrur estate was in charge of the Court of Wards, that is, the Financial Commissioner, Punjab. On 19th June, 1958, the Court of Wards decided to release the estate after partitioning the immovable property between the two widows. At one time a question arose as to whether the immovable properties should be partitioned into five equal shares for the two widows and three daughters or into two shares only for the two widows. Sometime before 6th May, 1959, it was decided that the partition would be of two shares only and thereafter a detailed mode of partition was agreed to between the parties. This is clear from the note of petitioner No. 1 dated 6th May, 1959. Thereafter there was no more dispute left, and the case of petitioner No. 1 that he was arrested on 18th July, 1959, because he dictated an adverse order some days previously which had been typed but not yet signed does not *prima facie* appear to be correct, apart altogether from the question whether petitioner No. 1 was acting merely as the channel between the Deputy Commissioner and the Financial Commissioner, the latter being the only authority competent to pass final orders in the matter.

We have, therefore, come to the conclusion that the petitioners have not established what they have alleged, namely, that R. P. Kapur, one of the petitioners;

had incurred the displeasure of the Chief Minister by reason of what happened in the Grewal case and the Sangrur case. Whether there were other reasons, administrative or otherwise, for the displeasure of the Chief Minister is a matter which is not germane to the present case. In the affidavits filed before us some reference has been made to the past record of R. P. Kapur. We consider it unnecessary to refer to that record; firstly, because it is not relevant to the case before us, and secondly because we think that it is not fair to refer to the confidential record of an officer unless the circumstances in which certain adverse remarks were made are known.

We proceed now to consider the four criminal cases pending against the petitioners or some of them, in relation to the two points urged: (1) whether in the institution and investigation of these cases a special procedure unknown to law has been adopted and (2) if the petitioners have been singled out for unequal treatment in administering the law relating to the institution and investigation of criminal cases in the State.

The first two cases, namely, Sethi's case and Dhingra's case need be dealt with at some length. Sethi's case started on a complaint which it was said was sent direct to the Chief Minister. Four material allegations about fraudulent misrepresentation were made in that complaint. It was alleged that R. P. Kapur had fraudulently misrepresented to Sethi that a particular piece of land which he had sold to Sethi had been purchased by him at Rs. 10 per square yard; that he had fraudulently concealed from Sethi the pendency of certain proceedings before the Land Acquisition Collector, Delhi, and of the acquisition of the said land under section 17 of the relevant Act; that he had made a fraudulent misrepresentation as regards the scheme of housing with regard to the area in which the land lay. Though the complaint was dated 10th December, 1958, it appears to have been made over to the Additional Inspector-General of Police on 23rd December, 1958. The Additional Inspector-General of Police then appears to have passed an order to the following effect: "Register a case and investigate personally". This was addressed to Sardar Hardayal Singh, D. S. P. Thereupon Sardar Hardayal Singh, Deputy Superintendent of Police, C.I.D., Amritsar, appears to have drawn up a First Information Report. The original complaint which Sethi filed has not been produced before us. What was produced before us was a carbon copy and on that carbon copy was the order of the Additional Inspector-General of Police to which we have already made a reference. The allegation of the petitioners was that the original complaint had been sent to the Chief Minister and the Chief Minister had passed certain orders thereon. On behalf of the petitioners it was suggested that the original was not produced in order to conceal from the Court the orders which the Chief Minister had passed thereon. We have stated earlier that the Chief Minister has filed no affidavit in respect of these allegations. An affidavit has been filed by A. N. Kashyap, Home Secretary to the Government, but obviously he was not in a position to say anything about the allegations made against the Chief Minister. We, therefore, proceed on the basis that so far as Sethi's case is concerned, a complaint was made or sent to the Chief Minister who thereupon sent it to the Additional Inspector-General of Police who in his turn sent it to Sardar Hardayal Singh, Deputy Superintendent of Police, C.I.D., at Amritsar. The short question before us is—does this amount to adopting a procedure unknown to law or even to unequal treatment so as to attract Article 14 of the Constitution? Learned Counsel for the petitioners has taken us through the relevant provisions in Part V, Chapter XIV, of the Code of Criminal Procedure and has submitted that under section 154 of the Code every information relating to the commission of a cognizable offence should be given to an officer in charge of a Police Station and under section 156 any officer in charge of a Police Station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial. He has also referred to section 157 under which the officer in charge of a Police Station, shall forthwith send a report of the first information to a Magistrate empowered to take cognizance of the offence and shall proceed



in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed to the spot to investigate the facts and circumstances of the case, and if necessary to take measures for the discovery and arrest of the offender. It is contended that the provisions of sections 154, 156 and 157 of the Code have been violated in the case against the petitioners; and thus the petitioners have been subjected to a special procedure unknown to law or, at any rate, to unequal treatment, treatment different from that of other persons against whom informations of a cognizable offence are made.

We are unable to accept these contentions as correct. First of all, section 154, Code of Criminal Procedure, does not say that an information of a cognizable offence *can only be made* to an officer in charge of a Police Station. That section merely lays down, *inter alia*, that every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a Police Station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in that behalf. Section 156 gives power to an officer in charge of a Police Station to investigate without the order of a Magistrate any cognizable case which a Court, having jurisdiction in the local area, etc., would have power to enquire into or try; sub-section (2) of section 156 lays down that no proceeding of a Police Officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate. There has been some argument before us as to the meaning of the expression "any such case" occurring in sub-section (2) of section 156. As we are not resting our decision on sub-section (2) of section 156, Code of Criminal Procedure, we consider it unnecessary to embark upon a discussion as to the true scope and effect of sub-section (2) of section 156. Section 157 of the Criminal Procedure Code lays down the procedure which an officer in charge of a Police Station must follow where information of a cognizable offence is made. Now, there is another important provision in the Code which is of great relevance in this case and must be read. That provision is contained in section 551 which is in these terms:

"Section 551. Police officers superior in rank to an officer in charge of a Police Station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station."

The Additional Inspector-General of Police to whom Sethi's complaint was sent was, without doubt, a Police Officer superior in rank to an officer in charge of a Police Station. Sardar Hardayal Singh, Deputy Superintendent of Police, C.I.D., Amritsar, was also an officer superior in rank to an officer in charge of a Police Station. Both these officers could, therefore, exercise the powers, throughout the local area to which they were appointed, as might be exercised by an officer in charge of a Police Station within the limits of his Police Station. It is not disputed that the jurisdictional area of the Additional Inspector-General of Police was the whole of the State. As to the jurisdictional area of the Deputy Superintendent of Police, C.I.D., the contention on behalf of the respondent State is that though he was posted at Amritsar, his jurisdictional area extended over the whole State. The learned Advocate-General for the respondent State has drawn our attention to Police Rule 21.28 in the Punjab Police Rules, 1934, Volume III, issued by and with the authority of the State Government under sections 7 and 12 of the Police Act (V of 1861). That rule lays down that the Criminal Investigation Department has no separate jurisdiction and the Deputy Inspector-General of Police, Criminal Investigation Department, may decide to take over the control of any particular investigation himself or depute one or more of his officers to work directly under the control of the Superintendent of Police of the District. Police Rule 21.32 enumerates some of the cases in which the assistance of the Criminal Investigation Department may be sought. Police Rule 25.14 says that the Criminal Investigation Department is able to obtain expert technical assistance, and in cases where such

assistance is required the assistance of the Criminal Investigation Department may be obtained. In the affidavit made by Sardar Hardayal Singh, he has stated that he was entrusted with the investigation of Sethi's case because of its technical nature and also because his sphere of duty as a Gazetted Officer attached to the Criminal Investigation Department was the whole of the State in view of the memorandum No. 9581-H-51/7912 dated 29th October, 1951. That memorandum shows that the Deputy Inspector-General, C.I.D. and all Gazetted Officers of the Criminal Investigation Department have jurisdiction extending over the whole of the Punjab State. This is also supported by the affidavit made by Shamshere Singh, Additional Inspector-General of Police. Learned Counsel for the petitioners has pointed out that Sethi's case involved no technical questions and the ground stated in the affidavits of Shamshere Singh and Sardar Hardayal Singh is not, therefore, correct. The question before us is not whether the reason for which the investigation was made over to Sardar Hardayal Singh is correct or not. The question before us is, whether in making over the investigation to Sardar Hardayal Singh a special procedure unknown to law was adopted or the law as to the investigation of cases was administered with an evil eye or unequal hand. If the Police Officer concerned thought that the case should be investigated by the C.I.D.—even though for a reason which does not appeal to us—it cannot be said that the procedure adopted was illegal. We are unable to agree with learned Counsel for the petitioners that any of these two contentions has been made out in the present case. We are satisfied that the Inspector-General of Police, C.I.D., had power to deal with Sethi's complaint and had further power to direct investigation of the same by Sardar Hardayal Singh who as a Police Officer superior in rank to an officer in charge of a Police Station could exercise powers of an officer in charge of a Police Station in respect of the same. It cannot, therefore, be said that the procedure adopted was unknown to law. Nor are we satisfied that the procedure adopted was motivated by any evil purpose, though we are not quite impressed by the reason given by Shamshere Singh or Sardar Hardayal Singh that Sethi's case was of a technical nature and, therefore, required the assistance of the C.I.D. Even if it was not of a technical nature, it was open to the Additional Inspector-General of Police to make over the investigation to a Deputy Superintendent of Police in view of the status of the petitioners. In paragraph 31 of his affidavit A. N. Kashyap, Home Secretary, has said that the Inspector-General of Police on receiving the complaint from Sethi ordered on his own the registration of the case without any order or direction from the Chief Minister. The correctness of this statement has been very seriously commented on. In the absence of any affidavit from the Chief Minister and of the original complaint, we have preferred to proceed in this case on the footing that the Additional Inspector-General of Police got the complaint from the Chief Minister and then passed necessary orders thereon. Even on that footing we are unable to hold that there has been any violation of legal procedure or that an unfair discrimination has been made against the petitioners.

Learned Counsel for the petitioners has relied on certain observations made by this Court in *H. N. Rishbud and Inder Singh v. The State of Delhi*<sup>1</sup>. The observations occur at page 1160 of the report and are to the effect that it is of considerable importance to an accused person that the evidence collected against him during investigation is collected under the responsibility of an authorised and competent Investigating Officer. These observations were made in a case where the question that fell for decision was whether the provisions in section 5 (4) and the Proviso to section 3 of the Prevention of Corruption Act, 1947 (Act II of 1947) and the corresponding section 5-A of the Prevention of Corruption (Second Amendment) Act, 1952 (Act LIX of 1952), were mandatory or not. It was held that they were mandatory and an investigation conducted in violation thereof was illegal. It was also held that an illegality committed in the course of an investigation did not affect the competence and jurisdiction of the Court for trial; but if any breach of the mandatory provisions relating to investigation were brought to the notice of the Court at an early stage of the trial, the Court would have to consider the nature

1. (1955) S.C.J. 283 : (1955) 1 M.L.J. (S.C.) 173 : (1955) 1 S.C.R. 1150.

and extent of the violation and pass appropriate orders for such re-investigation as might be called for. We do not think that the observations made and the decision are of any assistance to the petitioners. We have held that there has been no violation of any mandatory provisions as to investigation in Sethi's case against the petitioners and the investigation procedure followed is legal. Our attention has been drawn to *King Emperor v. Nilkantha and others*<sup>1</sup>. On a certificate by the Advocate-General, the case was considered by a Full Bench of the Madras High Court and one of the questions for decision was—

“Is an Inspector of the Criminal Investigation Department an authority legally competent to investigate the fact within the meaning of section 157, Evidence Act?”

The question was answered in the affirmative by the majority of Judges, Abdul Rahim, J., and Sundara Ayyar, J., dissenting. In the course of the arguments before their Lordships, one of the questions mooted was whether Inspectors of the Criminal Investigation Department were appointed to any local area within the purview of section 551, Code of Criminal Procedure. Some of the Judges held that the whole Presidency was their local area; some held that that was not so. On the materials before us, we have no hesitation in holding that the Deputy Superintendent of Police entrusted with the investigation of Sethi's case had the necessary authority to hold the investigation. The decision in *Pulin Bihary Ghosh v. The King*<sup>2</sup>, on which also some reliance has been placed does not appear to us to be in point: that was a case in which the Magistrate purported to act both under section 202 and section 156 (3), Code of Criminal Procedure, and it was held that proceedings under section 202 and investigation under section 156 (3) could not proceed simultaneously; it was further held that a direction under section 156 (3) could only be made to an officer in charge of a Police Station. No question arose there of the exercise of powers under section 551, Code of Criminal Procedure, and the decision does not establish what the petitioners are seeking to establish in the present case. More in point is the decision in *Textile Traders Syndicate, Ltd. v. State of U.P. and others*<sup>3</sup>, where it was held that an Inspector of Police in the Criminal Investigation Department was superior in rank to that of an officer in charge of a Police Station and under section 551, Code of Criminal Procedure, he could exercise the powers of an officer in charge of a Police Station throughout the State.

Turning now to Dhingra's case, the position is this. Admittedly, a complaint dated 27th February, 1959, was sent to the Chief Minister with a covering letter in which it was stated that

“R. P. Kapur had already started tampering with the evidence and I, therefore, request that orders be passed that the Police should take in hand investigation immediately and collect all material evidence.”

The Chief Minister wrote on this:

“Inspector-General, Police, is sick. Will Additional Inspector-General please take immediate action in taking over papers from Government departments concerned and the papers with Sri Dhingra. Please give a *prima facie* report.”

The Additional Inspector-General then made the following endorsement:

“Please take immediate necessary action. Depute one of your officers to contact Sri Dhingra and get the necessary records from him. Immediate action may be taken to take over the record from the various departments. A case may be registered. I have informed Chief Secretary and he agrees with this.”

This was addressed to the Deputy Inspector-General, C.I.D. and the latter wrote—

“Case should be registered and investigated by Bir Singh, D. S. P., under your supervision. Immediate steps should be taken to get the salient records of Sri Dhingra.”

This was addressed to Ujager Singh, Superintendent of Police, C.I.D. The case was then registered by Sardar Sampuran Singh, Inspector of Police, Police Station

1. (1911) I.L.R. 35 Mad. 247 : 22 M.L.J. 490 (F.B.).

2. I.L.R. 1 Cal. 124.

3. A.I.R. 1959 All. 337

Chandigarh, and the investigation was in charge of Sardar Bir Singh, Deputy Superintendent of Police, C.I.D.

The legal position as to the institution of Dhingra's case and its investigation is the same as in Sethi's case. The legal sanction for both is section 551, Code of Criminal Procedure, and the reasons which we have given for holding that the procedure followed in instituting and investigating Sethi's case is legally valid apply to Dhingra's case also. On behalf of the petitioners it has been submitted that the hand of the Chief Minister is no longer concealed in respect of Dhingra's case. It is pointed out that in 1959, a complaint is made in respect of offences alleged to have been committed about five years ago in 1954 and the Chief Minister, without any enquiry whatsoever, says "Please give a *prima facie* report" and the same C.I.D. machinery is again set in rapid motion as in Sethi's case, and this at a time when Sethi's case was kept "hanging as a sword" over the petitioners. It had been further submitted that the direction as to the seizure of papers was not justified in law, as the Chief Minister had no legal power to give such a direction. We do not think that these submissions establish what the petitioners have to establish in order to succeed on their writ petition, namely, that in the institution of Dhingra's case and its investigation, a procedure unknown to law has been followed or that the petitioners have been singled out for an unfair and discriminating treatment. We do not know what reasons led the Chief Minister to make the endorsement on the complaint of Dhingra as he did and why instead of referring the complaint to the officer in charge of the Police Station concerned, a reference was made to the Additional Inspector-General or the Criminal Investigation Department. These are matters within his special knowledge, and he has chosen to throw no light on them. Shamshere Singh has said in his affidavit that he dealt with Dhingra's case in exercise of his powers under section 551, Code of Criminal Procedure. Sardar Bir Singh has said in his affidavit that this case was also of a technical nature and so the investigation was entrusted to him. As we have said in Sethi's case this reason does not appear to us to be a convincing reason, but the Police Officers concerned may honestly have thought that the case should be investigated by the Criminal Investigation Department. We are not called upon to express any opinion on the merits of Dhingra's case, and all that we say now is that the petitioners have failed to establish either of their two contentions—(1) that the procedure adopted was illegal, or (2) that the petitioners were unfairly discriminated against.

We go now to the remaining two cases, the Orphanage case and the Ayurvedic Fund case. One was instituted on the complaint of the Civil Supply Officer, Karnal, and the other on the statement of Daryao Sing, Deputy Superintendent of Police, C.I.D., Karnal. The Orphanage case is against the Orphanage Advisory Board of which R. P. Kapur was the Vice-President at the relevant time, and Kartar Sing, farm manager of Kaushalya Devi. It related to the alleged violation of certain Control Orders in the matter of a brick kiln. The Ayurvedic Fund case is against R. P. Kapur and certain other persons, who are not petitioners before us. It alleged, criminal breach of trust, etc. in respect of certain funds in the hands of the persons accused therein. As we are not deciding these cases on merits, it is unnecessary to give further details of the allegations made in those cases.

No specific illegality has been brought to our notice with regard to the institution of the Orphanage case except some allegations of high handedness in the matter of seizure of records of the Orphanage in spite of the protest of the General Manager of the Orphanage and some allegations against Choudhuri Ram Singh who was then Deputy Inspector-General, Ambala Range. These allegations, be they true or not, do not establish any such illegality as would lead us to quash the investigation.

As to the Ayurvedic Fund case, Daryao Sing said in his affidavit :

"I say that the Audit Report contained details of meddling with Orphanage funds and of having made payments to one Kartar Sing an employee of the petitioner No. 1 and the attorney of Shrimati Kaushalya Devi. It appears that there was excess and double payment of funds. There were purchases of timber and wood without calling for any quotations. It disclosed the issue of Orphanage funds to Madhuban Co-operative Society and that the materials like cement, iron and steel which

were under control were also used in the construction of private building of Shri Kapur and his family and the use of such materials went up to 20,000 rupees."

Here again we do not express any opinion as to the correctness or otherwise of the allegations made. All that need be said at this stage is that the institution of the case is not illegal, nor is its investigation vitiated by discrimination.

It is indeed true that the investigation of these cases has been entrusted to certain officers of the Criminal Investigation Department, whether for good reason or not we cannot say. But that circumstance does not by itself make the investigation bad in law. The officers can exercise their powers of investigation under section 551, Code of Criminal Procedure. Daryao Sing, it may be stated, was an Inspector of the Criminal Investigation Department at Karnal and became a Deputy Superintendent of Police, C.I.D., in December, 1959. He also could exercise the powers under section 551, Code of Criminal Procedure.

For the reasons given above, we have come to the conclusion that the petitioners are not entitled to succeed and the writ petition must be dismissed ; in the circumstances of this case there will be no order for costs.

Before parting with this case we consider it necessary to make some observations with regard to a matter which has caused us some anxiety and concern. Serious allegation have been made against the Chief Minister in this case. He is a party respondent and had notice of the allegations made. In Sethi's case it was alleged that he had passed certain orders on the original complaint, which was sent to the Additional Inspector-General of Police with those orders. The original complaint was not made available to us on the ground that it could not be traced. The Additional Inspector-General of Police said in his affidavit that on receiving the complaint from Sri M. L. Sethi, he ordered the investigation of the case without any order or direction from the Chief Minister. He did not specifically say if he received the complaint direct from Sethi or through the Chief Minister. In Dhingra's case the Chief Minister passed an order which might either mean that he ordered the submission of a *prima facie* report or merely directed that a report should be submitted if a *prima facie* case was made out. It is not clear why he ordered the seizure of papers before even a *prima facie* report was given, in respect of an offence said to have been committed five years ago. These are all matters on which the Chief Minister alone was in a position to enlighten us. In view of the allegations made against him, we consider that the Chief Minister owed a duty to this Court to file an affidavit stating what the correct position was so far as he remembered it. We recognise that it may not be possible for a Chief Minister to remember the circumstances in which a document passes through his hands ; there must be many papers which a Chief Minister has to deal with in the day-to-day business of administration. If the Chief Minister did not remember the circumstances, it would have been easy for him to say so. If he remembered the circumstances he could have refuted the allegations with equal ease. This is not a case where the refutation should have been left to Secretaries and other officers, who could only speak from the records and were not in a position to say why the Chief Minister passed certain orders. The petitioners are obviously suffering from a sense of grievance that they have not had a fair deal. We have held that there is no legal justification for that grievance ; but in executive as well as judicial administration, justice must not only be done but it must appear that justice is being done. An affidavit from the Chief Minister would have cleared much of the doubt which in the absence of such an affidavit arose in this case.

*Petition dismissed.*

# THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.

Jagat Dhish Bhargava

.. Appellant.\*

v.

Jawahar Lal Bhargava and others

.. Respondents.

*Civil Procedure Code (V of 1908), Order 41, rule 1—Scope—Appeal filed with certified copy of only judgment and bill of costs endorsed on its back but without decree copy which the trial Court did not furnish though applied for—Effect—Proper procedure—Competency of appeal—Decree copy furnished later—Effect.*

If at the time when the appeal is preferred a decree has already been drawn up by the trial Court and the appellant has not applied for it in time it would be a clear case where the appeal would be incompetent and a penalty of dismissal would be justified on the ground that the appeal is not accompanied with a certified copy of the decree. The position would however be substantially different if at the time when the appeal is presented before the appellate Court a decree in fact has not been drawn up by the trial Court ; in such a case if an application has been made by the appellant for a certified copy of the decree, then all that can be said against the appeal preferred by him is that the appeal is premature since a decree has not been drawn up and it is the decree against which an appeal lies. In such a case, if the office of the High Court examines the appeal carefully and discovers the defect the appeal may be returned to the appellant for presentation with the certified copy of the decree after it is obtained. Where the appeal has passed through the stage of admission (appeal having been presented only with certified copy of judgment and bill of costs endorsed on it) through oversight of the office, then the only fair and rational course to adopt would be to adjourn the hearing of the appeal with a direction that the appellant should produce the certified copy of the decree as soon as it is supplied to him. In such a case it would be open to the High Court and it would be its duty, to direct the subordinate Court to draw up the decree forthwith without delay. On the other hand if a decree has been drawn up and an application for its certified copy has been made by the appellant after the decree was drawn up, the office of the appellate Court should return the appeal to the appellant as defective, and when the decree is filed by him, the question of limitation may be examined on the merits.

No hard and fast rule of general applicability can be laid down for dealing with appeals defectively filed under Order 41, rule 1, Civil Procedure Code. Appropriate orders would have to be passed having regard to the circumstances of each case but the most important step to take in cases of defective presentation of appeals is that they should be carefully scrutinized at the initial stage soon after they are filed and the appellant required to remedy the defects.

Appeal by Special leave from the Judgment and Order, dated the 15th December, 1959, of the Punjab High Court (Circuit Bench), Delhi, in R. F. Appeal No. 77-D of 1954.

G. S. Pathak, Senior Advocate, B. C. Misra, Advocate, with him, for Appellant.

Mukat Behari Lal Bhargava, Senior Advocate, J. P. Goyal, Advocate, with him, for Respondents Nos. 1 to 7.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The short question of law which arises for decision in the present appeal by Special Leave is whether the appeal preferred against the appellant and respondents 8 and 9 in the High Court of Punjab by respondents 2 to 7 was competent in law or not. This question arises under somewhat unusual circumstances. It appears that an agreement of sale of one-third of the one-fourth share in the property covered by the document was entered into between Gokal Dhish Bhargava and the appellant, Jagat Dhish Bhargava. Gokal Dhish Bhargava sued the appellant and *pro forma* respondents 8 and 9 for specific performance of the said agreement of sale in the Court of the Senior Civil Judge, New Delhi (Civil Suit No. 684/128 of 1949/50). This suit was dismissed on March 12, 1954. Pending decision in the trial Court Gokal Dhish Bhargava died and his son Jawahar Lal Bhargava, respondent 1 and Chunni Lal Bhargava were brought on the record as legal representatives. After the suit was dismissed and before the appeal in question was preferred in the High Court Chunni Lal Bhargava died ; thereupon respondents 2 to 7, as his legal representatives, joined respondent 1 in preferring an appeal against the

said decree in the High Court of Punjab. The memo. of appeal along with the judgment dismissing the suit and the taxed bill of costs endorsed on the back of the last page of the judgment was filed in the High Court on 29th July, 1954. It is the competence of this appeal that was questioned before the High Court and is in dispute before us in the present appeal.

The record shows that on 24th March, 1954, an application was made by respondents 2 to 7 (who will be called the respondents hereafter) for a certified copy of the judgment and decree passed in the said suit for specific performance. A certified copy of the judgment and the bill of costs was supplied to them but the decree had not been drawn up and no copy of the decree was therefore supplied to them. In the result the appeal was filed without the certified copy of the decree and only with the certified copy of the judgment and the bill of costs. On 2nd August, 1954, the Assistant Registrar of the High Court returned the memo. of appeal filed by the respondents to their counsel and pointed out to him that since no copy of the decree had been filed the presentation of the appeal was defective and the defect needed to be rectified. Thereafter, on 16th August, 1954, the respondents' counsel re-filed the appeal with an endorsement that a memo. of costs alone had been prepared by the trial Court and no decree had been drawn up, and so the appeal should be held to be properly filed. Apparently this explanation was treated as satisfactory by the office of the High Court and the appeal was registered as No. 77-D of 1954.

In due course the appeal was placed for preliminary hearing under Order 41, rule 11 of the Code of Civil Procedure before Dulat, J., who admitted it on 30th August, 1954. Notice of the appeal was accordingly served on the appellant and the *pro forma* respondents. Ultimately when the appeal became ready for hearing it was put up on the Board of the Circuit Bench of the High Court to be heard on 26th December, 1958. Meanwhile on 23rd December, 1958, the appellant served a notice on the respondent's counsel intimating to him that he proposed to raise a preliminary objection against the competence of the appeal on the ground that the decree under appeal had not been filed as required under Order 41, rule 1 along with the memo. of appeal and the certified copy of the judgment. Next day, that is to say on 24th December, 1958, the respondents moved the trial Court for drawing up of the decree, but since the record had in the meantime been sent by the trial Court to the High Court no decree could be drawn up by the trial Court, and so the motion became infructuous. The appeal, however, did not reach hearing on 26th December, 1958. On 29th December, 1958, the respondents moved the Court that the appeal should be declared to be maintainable as the memo. of costs which alone had been prepared by the trial Court read along with the concluding paragraph of the judgment may be held to satisfy the requirements of the decree; in the alternative they prayed that the record of the suit in the trial Court should be sent for to enable them to get a decree prepared with a view to file the same in the High Court along with their appeal. Bishan Narain, J., before whom this application was taken out for orders, directed that it may be heard by the Bench which would hear the appeal.

Eventually the appeal came on for hearing before Falshaw and Chopra, JJ. on 8th December, 1959. At the said hearing the appellant raised a preliminary objection that the appeal was not competent having regard to the mandatory provisions of Order 41, rule 1, and urged that the appeal should be dismissed as incompetent. This preliminary objection was, however, not upheld by the High Court, and it was held that

"the proper course to follow was to allow the respondents a month's time for the purpose of getting a decree drawn up in the proper form by the lower Court and obtaining a copy thereof."

Accordingly the record which had in the meanwhile been received by the High Court after the appeal was admitted under Order 41, rule 11, was ordered to be sent back to the lower Court without delay. It is against this order which was passed by the High Court on December 15, 1959, that the present appeal by Special Leave has been filed. On behalf of the appellant Mr. Pathak contends that the appeal filed before the High Court was plainly and manifestly incompetent, and so the High Court was in error in not dismissing it on that ground.

The position of law under Order 41, rule 1, is absolutely clear. Under the said rule every appeal has to be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in that behalf, and has to be accompanied by a copy of the decree appealed from, and of the judgment on which it is founded. Rule 1 empowers the appellate Court to dispense with the filing of the judgment but there is no jurisdiction in the appellate Court to dispense with the filing of the decree. Where the decree consists of different distinct and severable directions enforceable against the same or several defendants the Court may permit the filing of such portions of the decree as are the subject-matter of the appeal but that is a problem with which we are not concerned in the present case. In law the appeal is not so much against the judgment as against the decree; that is why Article 156 of the Limitation Act prescribes a period of 90 days for such appeals and provides that the period commences to run from the date of the decree under appeal. Therefore there is no doubt that the requirement that the decree should be filed along with the memorandum of appeal is mandatory, and in the absence of the decree the filing of the appeal would be incomplete, defective and incompetent.

That, however, cannot finally dispose of the point raised by the appellant before us. In the present case the respondents had applied for a certified copy of the judgment as well as the decree in the trial Court on 24th March, 1954, and they were not given a copy of the decree for the simple reason that no decree was drawn up; what they were given was a copy of the judgment and taxed bill of costs endorsed on the back of the last page of the judgment. These documents they filed along with their memo. of appeal; but that would not affect the mandatory requirement of Order 41, rule 1. In considering the effect of this defect in the presentation of the appeal we must bear in mind the rules of procedure in regard to the drawing up of the decree. The position in that behalf is absolutely clear. Section 33 of the Code of Civil Procedure requires that the Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow. Order 20, rule 3, provides, *inter alia*, that the judgment shall be dated and signed by the judge in the open Court at the time of pronouncing it, and under rule 4, sub-rule (2), a judgment has to contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Rule 6 of the same Order prescribes the contents of the decree. It provides that the decree shall agree with the judgment and shall contain the particulars therein specified. Under rule 7 it is provided that the decree shall bear the date, the day on which the judgment was pronounced, and it directs that when the judge has satisfied himself that the decree has been drawn up in accordance with the judgment he shall sign the decree. It is, therefore, clear that the drawing up of the decree in the present case was the function and the duty of the office, and it was obligatory on the judge to examine the decree when drawn up, and if satisfied that it has been properly drawn up, to sign it. Except in places where the dual system prevails the litigant or his lawyer does not play any material or important part in the drawing up of the decree. In fact the process of drawing up of the decree is beyond the litigant's control. Therefore, there is no doubt whatever that in failing to draw up a decree in the present suit the office of the trial Court was negligent in the discharge of its duties, and the said negligence was not even noticed by the learned trial judge himself.

Unfortunately, when the appeal was presented in the High Court, even the office of the High Court was not as careful in examining the appeal as it should have been, and we have already indicated the appeal passed through the stage of admission under Order 41, rule 11, without the defect in the appeal being brought to the notice of the learned judge who admitted it. Thus it is quite clear on the record that the respondents had applied for a certified copy of the judgment and the decree, and when they were given only a certified copy of the judgment and the bill of costs they filed the same along with the memo. of appeal in the *bona fide* belief that the said documents would meet the requirements of Order 41, rule 1. It is true that before the appeal came on for actual hearing before the High Court the appellant gave notice to the respondents about his intention to raise a preliminary objection that the appeal



had not been properly filed; but, as we have already pointed out, the attempt made by the respondents to move the trial Court to draw up the decree proved infructuous. and ultimately the High Court thought that in fairness to the respondents they ought to be allowed time to obtain the certified copy of the decree and file it before it; and so the High Court passed the order under appeal. The appellant contends that this order is manifestly erroneous in law; according to him the only order which could and should have been passed was to dismiss the appeal as incompetent under Order 41, rule 1.

The problem thus posed by the appellant for our decision has now become academic because subsequent to the decision of the High Court under appeal the respondents have in fact obtained a certified copy of the decree on 23rd December, 1959, and have filed it in the High Court on the same day. This fact immediately raises the question as to whether the appeal which has admittedly been completely and properly filed on 23rd December, 1959, was in time or not. If it appears that on the date when the decree was thus filed the presentation of the appeal was in time then the objection raised by the appellant against the propriety or the correctness of the High Court's order under appeal would be purely technical and academic.

The answer to the question as to whether the presentation of the appeal on 23rd December, 1959, is in time or not would depend upon the construction of section 12, sub-section (2) of the Limitation Act. We have already noticed that the period prescribed for filing the present appeal is 90 days from the date of the decree. Section 12, sub-section (2), provides, *inter alia*, that in computing the period of limitation "the time requisite for obtaining a copy of the decree shall be excluded"; What then is the time which can be legitimately deemed to have been taken for obtaining the copy of the decree in the present case? Where a decree is not drawn up immediately or soon after a judgment is pronounced, two types of cases may arise. A litigant feeling aggrieved by the decision may apply for the certified copy of the judgment and decree before the decree is drawn up, or he may apply for the said decree after it is drawn up. In the former case, where the litigant has done all that he could and has made a proper application for obtaining the necessary copies, the time requisite for obtaining the copies must necessarily include not only the time taken for the actual supply of the certified copy of the decree but also for the drawing up of the decree itself. In other words, the time taken by the office or the Court in drawing up a decree after a litigant has applied for its certified copy on judgment being pronounced, would be treated as a part of the time, taken for obtaining the certified copy of the said decree. Mr. Pathak has fairly conceded that on this point there is a consensus of judicial opinion, and in view of the formidable and imposing array of authorities against him he did not raise any contention about the validity of the view taken in all those cases (Vide : *Tarabati Koer v. Lala Jegdeo Narain*<sup>1</sup>, *Bani Madhub Mitter v. Matungini Dassi and others*<sup>2</sup>; *Gabriel Christian v. Chandra Mohan Missir*<sup>3</sup>; *Jayashankar Mulshankar Mehta v. Mayabhai Lalbhai Shah*<sup>4</sup>; *Gokul Prasad v. Kunwar Bahadur and others*<sup>5</sup>, and *Umda v. Rupchand and others*<sup>6</sup>).

There is, however, a sharp difference of opinion in regard to cases where an application for a certified copy of the decree is made after the said decree is drawn up. In dealing with such cases Courts have differed as to what would be the period requisite for obtaining the certified copy of the decree. The Bombay, Calcutta and Patna High Courts appear to have held that the period taken in drawing up of the decree would be part of the requisite period, while other High Courts have taken a contrary view. It is significant that though the High Courts have thus differed on this point, in every case an attempt is judicially made to do justice between the parties. With that aspect of the problem, however, we are not concerned in the present appeal.

The position, therefore, is that when the certified copy of the decree was filed by the respondents in the High Court on 23rd December, 1959, the whole of the

1. (1910-11) 15 C.W.N. 787.

2. (1886) I.L.R. 13 Cal. 104 (F.B.).

3. (1936) I.L.R. 15 Pat. 284 (F.B.).

4. (1951-52) 54 B.L.R. 11 (F.B.).

5. (1935) I.L.R. 10 Luck. 250.

6. (1926) 98 I.C. 1057 (Nagpur) (F.B.).

period between the date of the application for the certified copy and the date when the decree was actually signed would have to be excluded under section 12, sub-section (2). Inevitably the presentation of the appeal on 23rd December, 1959, would be in time. It is true that more than five years have thus elapsed after the pronouncement of the judgment but for this long delay and lapse of time the respondents are not much to blame. The failure of the trial Court to draw up the decree as well as the failure of the relevant department in the High Court to examine the defect in the presentation of the appeal at the initial stage have contributed substantially to the present unfortunate position. In such a case there can be no doubt that the litigant deserves to be protected against the default committed or negligence shown by the Court or its officers in the discharge of their duties. As observed by Cairns, L.C., in *Rodger v. Comptoir d'Escompte de Paris*<sup>1</sup>, as early as 1871 "one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors"; that is why we think that in view of the subsequent event which has happened in this case, namely, the filing of the certified copy of the decree in the High Court, the question raised by the appellant has become technical and academic.

Faced with this position Mr. Pathak attempted to argue that the application made by the respondents on 24th March, 1954, was not really an application for a certified copy of the decree; he contended that it was an application for the certified copy of the judgment and the bill of costs. This argument is wholly untenable. The words used in the application clearly show that it was an application for a certified copy of the judgment as well as the decretal order, and as subsequent events have shown, a certified copy of the decree was ultimately supplied to the respondents in pursuance of this application.

Then it was argued that the respondents should have moved the trial Court for the drawing up of a decree as soon as they found that no decree had been drawn up. It may be assumed that the respondents might have adopted this course; but where the dual system does not exist it would be idle to contend that it is a part of the duty of a litigant to remind the Court or its office about its obligation to draw up a decree after the judgment is pronounced in any suit. It may be that decrees when drawn up are shown to the lawyers of the parties; but essentially drawing up of the decree is the function of the Court and its office, and it would be unreasonable to penalise a party for the default of the office by suggesting that it was necessary that the party should have moved the Court for the drawing up of the decree. Therefore, we are not satisfied that the appellant is justified in attributing to the respondents any default for which the penalty of dismissing their appeal can be legitimately imposed on them. The result is that the appeal preferred by the respondents on 23rd December, 1959, is proper and in time and it can now be dealt with in accordance with law. It is true that in the circumstances over which the respondents had no control the appeal in question has already been admitted under Order 41, rule 11, and as a result of the decision under appeal it may not have to go through that process again. Dulat, J., who heard the appeal for admission was satisfied that it deserved to be admitted and we do not think it necessary to require that the present appeal should go through the formality of the procedure prescribed by Order 41, rule 11, once again. This position is no doubt unusual, but in the circumstances of the case it is impossible to say that the order passed by the High Court is not fair and just.

Let us then consider the technical point raised by the appellant challenging the validity or the propriety of the order under appeal. The argument is that Order 41, rule 1, is mandatory, and as soon as it is shown that an appeal has been filed with a memorandum of appeal accompanied only with a certified copy of the judgment the appeal must be dismissed as being incompetent, the relevant provisions of Order 41 with regard to the filing of the decree being of a mandatory character. It would be difficult to accede to the proposition thus advanced in a broad and general form. If at the time when the appeal is preferred a decree has already been drawn up by the trial Court and the appellant has not applied for it in time it would be a

clear case where the appeal would be incompetent and a penalty of dismissal would be justified. The position would, however, be substantially different if at the time when the appeal is presented before the appellate Court a decree in fact had not been drawn up by the trial Court; in such a case if an application has been made by the appellant for a certified copy of the decree, then all that can be said against the appeal preferred by him is that the appeal is premature since a decree has not been drawn up, and it is the decree against which an appeal lies. In such a case, if the office of the High Court examines the appeal carefully and discovers the defect the appeal may be returned to the appellant for presentation with the certified copy of the decree after it is obtained. In the case like the present, if the appeal has passed through the stage of admission through oversight of the office, then the only fair and rational course to adopt would be to adjourn the hearing of the appeal with a direction that the appellant should produce the certified copy of the decree as soon as it is supplied to him. In such a case it would be open to the High Court, and we apprehend it would be its duty, to direct the subordinate Court to draw up the decree forthwith without any delay. On the other hand, if a decree has been drawn up and an application for its certified copy has been made by the appellant after the decree was drawn up, the office of the appellate Court should return the appeal to the appellant as defective, and when the decree is filed by him the question of limitation may be examined on the merits. It is obvious that the complications in the present case have arisen as a result of two factors; the failure of the trial Court to draw up the decree as required by the Code, and the failure of the office in the High Court to notice the defect and to take appropriate action at the initial stage before the appeal was placed for admission under Order 41, rule 11. It would thus be clear that no hard and fast rule of general applicability can be laid down for dealing with appeals defectively filed under Order 41, rule 1. Appropriate orders will have to be passed having regard to the circumstances of each case, but the most important step to take in cases of defective presentation of appeals is that they should be carefully scrutinised at the initial stage soon after they are filed and the appellant required to remedy the defects. Therefore, in our opinion, the appellant is not justified in challenging the propriety or the validity of the order passed by the High Court because in the circumstances to which we have already adverted the said order is obviously fair and just. The High Court realised that it would be very unfair to penalise the party for the mistake committed by the trial Court and its own office, and so it has given time to the respondents to apply for a certified copy of the decree and then proceed with the appeal.

In this connection our attention has been drawn to the fact that in the Punjab High Court two conflicting and inconsistent views appear to have been taken in its reported decisions. Dealing with appeals filed without a certified copy of the decree some decisions have dismissed the appeals as defective, and have given effect to the mandatory words in Order 41, rule 1, without presumably examining the question as to whether the failure of the trial Court to draw up the decree would have any bearing or relevance on the point or not (Vide : *Gela Ram and others v. Ganga Ram, etc.*<sup>1</sup>; *Municipal Committee, Chiniot v. Bashi Ram and others*<sup>2</sup>; *Mubarak Ali Shah v. Secretary of State*<sup>3</sup> *Nur Din v. Secretary of State*<sup>4</sup>, *Hakam Beg and others v. Rahim Shah and others*<sup>5</sup>; *Fazal Karim v. Des Raj*<sup>6</sup> and *Banwari Lal Varma v. Amrit Sagar Gupta and others*<sup>7</sup>). On the other hand it has in some cases been held that it would be fair and just that the hearing of the appeal should be adjourned to enable the appellant to obtain a certified copy of the decree and produce it before the appellate Court (Vide: *Manoharlal v. Nanak Chand*<sup>8</sup>; *Mt. Jeewani v. Mt. Misri and others*<sup>9</sup>, and *Sher Muhammad v. Muhammad Khan and another*<sup>10</sup>). It would obviously have been better if this conflict of judicial opinion in the reported decisions of the High Court had been resolved by a Full Bench of the said High Court but that does not appear to have been done so far. However, as we have indicated, the question about the competence

1. A.I.R. 1920 Lah. 223.

2. A.I.R. 1922 Lah. 170.

3. A.I.R. 1925 Lah. 438.

4. A.I.R. 1927 Lah. 49.

5. A.I.R. 1927 Lah. 912.

6. 35 Punj.L.R. 471.

7. A.I.R. 1949 East Punj. 400.

8. A.I.R. 1919 Lah. 53.

9. A.I.R. 1919 Lah. 125.

10. A.I.R. 1924 Lah. 352.

of the appeal has to be judged in each case on its own facts and appropriate orders must be passed at the initial stage soon after the appeal is presented in the appellate Court. If any disputed question of limitation arises it may have to go before the Court for judicial decision.

In the result the order passed by the High Court is right. Having regard to the fact that the decree under appeal has already been filed by the respondents before the High Court on 23rd December, 1959 the High Court should now proceed to hear the appeal on the merits and deal with it in accordance with law. In the circumstances of this case we make no order as to costs.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT :—J. L. KAPUR, K. SUBBA RAO, M. HIDAYATULLAH, J. C. SHAH AND RAGHUBAR DAYAL, JJ.

Tarachand Damu Sutar

.. Appellant\*

v.

The State of Maharashtra

.. Respondent.

*Constitution of India (1950), Article 134 (1) (a) "Reversing order of acquittal"—Interpretation.*

The word "acquittal" in Article 134 (1) (a) of the Constitution of India (1950) does not mean that the trial must have ended in a complete acquittal of the charge but acquittal of the offence charged and conviction for a minor offence (than that for which the accused was tried) is included in the word "acquittal."

Wherein a trial for an offence under section 302, Penal Code on a charge of murder the accused was convicted under section 304 for culpable homicide not amounting to murder and on appeal the High Court convicted the accused of murder and sentenced him to death the finding of the trial Court was one of "acquittal" of that charge and the High Court having reversed the order of acquittal an appeal shall lie as of right under Article 134 (1) (a) and the appeal filed with Special Leave under Article 136 must be treated as if it is under Article 134 (1) (a).

The conviction based on the dying declaration of the victim is sustainable.

*Hidayatullah and Raghubar Dayal, JJ.*—"In appeals under Article 134 (1) (a), we are to assess afresh the value of the evidence on record, and do not follow the practice of this Court in appeals under Article 136 of the Constitution that the concurrent findings of the Courts below be not interfered with, ordinarily, but be interfered with only when special circumstances exist.

"It is not safe in this case to base the conviction of the accused solely on the dying declaration, made by the deceased, even though in law a conviction can lawfully be based on dying declarations alone if the Court feels fully satisfied about its giving a true version of the incident."

It would have been better exercise of discretion if this appeal against the acquittal had not been heard by the same Bench, which in a way, suggested the filing of the Government Appeal. In fact, to make such a suggestion, appears to be very abnormal.

Appeal by Special Leave from the Judgment and Order dated the 20th July, 1960 of the Bombay High Court, in Criminal Appeals Nos. 488 and 426 of 1960, with Review Application Nos. 555 and 641 of 1960.

G.C. Mathur, Advocate, (at State expense), for Appellant.

B. R. L. Iyengar and D. Gupta, Advocates, for Respondent.

The Court delivered the following Judgments:

*Kapur, J.*—(On behalf of the Majority).—This is an appeal against the Judgment and Order of the High Court of Bombay imposing the sentence of death in appeal by the State against the order passed by the Sessions Judge, Dhulia. The facts of the appeal are these :

The appellant, in about 1950, married Sindhubai, the daughter of Chandra-bhagabai. Sindhubai who is the deceased had read up to the 7th Standard. The appellant and Sindhubai were residing in a one-room tenement in a house belonging to one Tavar pleader in which there are in all 12 to 15 tenements. The tenement of the appellant was not very far from that of the appellant's cousin Shantabai who was residing with her husband Pandu Genda and the house of Chandra-

bhagabai was about a furlong away from that of the appellant. The relations between the appellant and the deceased were normal for sometime but about two years before the occurrence differences had arisen and there were frequent quarrels between them. A child of the marriage was born about 1½ years before the occurrence. The deceased was a frequent visitor to her mother's house to which the appellant took objection. The appellant had stopped giving her the necessities of life including foodgrains, etc. About a week before Diwali the appellant gave her a beating. The deceased used to have her meals with her mother and the appellant with his cousin Shantabai and the daughter of the marriage Urmila stayed with the mother of the deceased during the day time. The occurrence was on the Bhaubij day i.e., November 2, 1959 between 1-30 and 3-30 in the afternoon. After having her meals at her mother's house the deceased returned to her husband's house and went to sleep in the afternoon. It is stated that while she was sleeping the appellant gave her a beating and after sprinkling kerosene oil on her clothes, set fire to them. The deceased with her clothes burning went in the direction of the house of Shantabai but fell down in front of it and was almost naked when some body covered her body with a *dhoti*.

Chandrabhagabai received information, it is stated, from her niece Suman about this fact and Chandrabhagabai ran to the spot and found her body burnt. The cousin, Shantabai and her husband Pandu Genda also arrived and on enquiry by Chandrabhagabai the deceased told her that her husband had set fire to her clothes after sprinkling kerosene oil on her. By this time a Police Constable informed the Police Station which was nearby and an ambulance car was sent and the deceased was taken to the Civil Hospital, Dhulia, at about 4-15 P.M. She was examined by Dr. Javeri who treated her and on his enquiry the deceased told him that her husband had set fire to her clothes after sprinkling kerosene oil on her clothes. Dr. Javeri then informed the police and advised that a dying declaration be recorded. At about 5-30 P.M. a Magistrate Mr. Mhatre recorded the statement of the deceased but she died at 8-15 P.M. on the same day in the Hospital.

The defence of the appellant was that of alibi, in that he was at work on the house of Mulchand Rajmal at Nehru Nagar which was being built and that he was entirely innocent of the offence. The trial Court found that it was the appellant who had set fire to the clothes of the deceased after sprinkling kerosene oil; that the appellant had the intention of causing such bodily injury to the deceased as was likely to cause death and it therefore convicted the appellant of an offence under section 304, Part I and sentenced him to three years' rigorous imprisonment and a fine of Rs. 100. The learned Judge accepted the testimony of the mother Chandrabhagabai as to the dying declaration and also that of Dr. Javeri and finally he accepted the dying declaration recorded by the Magistrate which was in the form of questions and answers. In all her dying declarations the deceased had accused the appellant of setting fire to her clothes and thus causing her severe burns.

The State took an appeal to the High Court which convicted the appellant of an offence under section 302, Indian Penal Code, and sentenced him to death. Against that judgment and order the appellant applied for a certificate to appeal to this Court under Article 134 (1) (a) but the certificate was refused and this Court gave Special Leave under Article 136 of the Constitution.

The first question for decision is whether the appellant had a right of appeal to this Court under Article 134 (1) (a) and the decision of that must depend upon the construction to be put on the language used in that Article the relevant portion of which is as follows :

134 (1). "An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court—

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death."

If the High Court reverses an order of acquittal of an accused person and sentences him to death, an appeal shall lie as of right to this Court under the Article. The argument raised on behalf of the appellant was that as the appellant was acquit-

ted of the offence under section 302 and was convicted under section 304, Part, I, it was a case of reversing an order of acquittal. The argument on behalf of the State was that the word "acquittal" meant complete acquittal. The decision of this must depend upon the construction of the word "acquittal." If a person is acquitted of the offence charged and is convicted of a lesser offence, as in the present case, can it be said that he was acquitted and the High Court had on appeal reversed the order of acquittal? In our opinion the word "acquittal" does not mean that the trial must have ended in a complete acquittal of the charge but acquittal of the offence charged and conviction for a minor offence (than that for which the accused was tried) is included in the word "acquittal". This view has the support of a judgment of the Judicial Committee of the Privy Council in *Kishan Singh v. The King Emperor*<sup>1</sup>. In that case an accused person was tried by the Sessions Judge under section 302 of the Indian Penal Code on a charge of murder but was convicted under section 304 for culpable homicide not amounting to murder, the Court having power to do that under section 238 (2) of the Criminal Procedure Code. He was sentenced to five years' rigorous imprisonment. No acquittal of the charge under section 302 was recorded. There was no appeal to the High Court by the then local Government but it applied for revision under section 439 on the grounds that the appellant should have been convicted of murder and the sentence was inadequate. The High Court convicted the appellant of murder and sentenced him to death. On appeal to the Privy Council it was held that the finding of the trial Court was to be regarded as an acquittal on the charge of murder and that under section 439 (4), Criminal Procedure Code, the word "acquittal" did not mean complete acquittal. At page 397 Sir Lancelot Sanderson observed :—

" Their Lordships, however, do think it necessary to say that if the learned Judges of the High Court of Madras intended to hold that the prohibition in section 439, sub-section (4) refers only to a case where the trial has ended in a complete acquittal of the accused in respect of all charges or offences, and not to case such as the present, where the accused has been acquitted of the charge of murder, but convicted of the minor offence of culpable homicide not amounting to murder, their Lordships are unable to agree with that part of their decision. The words of the sub-section are clear and there can be no doubt as to their meaning. There is no justification for the qualification which the learned Judges in the cited case attached to the sub-section."

We are in respectful agreement with the interpretation put on the word "acquittal" by the Judicial Committee of the Privy Council and the word "acquittal" therefore does not mean that the trial must have ended in a complete acquittal but would also include the case where an accused has been acquitted of the charge of murder and has been convicted of a lesser offence. In that view of the matter the appellant was entitled to a certificate under Article 134 (1) (a) as a matter of right and this appeal must be treated as if it is under that provision of the Constitution.

The facts of this appeal have been set out above. In support of the prosecution the evidence mainly, if not solely, consists of the dying declarations. The first dying declaration was made to the mother Chandrabhagabai as soon as she came to the place where the deceased was lying and in answer to her question "as to who had done it," the reply was that "it was done by her husband; also that the husband had set fire to her clothes." In cross-examination she stated that at the time when this statement was made by the deceased Shantabai and her husband Pandu Genda were present. A suggestion was made to her that the deceased implicated the appellant at the instance of Chandrabhagabai but she repudiated this suggestion and both the trial Court and the High Court have accepted the correctness of this dying declaration and also that it was not prompted by the mother Chandrabhagabai. Beyond a mere suggestion in the cross-examination there is no material to support the contention of prompting by the mother.

A similar statement accusing the appellant of setting fire to her was made by the deceased to the doctor (Dr. Javeri) who asked the deceased as to how she got the burns and her reply was that her husband has sprinkled kerosene oil on her and had applied a matchstick to her clothes. This statement was also accepted by the High Court and we find no reason to differ from that conclusion. The

third dying declaration was made in the presence of and was recorded by Mr. Mhatre, a Magistrate at about 5-30 p.m. in the presence of Dr. Javeri who certified that the deceased was in a fit state of mind to make the statement. The Magistrate asked her certain questions which are set out in detail and he took down the answers and his evidence is that the deceased understood the questions and replied to them. He made a record of the questions and answers but that record was not signed by her nor her thumb impression taken on it because her hands were badly burnt. This examination took about an hour. This dying declaration was held by the trial Court to have been made without the help or prompting of any body and according to Chandrabhagabai she was not present at the time. The learned trial Judge held that the dying declaration was "freely given without the influence of any body. It was not made under influence of any personal feelings." The High Court also accepted the correctness of this dying declaration and there is no evidence on the record which would in any way detract from the finding of the trial Court or of the High Court in regard to the correctness or the propriety of this dying declaration.

The argument raised before us was two fold : (1) that the appellant was not present at the place of occurrence at all and (2) that it was a case of suicide. There are no cogent grounds which would lead to the conclusion that the deceased wanted to commit suicide nor have any circumstances been shown to us which would lead to any such conclusion. Even though it may be true that the relations between the husband and the wife were strained so much so that the husband had almost refused to maintain the deceased and was not prepared to give her even food there is no indication that the deceased was so worked up as to have lost her self-control so as to commit suicide. Certain other circumstances as to the absence of any kerosene oil on the clothes of the appellant or the absence of kerosene oil on the bedding have been pointed out but in the circumstances of this case those circumstances are of no significance. Both the trial Court and the High Court have found that the deceased had died as a result of burns caused by the fire set to her clothes by the appellant who had sprinkled kerosene oil on her. This is supported by the dying declarations against the correctness of which no cogent reasons have been given or suggested and a conviction based on such evidence has been held to be sustainable by this Court in *Khushal Rao v. The State of Bombay*<sup>1</sup>.

The plea of alibi was sought to be supported by the evidence of Gangaram Sitaram a co-worker of the appellant but his testimony was rejected by both the trial Court and the High Court and having gone through it we find no reason to differ from that opinion.

In the result this appeal fails and is dismissed.

*Raghubar Dayal, J.* (for *Hidayatullah, J.* and himself).—We agree that the appellant had a right of appeal under Article 134 (1) (a) of the Constitution, but regret our inability to agree with the view that the conviction of the appellant under section 302, Indian Penal Code be maintained.

In appeals preferred under Article 134 (1) (a) of the Constitution, we are to assess afresh the value of the evidence on record, and do not follow the practice of this Court in appeals by Special Leave, under Article 136 of the Constitution, that the concurrent findings of the Courts below be not interfered with, ordinarily, but be interfered with only when special circumstances exist.

We are of opinion that it is not safe in this case to base the conviction of the appellant solely on the dying declarations made by the deceased, even though in law a conviction can lawfully be based on dying declaration alone if the Court feels fully satisfied about its giving a true version of the incident.

The first dying declaration was made to her mother, by the deceased. It was certainly natural for the mother to question her daughter as to how she got burnt. But that does not really mean that the daughter did state all what the mother deposes. Two points arise there, and they are : (a) Did the mother speak the truth ? and (b) Did the daughter speak the truth ? The mother, P.W. 1,

1. (1958) S.C.J. 198 : (1958) M.L.J. (Cri.) 100 : (1958) S.C.R. 552.

admittedly, has not good relations with her son-in-law. She made discrepant statements. The Sessions Judge has remarked, in paragraph 12 of his judgment, that there were lot of discrepancies in the statements of this witness. Reference may be made to her stating at one place that when she used to 'request the accused not to beat the daughter, the result was adverse and denying the correctness of this statement when questioned in cross-examination. According to her, only she was sent away from the room when the Magistrate recorded the dying declaration of the deceased in the Hospital, indicating that the accused and some others continued to remain in the room. This statement is not borne out by Dr. Javeri or by the Magistrate. She expressed ignorance about the deceased making a statement to the police. The Sub-Inspector and Dr. Javeri deposed about her making such a statement. She could not have been ignorant about it.

She deposes that the accused came to the spot where Sindhubai, the deceased, lay injured, about five minutes after her arrival. She knew that he had set fire to Sindhubai's clothes after pouring kerosene oil on her. She did not question him about it. She did not reprimand him. She did not abuse him. She did nothing which could have been normally expected of a mother knowing that the accused had burnt her daughter. The explanation that she was sorrow-stricken, lacks the ring of truth. Grief-stricken she must be, but that would not have made her mute.

According to her, Sindhubai made this dying declaration when Shantabai cousin of the accused, and her husband Pandu Genda, were present. These witnesses have not been examined by the prosecution to corroborate her statement.

The other dying declaration relied on by the Courts below, was made by the deceased to Dr. Javeri, on his causally questioning the deceased as to how she got injured. It may be natural, but we have our doubts, for the Doctor to put such questions to the patient in agony, which had no real connection with his duties as a medical man, and such questioning cannot be said to have any comforting effect on the patient. Such questioning can be nothing but idle curiosity which a Doctor in that position should not evince. Any way, it would not be a good precedent to rely on such a statement to the Doctor in such circumstances, when the Doctor makes no record about it, even if it be not required to be noted in the medico-legal register. We would consider it safe not to rely upon such a statement made to a casual question by the Doctor, the details of which statement are not clear.

The dying declaration made to the police has been ignored, the Sessions Judge considering that it was not made at all, or not made at the time the Sub-Inspector deposed to have got the dying declaration from the deceased. No significance attaches to this dying declaration in any case when it was recorded after the deceased had made a formal dying declaration to the Magistrate.

The dying declaration to the Magistrate has certainly been recorded with care. The relevant statements made in this dying declaration are the following :

"I am suffering injuries of burning. My husband is my enemy. My husband has burnt me. Kerosene was poured over my body and a match stick was lighted. I was sleeping in the house. He, i.e., my husband, beat me and then burnt me. I shouted, but nobody came. He was ill treating me. He was harassing me and was causing me starvation for the last 8 days. I had complained about it to Pandu Genda and Shanta Pandu. I did not send any information to my parents about the starvation."

The High Court has stated several times in its judgment that Sindhubai was sleeping when the accused set fire to her clothes. The panchanama—Exhibit 14, prepared about the room, does not show that the bedding had any oil sprinkled over it or that it got burnt. Quite a number of other clothes were burnt, which need not have caught fire. Absence of oil on the bedding is not consistent with her statement that she was sleeping in the house when the thing happened. This statement is also not consistent with the next statement made by her that her husband beat her and then burnt her. Her statement that nobody came on her shouts because the door of the house was shut, does not fit in with her statement to police in Exhibit 19 that the accused ran away on his work after he had set fire. The probability too is that if the accused had set fire to her clothes he would have just after setting fire as he could expect that the victim would shout.



her shouts would attract neighbours and persons passing by. Even if the door was latched for some time while the accused remained there because he did go subsequently, that does not explain the non-arrival of any person. The persons could have come and could have knocked at the door. It is really remarkable that in this case not a single witness of the neighbourhood has come to depose anything in support of the prosecution case. There is no evidence at all from an outside source. The investigation seemed to have revealed nothing whatever. There is nothing in the case to lend assurance to any circumstance. Surely, this cannot be the result of the accused's influence on the witnesses or the result of a general inclination not to speak the truth in the interests of justice, even when the accused committed the dastardly act of setting fire to his own wife. Their absence from the witness box may be due to their not stating what they knew to be untrue or did not consider to be true.

It is always a difficult question to speculate why the deceased accused a certain person of committing the crime, or why a witness deposes against a person with whom he has no ostensible cause of enmity or why the police, in the discharge of its public duty should influence persons to make inaccurate statements, when Courts come to the conclusion that the accusation or the evidence does not appear to be true and that there are reasons to suppose that the police had influenced the testimony of witnesses. Any way, the same difficulty occurs in the present case. But it is clear that the relations between the wife and the husband were strained to such an extent that, according to the prosecution, the accused not only starved her, but also set fire to her clothes with the intention to cause her death. Such a conduct of the husband cannot be on account of ordinary domestic unpleasantnesses, but must be the result of a very acute feeling of desperation and a desire not to live any more with his wife. If such were the relations which one is inclined to infer from what the prosecution wants the Court to believe, it should not be difficult to imagine that the wife's motives in charging the husband falsely may be equally strong. She too must have been fed up with the misery of her life and might have committed suicide and put an end to her life, but when, as often happens, she was questioned, she accused her husband of setting fire to her clothes, not with a view to save herself from a conviction for attempting to commit suicide but either on account of her feeling that her husband was responsible for all her troubles and that her desperate action was also due to the same cause or out of malice. Any way, a dying declaration is not to be believed merely because no possible reason can be given for accusing the accused falsely. It can only be believed if there are no grounds for doubting it at all.

Apart from the above considerations indicating that implicit reliance cannot be placed on the dying declaration, there are other circumstances which add to the feeling of uncertainty about the truth of the accusation made in the dying declaration. The panchnama of the room shows that a few shirts and old trousers and pieces of two sarees lay near the southern wall of the room in a wet and half burnt condition. There is no explanation why such clothes should have been burnt. There was no point in the accused pouring kerosent oil on these clothes even if they just lay huddled near the wall. If Sindhubai fell on the clothes lying there, that may burn some of them, but will not explain their getting wet. There is no suggestion that anybody had poured water over the burnt clothes in order to extinguish the fire, because none came there at all. In fact, Ranganath Sitaram, P.W. 6, one of the Panchs, states that the burnt clothes were also giving smell of rock oil. The panchnama further notes :

"On the eastern wall, two feet height from the ground there is a black spot caused due to the burning of the clothes and the same is recent one."

There is no explanation why such a mark should be there.

Sindhubai could not have stood opposite the wall and, even if she did, there should have been marks of burning along the length of her body beside the wall and not at a certain spot only. These two observations can be consistent only with some body deliberately setting fire to the clothes and keeping some burning clothes beside the wall for a little time. The appellant, or whoever, set fire to her clothes,

would not have done this as he would have made a very quick exit after drenching Sindhubai with kerosene oil and setting fire to her clothes. Sindhubai does not make any statement about such a conduct of the accused in her dying declaration: The only inference then possible is that she herself did all this, in accordance with her own inclinations. Why she did this, one cannot say.

Sindhubai returned to her house with her daughter after taking her mid-day meal at her mother's house and sent back the daughter with Usha. This is according to the statement of her mother. She brought the child, when, according to her mother's statement, she expected her husband to come to the house after taking his meal at his cousin's place. The conduct is unusual, as, ordinarily the child used to remain with her maternal grand-mother during the day time, as for some reason the accused probably felt aversion to her. The conduct can be consistent with her intention to commit suicide. She brought the child to her place to fondle with her for the last time and then sent her back to her mother.

Sindhubai's running towards the house of Shantabai, her husband's cousin, and not running towards her mother's place, also appears to be unnatural. It may be that in such troublous moments one need not be absolutely logical, but it is expected to be instinctive that when in trouble one thinks of one's relations who are expected to be sympathetic, and helpful, on the occasion. It is in the statement of her mother that the route to her house is different from the passage to the house of Shantabai. It may be that the accused did not go to the house as expected, and went away to his job from his cousin's place. It was a day of festival. Sindhubai might have felt this conduct badly, set fire to her clothes, and then run towards Shantabai's house where she might have expected her husband to be present.

The time of the incident though said to be between 1-30 and 3-30 P.M., appears to have been near about 3 O'clock. The mother states to have got information about that time. The police got information at about 3-45 P.M., and the ambulance took Sindhubai to the Hospital at 4-15 P.M. The accused was not expected to be at his house at 3 P.M. The learned Judges of the High Court did not believe the defence evidence about the accused working at the house of Mulchand Rajmal from about 2 P.M., and to have gone to his house on receiving information from one Daga, because Daga was not examined, the Munim of the house-owner was not examined and the register of workers was not produced. It is however the case for the prosecution that the accused used to go to work at 7 A.M., to return at 12 O'clock and again go for work at 2 P.M., and then return at 6 P.M. Chandrabhaga, the mother of the deceased, deposes so. There is therefore no good reason to think that the accused did not go to his duty at 2 P.M., that day as deposed to by D.W. 1.

Sindhubai herself stated in her statement to the police that the accused, after setting her on fire, ran away to his work. If the time of the incident be calculated from the time the police was informed, *i.e.*, from 3-45 P.M., the incident would have taken place some time between 3 and 3-30 P.M., and the accused would not have been at his house at that time. In fact, it appears to us that it is to avoid this difficulty that at some stage an attempt was made to time the incident at about 1-30 P.M. The incident could not have taken place before 2 P.M., as, in that case, information to the police would be very belated and in the normal course of events, it is not expected that Sindhubai would have tarried in the room for long or that the persons who must have collected after her running towards Shantabai's place and falling down there, would not have taken steps to inform the police without any undue delay.

The mother's statement that Sindhubai used to tell her that if the ill-treatment continued she would sever her connection with the accused and would earn her own living, would support the view that she had really got tired of her living with the accused and that this could have prompted her to attempt suicide.

If Sindhubai was not actually asleep when the kerosene oil was poured on her, it does not stand to reason that she would not have made any attempt to run away and the possibility of the accused successfully setting fire to her clothes in the course of the struggle, would be remote, and even if he succeeded, it is a moot point whether he too would not have been singed, if not burnt.

These are the various considerations which make us feel doubtful about the truth of the dying declaration and take the view that the appellant's conviction on the basis of the dying declaration should not be maintained.

It appears from the High Court judgment that the case put before it was

"some time after 1-30 P.M., the accused latched the room from inside and while Sindhubai was sleeping he poured a large quantity of kerosene oil on her person. Her clothes became wet with that kerosene oil and before she could struggle and get up he searched for a match stick, lighted it and set Sindhu's clothes on fire."

Such a case could not be made out from the dying declaration recorded by the Magistrate. Sindhubai had said at first that she was sleeping when it happened, but, in answer to the very next question, she said that her husband beat her and then burnt her. If the burning followed the beating, there could be no question of throwing kerosene oil on her while asleep. No reason for this conduct was stated. The Magistrate who cleared the doubtful points failed to elicit why this deed was perpetrated.

Further, the searching for a match box is a very improbable thing. If the accused had decided to set fire to his wife, he would have got a match box handy and if he did forget about it and had to search for it, that would give sufficient time to Sindhubai to make good her escape.

The aversion of Sindhubai to tell the name of her husband could not have been on account of any tender feeling for her husband, but was the natural act of a Hindu married woman not to tell her husband's name. This aversion to tell the name of her husband is no guarantee of the truth of her subsequent statement accusing her husband of the crime.

We do not find any justification for the following observation of the High Court, when considering the defence evidence :

"The accused has led evidence and his case is that he was not responsible for this murder at all. But in fact he was in the house when the incident took place."

The High Court had made the latter statement as a statement of fact, though there was no evidence to support it. Of course, on the basis of a dying declaration, the High Court had already held, before discussing the defence evidence, that the accused was responsible for the murder of his wife. If the defence evidence is to be adjudged on the basis of the final finding of the Court, there is no use for defence evidence. It has to be taken into consideration before arriving at a final finding.

The conduct of the accused in travelling in the same ambulance car and in remaining in the Hospital is in his favour and is against the prosecution. The accused stated in his examination that he paid the charges for the ambulance car.

We would like to remark that the learned Judges who heard the appeal should not have heard it when they, at the time of admitting it, felt so strongly about the accused being wrongly acquitted of the offence of murder that they asked the Government Pleader to look into the papers to find out whether it was a case where the Government would like to file an appeal against the acquittal, under section 302, Indian Penal Code. Government did file an appeal against that acquittal. We do not know whether it was at the suggestion of the Government Pleader or not. But, in these circumstances, it would have been better exercise of discretion if this appeal against the acquittal had not been heard by the same Bench which, in a way, suggested the filing of the Government appeal. In fact, to make such a suggestion, appears to be very abnormal.

We are therefore of opinion that it is not satisfactorily proved that the appellant committed the murder of his wife by setting fire to her clothes. We would therefore allow the appeal, set aside the order of the Court below and acquit the appellant of this offence.

ORDER OF THE COURT.—In accordance with the opinion of the majority, this appeal fails and is dismissed.

*Appeal dismissed.*

## THE SUPREMECOURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

Arjun Prasad (dead) through his legal representatives, Smt.  
 Madhurbhasini Devi and others. (In both the Appeals) .. *Appellants\**

v.

Shantilal Shankarlal Shah and others (In C. A. No. 201 of 1961)  
 and Nand Prasad and others. (In C.A. No. 202 of 1961) .. *Respondents.*

*Companies Act (VII of 1913), Section 153—Creditors' meeting—Present in person or by proxy—Creditor Company—If can be present in person or by proxy and vote—Order of Company Judge—Appeal under sub-section (7)—If lies to High Court or Supreme Court.*

When the Company Judge exercises jurisdiction he does it under the provisions of section 3 of the Companies Act (1913) which says that "the Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate." The authority authorised to hear appeals from appealable decisions of a single Judge of the Patna High Court when exercising Original Jurisdiction is the High Court and appeals lie to the High Court and not to the Supreme Court.

Unless there is some special provision by a law a company which is not a physical person cannot be present at any place "in person."

In the Companies Act, 1956 a provision has been introduced under which a company which is a creditor of another company may by resolution of its directors, authorise such person as it thinks fit to act as the representative at the meeting of any creditors of the company held in pursuance of the Act and a person authorised in this manner shall be entitled to exercise the same rights and powers (including the right to vote by proxy) on behalf of the company. [Section 187(1) and (2) of 1956 Act.]

No such provision however is to be found in the Companies Act, 1913. Rule 150 of the Rules framed by the Patna High Court lays down how a proxy is to be given when a creditor is a corporation. In the instant case no proxy in accordance with Rule 150 was given by the Creditor Companies.

A mere resolution of the directors of a company authorising a director or some other person to represent the company at the creditors' meeting cannot make him a "present in person" in law for that company at the meeting. The vote of such a representative is not a valid vote.

However deplorable the delay of the opposing creditors in raising objections to the validity of such votes, that would not be a sufficient reason for refusing to entertain that objection.

Appeals from the Judgment and Decree dated the 16th May, 1958, of the Patna High Court in L. P. As. Nos. 13 and 14 of 1957.

A. V. Viswanatha Sastri, Senior Advocate, (R. K. Garg, M. K. Ramamurthi, D. P. Singh and S. C. Agarwala, Advocates of M/s Ramamurthi & Co., with him) for Appellants.

M. C. Setalvad, Attorney-General for India (B. P. Rajgarhia and K. K. Sinha, Advocates, with him) for Respondents.

The Judgment of the Court was delivered by

*Das Gupta, J.*—These appeals raise a question as to the manner in which a creditor company can validly cast its vote at a meeting of the creditors held under the provisions of section 153 of the Indian Companies Act, 1913. The question arises in connection with such a meeting held of the creditors of the Gaya Sugar Mills, Ltd. On 14th November, 1951, an order was made by the Company Judge in the Patna High Court for the winding up of the Gaya Sugar Mills, Ltd. On 6th October, 1953 an order was made by the learned Judge for action to be taken under section 153 of the Indian Companies Act. Mr. G. C. Banerjee, who was appointed Chairman to hold the meeting of the creditors held separate meetings of the debenture-holders, secured creditors and of the unsecured creditors. In his Report he stated as regards the meeting of the unsecured creditors that "thirty unsecured creditors either in person or through proxy attended and took part in the meeting," and that ultimately a resolution proposed by one of the creditors, the Standard Vacuum Oil Company and seconded by another creditor Shri K. C. Agarwal was

passed "by the creditors present by majority in number as well as three-fourths in value." It appears that at this meeting one Arjun Prasad claiming to represent two creditor companies, *viz.*, Bhandani Brothers, and the Hindustan Coal Company, Ltd., cast his votes on behalf of these two companies, in support of the resolution. No objection was taken at the meeting to the validity of these votes by any of the creditors who opposed the resolution and the Chairman proceeded on the basis that these votes were validly cast. It is not disputed that if these votes were not validly cast the requisite majority of three-fourths in value would not be obtained.

When the application came up for final hearing before the Court an objection was taken on behalf of creditors who opposed the scheme that the votes cast by Arjun Prasad on behalf of the two creditor companies, *viz.*, Bhandani Brothers and the Hindustan Coal Company were not valid votes and so the requisite majority of three-fourths in value of the creditors had not been obtained. The Company Judge was of the opinion that there was no sufficient explanation as to why the objection as to the validity of the votes was not taken earlier and so the objection raised at the late stage could not be entertained. On the merits also he held that the resolution passed by the creditor companies authorising Arjun Prasad to attend the meeting of the unsecured creditors of the Gaya Sugar Mills, Ltd., and vote on behalf of the companies, were sufficient in law to make his attendance at the meeting the attendance of the companies "in person" and his voting on behalf of the companies valid voting of the companies. Accordingly, he rejected this objection.

On appeal a Division Bench of the Patna High Court has allowed the objection, being of opinion that the delay in raising the objection would not entitle the Court to ignore the legal defect of the votes and that in law the votes cast by Arjun Prasad were not valid votes of these two creditor companies, *viz.*, Bhandani Brothers and the Hindustan Coal Company. A contention that no appeal lay to the High Court from the order of the Company Judge was rejected. Therefore, the learned Judges set aside the order of the Company Judge as to this part of the case. They, however, gave a certificate that as regards the value and nature of the case, it fulfils the requirements of Article 133 (1) (a) of the Constitution and is a fit one for appeal to this Court. On this certificate the present appeals have been filed.

Three points were raised before us by Mr. Sastri in support of the appeals. The first is that from the decision of the Company Judge, an appeal lay to this Court and not to the High Court. Secondly, it was urged that the objection to the validity of the votes not having been taken earlier should not be allowed to be raised for the first time during arguments at the final hearing of the application. Lastly, it was urged that the votes were valid.

As regards the first point it is to be noticed that sub-section (7) of section 153, which was added in 1936 provides that an appeal shall lie from any order made by the Court exercising original jurisdiction under the section to the authority authorised to hear appeals from the decisions of the Court. It therefore could not be disputed and was not disputed that an appeal did lie from the order made by the Company Judge on 6th October, 1953. The controversy is whether the appeal lay to this Court or the High Court. In other words, the question is, which is the authority authorised to hear appeals from the decisions of the Court? The "Court" here cannot but mean the Court exercising original jurisdiction. When the Company Judge exercises the jurisdiction he does it under the provisions of section 3 of the Companies Act which says that

"the Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate."

The authority authorised to hear appeals from appealable decisions of a Single Judge of the Patna High Court when exercising original jurisdiction is the High Court and appeals lie to the High Court and not to this Court. (Vide Clause 10 of the Letters Patent). It necessarily follows that the appeal from the order of the Company Judge lay to the High Court and not to this Court. There is, therefore, no substance in the first point raised on behalf of the appellant.

The next contention that the objection cannot be entertained for the first time at the final hearing of the application appears to us to be equally unsound. It is undoubtedly true that the opposing creditors were guilty of negligence in not drawing the attention of the Chairman to what they considered to be a defect in the voting on behalf of the two creditor companies, *viz.*, Bhandani Brothers and the Hindustan Coal Company and no less negligent in not bringing this to the Court's notice at the earliest opportunity. Laches on the part of some creditors cannot however justify the Chairman or the Court in disobeying the requirements of the Act. If in law the two votes cast by Arjun Prasad for these two creditor companies were not validly cast the three-fourths majority requisite under section 153, sub-section (2) would not be there and so no further action under section 153 could be taken by the Court in the matter. How can the Court turn a blind eye to the fact, if proved, that on the basis of valid votes at the meeting the requisite majority was not obtained, merely because the Chairman's attention was not drawn to the defect or it was not brought to the Court's notice earlier? In our opinion, the learned Judges who heard the appeal were right in thinking that however deplorable the delay by opposing creditors in raising the objection might be, that would not be a sufficient reason for refusing to entertain the objection.

This brings us to the main question in controversy, *viz.*, whether the resolutions passed by the two creditor companies, *viz.*, Bhandani Brothers and the Hindustan Coal Company, authorising Arjun Prasad to attend the meeting on their behalf and to vote there on their behalf made Arjun Prasad's voting valid voting. Section 153 (2) of the Indian Companies Act is in these words :—

"If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present either in person, or by proxy at the meeting agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all members or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributories of the Company."

The agreement has to be of a majority in number representing three-fourths in value of those who are present either in person or by proxy at the meeting. The agreement of those who are not present at the meeting either in person or by proxy cannot be taken into consideration. Any creditor, whether a corporation or natural person can be present at a meeting by proxy. A natural person can of course be present at a meeting "in person". Can a corporation be present at a meeting "in person"? It appears to us that unless there is some special provision by a law, a company which is not a physical person cannot "be present" at any place "in person". It is true that under the General Clauses Act, 1897, a company is a "person", so that whenever the word "person" is used in any statute a company would be included thereunder. The definition in the General Clauses Act can however be of no assistance in interpreting the words "to be present in person", and the difficulty in the way of a company being present in person can be obviated only by statutory provisions or rules having the force of law.

Nor can the appellant derive any assistance from the English Case *In re Kelantan-Coco, Limited and Reduced*<sup>1</sup> cited by the learned counsel. In that case, the Court was dealing with a petition for reduction of capital. In deciding whether the special resolution to reduce the capital of the company had been duly passed, the Court had to consider whether there was a quorum at the confirmatory meeting, at which one member of the company and one representative appointed under section 68 of the Companies (Consolidation) Act, 1908 to represent a shareholder of the company, the Eastern Development Corporation, Limited, were present. The Articles of Association provided "two members personally present shall be a quorum". It was held that a representative appointed under section 68 should be taken into account in considering whether there was a quorum. The provisions of section 68 were similar to those of section 80 of the Indian Companies Act, 1913 and thereunder a company which is a member of another company may, by resolution of the

directors authorise any of its officials or any other person to act as its representative at any meeting of that other company. The presence of such a representative was taken in the above case to amount to personal presence of a member of the company. The case does not deal with the question of a creditor Company.

In the Indian Companies Act, 1956, a provision has been introduced under which a company which is a creditor of another company may by resolution of its directors, authorise such person as it thinks fit to act as its representative at any meeting of any creditors of the company held in pursuance of the Act and a person authorised in this manner shall be entitled to exercise the same rights and powers (including the right to vote by proxy) on behalf of the company. (Section 187(1) (b) and (2)). No such provision however is to be found in the Indian Companies Act, 1913. It is unnecessary for us to consider whether under this new provision the attendance of a person authorised in this manner at a meeting of the creditors will amount to attendance of the creditor company "in person". For, the present case is governed by the provisions of the Indian Companies Act, 1913 and not by this new provision.

When the Companies Act was amended in 1936, an addition was made in section 246 which empowers the High Court to make Rules, concerning the mode of proceedings *inter alia* "for the holding of meetings of creditors and members in connection with proceedings under section 153 of this Act". Accordingly, a number of Rules were framed by the Patna High Court in exercise of this additional power. Rule 144 of the Rules states that a creditor or contributor may vote either in person or by proxy. Rules 145 to 153 deal with various questions as regards proxies. Of these Rule 150 lays down how a proxy is to be given where a creditor is a corporation. Admittedly, no proxy in accordance with Rule 150 was given by the two creditor companies, Bhandani Brothers and the Hindustan Coal Company, in the present case. There is nothing in these rules which can assist Mr. Sastri's argument that a resolution by the directors of the company authorising a director or some other person to represent the company at the creditor's meeting makes him a "present in person" in law for that company at the meeting.

Mr. Sastri's last argument was that as the business of the company has to be managed by the directors and the directors can delegate any of their powers to any one of themselves, the attendance of Arjun Prasad at the meeting should reasonably be construed as the attendance of all the directors and so the attendance of the company "in person". As we have already indicated it does not appear to us that in the Act of 1913 there is any provision for attendance of the company "in person" but apart from that we wish to point out that the resolution made by the two companies do not appear to us to delegate the powers of the directors to Arjun Prasad.

The conclusion of the High Court that the votes cast by Arjun Prasad on behalf of the two companies, *viz.*, Bhandani Brothers and the Hindustan Coal Company, were not valid votes, is in our opinion, correct.

The appeals are accordingly dismissed with cost. One set of hearing fee.

*Appeals dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR AND K. N. WANCHOO, JJ.

Basant Ram (deceased) and after him his legal representatives  
and others

.. Appellants\*

v.

The Union of India and another

.. Respondents.

Budha Singh and others

.. Interveners.

*Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954)—Effect of—Section 12 and notification thereunder of 24th March, 1955—Power of Central Government to act under Administration of Evacuee Property Act (XXXI of 1950)—If survives in respect of agricultural lands temporarily allotted in 1947).*

After the coming into force of the Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954) and the notification made thereunder on 24th March, 1955 under section 12, the agricultural land temporarily allotted to appellants who migrated in 1947 from what is now West Pakistan in the villages of Sheikhapind and Kotla ceased to be evacuee property and became part of the compensation pool created thereunder and therefore the Central Government had no power left to act under the Administration of Evacuee Property Act (XXXI of 1950) and the Rules framed thereunder. Accordingly the order passed by the Central Government on 11th October, 1955 declaring the two villages sub-urban was not within the competence of the Central Government. It was therefore not open to the authorities under Act (XXXI of 1950) to take any action under that order with the object of varying the allotment made in favour of the appellants by reducing the area allotted to them. Whatever further action has to be taken after the notification of 24th March, 1950 can only be taken under the Act (XLIV of 1954.)

Appeal by Special Leave from the Judgment and Order dated the 31st January, 1956 of the Punjab High Court in Civil Writ Petition No. 30 of 1956.

R. S. Narula, Advocate, for Appellants.

B. K. Khanna and P. D. Menon, Advocates, for Respondents.

S. L. Pandhi, Advocate, for Interveners.

The Judgment of the Court was delivered by

*Wanchoo, J.*—This is an appeal by Special Leave against the order of the Punjab High Court summarily rejecting a petition filed by the appellants under Article 226 of the Constitution. The brief facts necessary for present purposes are these. The appellants migrated in 1947 from what is now West Pakistan and settled in two villages, *viz.*, Sheikhapind and Kotla. They were given temporary allotment of agricultural land in the two villages under the East Punjab Evacuees' (Administration of Property) Act (No. XIV of 1947), then in force. Thereafter a scheme was formulated in 1948 for quasi-permanent allotment of agricultural land to owners of land in West Pakistan after the East Punjab Refugees (Registration of Claims) Act (No. VIII of 1948) was enacted. In July 1949, a notification was issued stating the conditions under which allotment of agricultural land would be made to displaced persons from West Pakistan. This allotment was quasi-permanent in the sense that it was to remain in force so long as the land was to remain vested in the Custodian of Evacuee Property. In pursuance of this notification, land was allotted in the two villages to the appellants on quasi-permanent basis in 1949 and the appellants have remained in possession thereof ever since. Originally land was classified into two kinds, namely, (i) urban and (ii) agricultural land. Later in 1949, however, a third classification, namely sub-urban was also introduced in practice with respect to agricultural land in the neighbourhood of certain towns and a notification seems to have been issued with respect to that specifying the villages land in which was considered to be a sub-urban (*vide* Chapter V of Land Settlement Manual by Tarlok Singh). But the two villages in which land was allotted to the appellants were not included in the notification with respect to sub-urban land.

In August 1950 after the quasi-permanent allotment in favour of the appellants had been made, the Revenue Assistant (Rehabilitation) Jullundur proposed that



these two villages should also be classified as sub-urban, the consequence of which would have been to reduce the area of land given to the allottees therein. The appellants objected before the Director-General of Rehabilitation to the villages being graded as sub-urban. The Director-General called for a report from the Revenue Assistant (Rehabilitation) and eventually passed an order on 12th January, 1951 that it was not desirable at that stage to cause any disturbance to the allotments made in these two villages by declaring them sub-urban and that the *status quo* should continue. This however did not end the matter and in February, 1952 the Director of Rehabilitation passed an order in effect declaring these villages as sub-urban with the result that the allotment made to the appellants would have to be reduced. It also appears that some order was passed in April 1952 on paper allotting the extra land which would be released from the allotment of the appellants to other persons who have appeared as interveners in this appeal. But this order remained merely on paper and has not been carried out so far. When the appellants came to know of the order of 29th February, 1952, they filed a revision before the Custodian-General for setting aside that order. The revision came up before the Deputy Custodian-General for hearing in January, 1956. By then however certain changes in the law and Rules had been made. Firstly, there was an amendment in rule 14 (6) of the Administration of Evacuee Property (Central) Rules framed under the Administration of Evacuee Property Act (Central Act XXXI of 1950). Further, the Displaced Persons (Compensation and Rehabilitation) Act, Central Act XLIV of 1954 (hereinafter referred to as the Act) had been passed. Under the amendment to rule 14(6) power was given for cancellation or variation of any allotment of rural evacuee property on a quasi-permanent basis, where the allotment was to be cancelled or varied in accordance with the general or special order of the Central Government. It appears that in the meantime correspondence passed between the Punjab Government and the Central Government and an order under the amended rule 14 (6) (iii) (d) was obtained on 11th October, 1955. Therefore, when the revision came up before the Deputy Custodian-General he held that in view of rule 14 (6) (iii) (d) of the Rules it was open to the Central Government by special order to direct cancellation or variation of the allotment made in this case in favour of the appellants and that the Central Government had on the representation of the Punjab Government agreed to declare these two villages as sub-urban by its order dated 11th October, 1955; therefore he held that whatever was being done after 11th October, 1955 was in pursuance of the order of the Central Government. He therefore held that the impugned order of 29th February, 1952, even if it was revisable, no longer held the field and action was to be taken in future under the order of the Central Government passed on 11th October, 1955. Therefore, the revisions had become infructuous and he dismissed them. Then followed the writ petition by the appellants in the Punjab High Court, which was dismissed summarily. As leave was refused by the High Court, the appellants applied for Special Leave to this Court, which was granted; and that is how the matter has come up before us.

The main contention on behalf of the appellants before us is that after the coming into force of the Act and the notification made thereunder on 24th March, 1955 under section 12, the land allotted to the appellants in the two villages ceased to be evacuee property and became part of the compensation pool created thereunder and therefore the Central Government had no power left to act under the Central Act XXXI of 1950 and the Rules framed thereunder. In consequence the order passed by the Central Government on 11th October, 1955 on the basis of which the Deputy Custodian-General rejected the revision petitions filed on behalf of the appellants was not within the competence of the Central Government and no action could be taken by virtue of that order declaring the two villages as sub-urban. Therefore it was not open to the authorities under the Central Act XXXI of 1950 to take any action under that order with the object of varying the allotment made in favour of the appellants by reducing the area allotted to them. It is further urged that whatever further action has to be taken after the notification dated 24th March, 1955 can only be taken under the Act and that no such action has in fact been taken.

We are of opinion that there is force in this contention of the appellants and it must prevail. Section 12 (1) of the Act provides that

"if the Central Government is of opinion that it is necessary to acquire any evacuee property for a public purpose, being a purpose connected with the relief and rehabilitation of displaced persons, including payment of compensation to such persons, the Central Government may at any time acquire such evacuee property by publishing in the Official Gazette a notification to the effect that the Central Government has decided to acquire such evacuee property in pursuance of this section".

Sub-section (2) then provides that

"on the publication of a notification under sub-section (1), the right, title and interest of any evacuee in the evacuee property specified in the notification shall. . . . be extinguished and the evacuee property shall vest absolutely in the Central Government free from all encumbrances."

Sub-section (4) provides that all evacuee property acquired under this section shall form part of the compensation pool. Section 14 provides for constitution of a compensation pool. Section 16 gives powers to the Central Government for the management of the compensation pool, including the appointment of such officers as it may deem fit (referred to as managing officers) or constitution of such authority or corporation, as it may deem fit (referred to as managing corporations). Section 17 provides for functions of managing officers and managing corporations. Section 19, which is important, provides that

"notwithstanding anything contained in any contract or any other law for the time being in force but subject to any rules that may be made under this Act, the managing officer or managing corporation may cancel any allotment or terminate any lease or amend the terms of any lease or allotment under which any evacuee property acquired under this Act is held or occupied by a person, whether such allotment or lease was granted before or after the commencement of this Act."

Rules have been framed under the Act specifying the circumstances under which a managing officer or a managing corporation may cancel an allotment or terminate a lease or vary the terms of any such lease or allotment (see rule 102). It is not in dispute that the evacuee property in these two villages was notified under section 12(4) of the Act on 24th March, 1955. The consequence of that notification is that all rights, title and interest of the evacuees in the property ceased with the result that the property no longer remained evacuee property. Once therefore the property ceased to be evacuee property it cannot be dealt with under the Central Act No. XXXI of 1950 or the Rules framed thereunder. The property in these two villages became part of the compensation pool after the notification of 24th March, 1955 and could be dealt with under the provisions of the Act and any variation or cancellation of any lease or allotment thereafter could only be made under section 19 of the Act. This is the position which emerges on a consideration of sections 12, 14, 16 and 19 of the Act after the notification under section 12(1) was made with respect to the evacuee property in these two villages on 24th March, 1955. This view has been taken by the Punjab High Court in *Balmukand v. The Punjab State*.<sup>1</sup> The same view has also been expressed by this Court in *Major Gopal Singh v. Custodian Evacuee Property*,<sup>2</sup> where it was held that from the date of the notification under section 12, the Custodian by reason of the divesting of the property becomes *functus officio* with respect to it and cannot rectify any error made by him in the past in the matter of cancellation of allotment. It follows therefore that when the notification of 24th March, 1955 was made and the evacuee property in these two villages ceased to be evacuee property and became part of the compensation pool it could only be dealt with under the Act and if any variation or cancellation of allotment was to be made it could only be done under the provisions of section 19 of the Act and there was no power left in the Central Government to act under rule 14(6) (iii) (d) of the Rules framed under the Central Act XXXI of 1950 with respect to this land after the notification of 24th March, 1955. The order of the Deputy Custodian General of January, 1956 shows that further proceedings with respect to this land are contemplated under the order of 11th October, 1955 passed by the Central Government under rule 14(6) (iii) (d). As however that order was passed after 24th March, 1955 when the power of the Central Government to act

1. I.L.R. (1957) Punj. 712.

2. A.I.R. 1961 S.C. 1320.

under the Central Act XXXI of 1950 had ceased on the evacuee property in these two villages becoming part of the compensation pool, that order must be set aside and no further proceedings can be taken under that order. We order accordingly. The appellants will get their costs.

We should however like to make it clear that we express no opinion on the controversy between the appellants and the interveners who are left to such remedies as may be available to them under the law.

Appeal allowed.

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR AND RAGHUBAR DAYAL, JJ.

Kamalabai Jethamal

Appellant\*

v.

The State of Maharashtra

Respondent.

*Suppression of Immoral Traffic in Women and Girls Act (CIV of 1956), Sections 3 and 18 (2)—Sending a person to aid an act of prostitution in order that an offence under the Suppression of Immoral Traffic in Women and Girls Act may be detected—Propriety—Search of women accused in the presence of men—Effect—High Court in revision against acquittal convicting person under section 3 of the Act—Power to Order eviction of convicted person from house used as brothel.*

It is wholly wrong for a police officer or any other person to be sent to aid an act of prostitution in order that an offence under the Suppression of Immoral Traffic in Women and Girls Act (for instance keeping a brothel) may be detected. What is more reprehensible and a matter of greater concern is the sending with him a young student (for being a witness in the case). To use students in this manner should not be allowed by any Governmental authority in a country like ours.

It may be that the search of the accused (a woman) in the instant case, was contrary to the spirit or even the letter of the Criminal Procedure Code but the fact remains that there was a search and a hundred rupee currency note was recovered and even if the recovery of a hundred rupee note were held not proved (because of the search of the woman in the presence of men), the payment of that amount will not thereby become unproved if there is evidence which has been accepted by the High Court.

The High Court convicting the accused of an offence under section 3 of the Suppression of Immoral Traffic in Women and Girls Act in an appeal against acquittal under section 423 of the Criminal Procedure Code has the power to order eviction of such accused from the house used as a brothel. In view of the specific provision in section 18 of the Act it cannot be said that only the Magistrate has such a power.

Appeal by Special Leave from the Judgment and Order dated the 29th September, and 11th October, 1961, of the Bombay High Court in Criminal Appeal No. 906 of 1961.

S. G. Patwardhan, Senior Advocate (J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. Dadachanji & Co. with him), for Appellant.

H. R. Khanna and P. D. Menon, Advocates, for Respondent.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal against the judgment and order of the High Court of Bombay setting aside the order of acquittal of the appellant and sentencing her to one year's rigorous imprisonment and evicting her from the premises which she was occupying as a tenant.

The appellant was tried by the Additional Chief Presidency Magistrate, Esplanade, Bombay, for offences under sections 3(2) and 4(1) of the Suppression of Immoral Traffic in Women and Girls Act (Act CIV of 1956) hereinafter called the 'Act'. The charge against the appellant was that she supplied a girl to Manmohan Anandji Mehta who is a witness and she kept or managed a brothel at block No. 6, plot No. 144 Shivaji Park, Bombay; that she knowingly lived on the earnings

of prostitution and that she procured women for the purpose of prostitution. The story of the prosecution was that information was received by Police Superintendent Kanga that the premises were being used as a brothel and that the appellant was supplying girls for the purpose of prostitution. He thereupon laid a trap and sent two persons, Manmohan Anandji Mehta and Prabhakar K. Loke, the former was to ask for a girl for the purpose of prostitution and the latter was to be a panch, *i.e.*, a witness of that fact. Sub-Inspector Purohit, it is stated, gave two one hundred rupees marked currency notes to Manmohan Anandji Mehta with the instruction that he was to pay out of that to the appellant and thus to obtain a girl from her for the purpose of prostitution. He along with Loke went to the house of the appellant, rang the bell and was admitted by her. He then asked the appellant to arrange a girl for him and both Manmohan Anandji Mehta and Loke are alleged to have said that they wanted two girls for enjoyment. Two girls were shown, one Kamal Govind and the other Indu Bapurao Salunke both of whom are witnesses. The amount quoted by the appellant in the case of the former was Rs. 100 and for the latter Rs. 50. Manmohan Anandji Mehta selected Kamal and handed over one one hundred rupees currency note to the appellant which she put under her blouse. Manmohan Anandji Mehta and the girl then went into the kitchen and there they undressed and were later found naked on the floor and in a rather compromising position. On a signal being given the police, *i.e.*, Superintendent Kanga and Sub-Inspector Purohit entered the premises and were told by Loke that Manmohan Anandji Mehta and the girl were in the kitchen. The Police Officers opened the door of the kitchen and found both Manmohan Anandji Mehta and Kamal as stated above. They then were asked to dress and come out. Manmohan Anandji Mehta then returned the other one hundred rupees currency note to Superintendent Kanga. A woman Panch who had accompanied the police party searched the appellant and recovered the one hundred rupees currency note from under the blouse. It is stated that the male members of the party were at that time in a passage adjoining the hall where the appellant was searched. The appellant was tried for the offences above mentioned but was acquitted by the Additional Chief Presidency Magistrate. On appeal the High Court set aside the order of acquittal and sentenced her to a year's rigorous imprisonment and also ordered her eviction from the premises she was occupying as a tenant.

The evidence mainly consists of Manmohan Anandji Mehta and Loke and the two Police Officers. The testimony of Manmohan Anandji Mehta and Loke by itself may not, in the circumstances of the case, be of much value but their testimony receives corroboration and thus gives credence to the prosecution case. The evidence of Police Superintendent Kanga shows that when the door of the kitchen was pushed open both Kamal and Manmohan Anandji Mehta were naked and were in a compromising position; their clothes were lying by the side of the mattress. The testimony of Sub-Inspector Purohit is also to the same effect. The other circumstance which is very much against the appellant is that there is evidence to show that when the woman panch accompanied the police party and searched the appellant a hundred rupees currency note was found from her person under her blouse. The fact is deposed to by Sub-Inspector Purohit and by Police Superintendent Kanga. Loke has also deposed to the same effect. But it was submitted on behalf of the appellant that this evidence should not be accepted as, according to law, no woman can be searched except by another woman and having regard to the emphasis on decency under sections 52 and 103 of the Criminal Procedure Code that cannot be done in the presence of men. There is no evidence to show except that of Manmohan Anandji Mehta that the men were asked to move away from the hall or had actually left the hall during the search. But assuming they were not in the hall even then it will not be an extraordinary circumstance that one or all of them should have seen the hundred rupees note being taken out from under the blouse of the appellant. The High Court has accepted the testimony of Loke and we find no reason to depart from the usual practice of this Court of accepting such findings. Besides the High Court has also accepted the testimony of Loke in regard to the payment of a hundred rupees currency note to the appellant which

proves that money was paid before the girl, Kamal Govind, was asked to go with Manmohan Anandji Mehta for the purpose of prostitution.

Counsel for the appellant emphasised two points : (1) that the woman, who was brought by the police to search the appellant and is alleged to have recovered the hundred rupees note from her person, has not been produced and (2) that considering that the person to be searched was a woman it must be presumed that in accordance with the requirements of law and of decency no man could have been present when the search of the appellant took place. In support of the first contention reference is made to a judgment of this Court in *Purvez Ardeshir Poonawalla v. The State of Bombay*<sup>1</sup>, where the necessity of producing the search witness was emphasised and it was observed :—

“ This is one of those cases where the rule in regard to search witnesses becomes applicable and importance must be attached to the lack of that class of search witnesses which are envisaged by the Criminal Procedure Code in section 103.”

The Privy Council also in *Malik Khan v. Emperor*<sup>2</sup>, emphasised the necessity of the presence of search witnesses. Lord Porter there said :

“ In their Lordship's opinion the presence of witnesses at a search is always desirable and their absence will weaken and may sometimes destroy the acceptance of the evidence as to the finding of the articles. . . . .”

The observations in *Poonawalla's* case<sup>1</sup>, and of Lord Porter in *Malik Khan v. Emperor*<sup>2</sup> are not directly applicable in the present case. As we have said above there is evidence in this case which has been accepted by the High Court that a hundred rupees note was given to the appellant by Manmohan Anandji Mehta. There is also evidence that as a consequence of the payment of money Manmohan Anandji Mehta did hire Kamal Govind for prostitution and it is regrettable to say that with the money given to him by the police he acted not merely as a ‘ bogus customer ’, as he has been described, but his participation was more active, reprehensible, immodest, indecent and indecorous. If in any case the following observations of Lord Goddard, Chief Justice, in *Brannan v. Peek*<sup>3</sup>, are apposite it is this case :

“ The Court observes with concern and disapproval the fact that the Police Authority at Derby thought it right to send a Police Officer into a public house to commit an offence. It cannot be too strongly emphasised that, . . . . . it is wholly wrong for a Police Officer or any other person to be sent to commit an offence in order that an offence by another person may be detected.”

We have only to substitute the words “ aid an act of prostitution ” for “ to commit an offence ” and the analogy is complete. In this case two youngmen were given money to go to the house of the appellant and also to use that money in rather an improper manner. Manmohan Anandji Mehta seems to be a person of rather doubtful character and the employment of this class of persons for detection of offences is hardly a credit to any one. What is more reprehensible and a matter of greater concern is the sending with him a young student who was reading for his Matriculation. To use students in this manner should not be allowed by any governmental authority in a country like ours. It is no justification to say that in order to suppress immoral traffic in women and to stop prostitution somebody has to be used and the only class of people that can be employed are persons like Manmohan Anandji Mehta who is confessedly a police agent and Loke who is a youngman willing to be employed by the police. After saying this we have still to see what is the consequence of the testimony of these witnesses produced in this case. The High Court has believed the testimony of Loke in regard to the payment of one hundred rupees and there is evidence to show that that amount was used for the purpose of procuring Kamla for prostitution. The payment must therefore be held to be proved.

It may be that the search was contrary to the spirit or even the letter of the Criminal Procedure Code but the fact remains that the High Court has accepted that there was a search and a hundred rupees currency note was recovered and.

1. Cr. A. No. 122 of 1954, decided on 20th December, 1957.

2. (1945) 2 M.L.J. 486 : L.R. 72 I.A. 305

(P.C.).

3. (1947) 2 All E.R. 573-4.

even if the recovery of a hundred rupees currency note were held not proved, the payment of that amount will not thereby become unproved if there is evidence which the High Court has accepted.

On the findings of the High Court we are unable to come to any other conclusion but the one to which the High Court came, that the appellant is guilty of the offences of which she was accused.

The next submission of Counsel for the appellant was that the High Court in appeal could not order the appellant's eviction because that power only a Magistrate has under section 18 of the Act. The argument raised was that the powers of the appeal Court under section 423, Criminal Procedure Code are to reverse the order of acquittal or to order a fresh enquiry or a retrial, etc. but not to order eviction. But this argument is untenable in view of the fact that in the Act there is a specific provision in section 18 of the Act authorising the making of such an order by a Court convicting a person of offences under section 3 or section 7 of the Act. The relevant portion of section 18 is as follows :—

*Section 18. "Closure of brothels and eviction of offenders from the premises.—*

(1) . . . . ., and if after hearing the person concerned, the Magistrate is satisfied that the house . . . . . or portion is being used as a brothel or for carrying on prostitution then the Magistrate may pass orders—

(a) directing eviction of the occupier within seven days of the passing of the order from the house. . . . .

(2) A Court convicting a person of any offence under section 3 or section 7 may pass orders under sub-section (1) without further notice to such person to show cause as required in that sub-section."

The High Court ordered the conviction of the appellant under section 3 of the Act and therefore it had the power to order her eviction. The second contention is also without substance.

The appeal is therefore dismissed.

*Appeal dismissed*

## THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR, J. R. MUDHOLKAR AND T. L. VENKATARAMA AYYAR, JJ.

Smt. Somawanti and others

.. *Petitioners\**

*v.*

The State of Punjab and others (In all the Petitions)

.. *Respondents.*

The State of Gujarat (In all the Petitions)

.. *Intervener.*

*Land Acquisition Act (I of 1894), section 6 (3)—Declaration of Government in Notification that land was required for a public purpose—Conclusive evidence as to "need" as well as "purpose"—Colourable exercise of powers is open to challenge—Token contribution by State towards cost of acquisition—How far sufficient compliance with law—Establishing a particular industry as a public purpose—Article 14 of the Constitution, if offended—Notifications under section 4 (1) and section 6 (1) published on the same day—Validity.*

*Practice—Stare decisis—Applicability.*

The declaration of the Government in the notification that the land is required for a public purpose is made conclusive by sub-section (3) of section 6 of the Act and, therefore it is not open to the Court to go behind it and try to satisfy itself whether in fact the acquisition is for a public purpose or not.

There is no difference between the effect of the expression "conclusive evidence" from that of "conclusive proof" the aim of both being to give finality to the establishment of the existence of one from the proof of another.

For a right under Article 19 (1) (f) of the Constitution to hold property to be available to a person he must have the property with respect to which he can assert such right. If the right to the possession of the property is taken away by a law protected by Article 31 (5) (a), Article 19 (1) (f) is attracted.

The declaration that a particular land is needed for a public purpose or for a company is not to be made by the Government arbitrarily, but on the basis of material placed before it by the

Collector. The provisions of sub-section (2) of section 5-A of the Land Acquisition Act make the decision of the Government on the objections final while those of sub-section (1) of section 6 enable the Government to arrive at its satisfaction. Sub-section (3) of section 6 goes further and says that such a declaration shall be conclusive evidence that the land is needed for a public purpose or for a company.

The Government has to be satisfied about both the elements contained in the expression "needed for a public purpose or a company". That conclusiveness is not merely regarding the fact that the Government is satisfied but also with regard to the question that the land is needed for a public purpose or is needed for a company, as the case may be. Then again, the conclusiveness must necessarily attach not merely to the need but also to the question whether the purpose is a public purpose or will be said to be a company is a company.

Public purpose is bound to vary with the times and prevailing conditions in a given locality. Therefore, it would not be a practical proposition even to attempt a comprehensive definition. It is because of this that the Legislature has left it to the Government to say what is a public purpose and also to declare the need of a given land for a public purpose.

If the purpose for which the land is being acquired by the State is within the legislative competence of the State the declaration of the Government will be final subject, however, to one exception. The exception is that if there is a colourable exercise of power the declaration will be open to challenge at the instance of the aggrieved party. The power committed to the Government by the Act is a limited power in the sense that it can be exercised only where there is a public purpose, leaving aside for a moment the purpose of a company. If it appears that what the Government is satisfied about is not a public purpose but a private purpose or no purpose at all the action of the Government would be colourable as not being relatable to the power conferred upon it by the Act and its declaration will be a nullity. Subject to this exception the declaration of the Government will be final.

On the basis of the correctness of the view in *Senja Naicken's Case*<sup>1</sup>, the State Governments have been acquiring private properties all over the country by contributing only token amounts towards the cost of acquisition. Titles to many such properties would be unsettled if it was held that "partly at public expense" means substantially at public expense. Therefore, on the principle of *stare decisis* the view taken in *Senja Naicken's Case*<sup>1</sup>, should not be disturbed. A token contribution by the State towards the cost of acquisition will not be sufficient compliance with the law in each and every case. Whether such contribution meets the requirements of the law would depend upon the facts of every case. Indeed the fact that the State's contribution is nominal may well indicate, in particular circumstances, that the action of the State was a colourable exercise of power. 'Part' does not necessarily mean a substantial part and it will be open to the Court in every case which comes up before it to examine whether the contribution made by the State satisfied the requirement of the law.

It is always open to the State to fix priorities amongst public utilities of different kinds, bearing in mind the needs of the State, the existing facilities and other relevant factors.

It is for the State Government to say which particular industry may be regarded as beneficial to the public and to decide that its establishment would serve a public purpose. No question of discrimination would, therefore, arise merely by reason of the fact that Government has declared that the establishment of a particular industry is a public purpose. The challenge to the notification based on Article 14 of the Constitution must, therefore fail.

A Notification under sub-section (1) of section 4 is a condition precedent to the making of notification under sub-section (1) of section 6. If the Government, therefore, takes a decision to make such a notification and, thereafter, takes two further decisions, that is, to dispense with compliance with the provisions of section 5-A and also to declare that the land comprised in the notification is in fact needed for a public purpose, there is no departure from any provision of the law even though the two notifications are published on the same day.

The binding effect of a decision does not depend upon whether a particular argument was considered therein or not provided that the point with reference to which an argument was subsequently advanced was actually decided.

*Per Subba Rao, J. (Contra).*—This literal interpretation of the word "part" *de hors* the setting in which that word appears in the section, makes the condition imposed on the exercise of the jurisdiction by the Government meaningless and also attributes to the Legislature an intention to impose a purposeless and ineffective formality. Unless the Government agrees to contribute a substantial part of the compensation, depending upon the circumstances of each case, the condition imposed by the Proviso on the exercise by the appropriate Government of its jurisdiction is not complied with. In the instant case it is impossible to say that a sum of Rs. 100 out of an estimated compensation which may go even beyond Rs. 4,00,000 is in any sense of the term a substantial part of the said compensation. The Government has clearly broken the condition and, therefore, it has no jurisdiction to issue the declaration under section 6 of the Act.

Petitions under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

G. S. Pathak, Senior Advocate (*Rameshwar Nath, S. N. Andley and P. L. Vohra, Advocates of M/s. Rajinder Narain & Co. with him*), for Petitioners (In Petition No. 246 of 1961).

*Rameshwar Nath, S. N. Andley and P. L. Vohra*, Advocates of *M/s. Rajinder Narain & Co.*, for Petitioners (In Petitions Nos. 247 and 248 of 1961).

*S. M. Sikri*, Advocate-General for the State of Punjab and *N. S. Bindra*, Senior Advocate (*P. D. Menon*, Advocate, with them), for Respondent No. 1 (In all the Petitions).

*S. P. Varma*, Advocate, for Respondent No. 6 (In all the Petitions).

*H. N. Sanyal*, Additional Solicitor-General of India (*R. H. Dhebar and P. D. Traon*, Advocates, with him), for Intervener (In all the Petitions).

The Court delivered the following Judgments—  
*Mudholkar, J.* (on behalf of the majority).—The petitioners who have acquired six acres of land by purchase for Rs. 4,50,000 in February, 1961, under five deeds and one lease deed claim to have done so for the purpose of establishing a paper mill in collaboration with Messrs. R. S. Madhoram & Sons who had been granted a licence for the establishment of a paper plant in Ghaziabad in Uttar Pradesh. The aforesaid land is situate in the village Meola Maharajpur, Tehsil Ballabgarh, District Gurgaon and abuts on the Mathura Road, and is only about 10 or 12 miles from New Delhi. Respondent No. 6, Air Conditioning Corporation (*P.*) Ltd., is a private limited concern and holds a licence from the Government of India for starting a factory for the manufacture of various ranges of refrigeration compressors and ancillary equipment. We may mention here that initially this project was allotted to the State of West Bengal but at the request of the State of Punjab its location was shifted to the State of Punjab.

The respondent No. 6 requested the State of Punjab for the allotment of an appropriate site for the location of the factory. The petitioners contend that the respondent No. 6 being interested in acquiring land in the village Meola Maharajpur approached the State of Punjab in or about the month of March, 1961, for the purpose of acquiring land for their factory under the Land Acquisition Act, 1894 (hereinafter referred to as the Act). One of the petitioners having learnt of this made an application on 23rd March, 1961, to the Deputy Commissioner, Gurgaon, requesting him that none of the lands purchased by the petitioners should be acquired for the benefit of the respondent No. 6. Owners of adjacent lands Mr. Om Prakash, Mr. Ram Raghbir, Mr. Atmaram Chaddha and Mr. Hari Kishen who are petitioners in W.P. Nos. 247 and 248 of 1961 which were heard along with this petition made similar requests. The petitioners allege that they were assured by the Deputy Commissioner that their lands would not be acquired for the benefit of respondent No. 6. Thereafter the respondent No. 6 purchased by private treaty a plot of land measuring approximately 70,000 sq. yards contiguous to the land owned by the petitioners on or about 21st April, 1961.

The petitioners' grievance is that notwithstanding the assurances given to them by the Deputy Commissioner, Gurgaon, the Governor of Punjab, by notification, dated 25th August, 1961, under section 4 of the Act declared that the lands of the petitioners in this petition as well as those of the petitioners in the other two writ petitions were likely to be needed by Government at public expense for a public purpose, namely, for setting up a factory for manufacturing various ranges of refrigeration compressors and ancillary equipment. It accordingly notified that the land in the locality described in the notification was required for the aforesaid purpose. Similarly it authorised the Sub-Divisional Officer and Land Acquisition Officer, Palwal, to enter upon and survey the land in the locality and to do all other acts required or permitted by section 4 of the Act. It further directed that action under section 17 of the Act shall be taken because there was urgency and also directed that the provisions of section 5-A shall not apply to the acquisition. On 19th August, the Governor of Punjab made a notification under section 6 of the Act to the effect that he was satisfied that the land specified in the notification was required by Government at public expense for public purpose, namely, for setting up a factory for the manufacture of refrigeration compressors and other ancillary



equipment and declared that the aforesaid land was required for the aforesaid purposes. This declaration was made "to all whom it may concern" and the Sub-Divisional Officer, Palwal, was directed to take all steps for the acquisition of this land. Finally the notification provided for the immediate taking of possession of the land under the provisions of section 17 (2) (c) of the Act. Both these notifications were published in the Punjab Government Gazette of 25th August, 1961.

The petitioners contend that these notifications and the land acquisition proceedings permitted to be taken under them violate their fundamental rights under Article 19 (1) (f) and (g) to possess the said land and carry on their occupation, trade or business and that, therefore, they must be quashed.

It is their contention that they have purchased this land *bona fide* for industrial purposes as land in the vicinity of this land is being acquired by industrialists for establishing various industries. The purpose is said to be the establishment of a paper manufacturing plant. According to them they have entered into an arrangement with Messrs. R. S. Madho Ram & Sons who hold industrial licence No. L/24 (1)/N-60/62. The proposed industry, according to them, would employ about 200 people. The industry they wish to start is a new one so far as they are concerned, whereas, according to them, the respondent No. 6 is already engaged in refrigeration industry and as far as they know, it has established a factory for manufacturing refrigeration equipment at Hyderabad in the State of Andhra Pradesh.

It may be mentioned that some time after the notification was published, that is, on 29th September, 1961, the Government of Punjab sanctioned the expense of Rs. 100 for the purpose of acquisition of this land. According to the petitioners this was an after-thought and besides, a token contribution of this kind is not sufficient to show that the acquisition is being made partly at public expense.

The petition was opposed not only by respondent No. 6 but also by the State of Punjab which is respondent No. 1 to the petition. The respondent No. 1 denied that the petitioners had purchased the land for a *bona fide* industrial purpose and would in fact use it for such purpose. It also denied that any assurance was given to the petitioners that their lands would not be acquired. It admitted that the respondent No. 6 had made an application in December, 1960, for acquiring land for setting up its factory and that, therefore, the Punjab Government agreed to do the needful. According to respondent No. 1 the acquisition proceedings have been undertaken for a public purpose and at public expense as stated in the notification and that the State Government would make part contribution towards the payment of compensation of the land out of public revenues. In the circumstances it is contended that the petitioners would not be entitled to any relief whatsoever. They would of course get compensation for the land as determined by the Land Acquisition Officer.

The action of the State Government is said to be legal and in accordance with the provisions of the law because what was done was permissible under sections 4 and 6 of the Act, that it was done *bona fide*, that part of the compensation would be paid out of the public revenues, that the declaration made by the Government is conclusive evidence under sub-section (23) of section 6, that the land is needed for a public purpose, that the notifications were made on different dates though they were published in the same issue of the Gazette and are perfectly valid, that the land is not being acquired for a company but for a public purpose, that, therefore, the provisions of Part VII of the Act are inapplicable and that the lands are lying vacant and their owners will be paid compensation. No question of depriving them of their fundamental rights under Article 19 (1) (f) and (g) or of violation of their right under Article 14 therefore arises.

According to respondent No. 1 it would be open to the petitioners to make their claim for compensation to the Land Acquisition Officer for such loss as the acquisition would entail on them. It also stated that as the land purchased by the respondent No. 6 through private negotiation has no access to the main road and as the land is inadequate to meet the minimum essential requirements the acquisition of the lands in question became necessary.

On behalf of the respondent No. 6 it is stated that the need for a factory like the one in its contemplation is acutely felt in India inasmuch as manufacture of compressors and the components of big and small air-conditioners, refrigerators, water coolers and cold storage cabinets is not being carried out anywhere in the country so far. The import of these goods naturally drains away a considerable amount of foreign exchange. It was, therefore, felt that by starting manufacture of these articles in our country not only will foreign exchange be saved, but some foreign exchange will eventually be earned by the export of manufactured goods. They further contend that the purpose for which the factory is being set up must be regarded as a public purpose because *inter alia* it is intended by manufacturing the aforesaid goods, to cater to the needs of the public at large. It is in view of these circumstances that the Government of India, accepting the recommendation made in this regard by the licensing committee under the Industries Development and Regulation Act, 1951, issued a licence in its favour on 8th April, 1951. It then pointed out that it has secured the collaboration in this project of a well-known American Company named Borg-Warner International Corporation of Chicago, which is the biggest manufacturers of air-conditioning plants and equipment in the world, and that the collaboration agreement has been approved by the Government of India in the Ministry of Commerce. Its grievance is that this agreement has not been implemented so far because it has not been able to get the land for constructing the building in which the necessary machinery and 'implements' could be installed. Finally it says that originally the licence was issued for setting up a factory in the State of West Bengal and that it was at the instance of the Government of Punjab that the Central Government permitted the location of the factory to be shifted from West Bengal to Punjab. According to it once the factory gets going it is likely to employ at least 1,000 workers.

It is not necessary to refer to the other affidavits and the rejoinder affidavits except to some portions of the additional affidavit filed by Mr. M. R. Bhagat, Under Secretary on behalf of the respondent No. 1. We are referring only to those portions which were relied on during the arguments before us. In that affidavit it is denied that any licence had been granted to Messrs. R. S. Madho Ram & Sons for the establishment of a paper plant in the Punjab. According to respondent No. 1 Messrs. R. S. Madho Ram & Sons were granted a licence on 17th August, 1960, for the establishment of an industrial undertaking in Ghaziabad (U.P.) for the manufacture of writing and printing paper and pulp. It further stated that even this licence has been cancelled by the Government of India by their letter, dated 31st January, 1962, since the said licensee did not take any effective steps to establish the same. It then stated that the Air Conditioning Corporation which was incorporated as a private limited company has since, with the permission of the Central Government, been converted into a public limited company with the name and style of "York India, Ltd.", and that the company has been granted a licence to manufacture refrigeration equipment by the Industrial Licensing Committee. There is an agreement between York India, Ltd., and Messrs. York Corporation, U.S.A. a subsidiary of Borg-Warner of the U.S.A. whereunder the latter have undertaken to give all technical assistance and technical training to the Indian personnel as also to contribute 50 per cent. of the initial investment in the undertaking. The respondent No. 6 expects to manufacture 70 per cent. of the equipment in the very first year and cent. per cent. by the end of 1966. It further stated that the foreign collaborators also have agreed to sell the products of the firm outside India at prices and on terms and conditions most favourable to the Indian firm, thereby enabling it to obtain access to the foreign market. The foreign collaborator would make available to the Indian personnel the technical 'know-how' and other information necessary for the manufacture of refrigeration materials and that such assistance will itself be very valuable. It denied that the respondent No. 6 has established a factory similar to the one now intended to be established in Hyderabad as alleged by the petitioners. It is admitted that licences have been granted to two other concerns in India for the manufacture of similar equipment. Neither of those licensees has actually started production, at any rate,

so far, and, therefore, it is not correct to say that similar equipment is already being manufactured in India. Then it stated

"the products that are to be manufactured by the respondent till now were being imported into India from foreign countries and goods worth about Rs. 3,83,70,000 in 1960 and for the first ten months in 1961 Rs. 3,55,50,000 were imported by the various licensees holding import licences."

It also stated that the respondent No. 6 was granted licence to establish a factory in West Bengal but since no one had been granted a licence to establish a factory of this kind in the Punjab its licence was transferred to Punjab. The proposed factory would employ a large number of persons and thus help to solve to some extent the existing problem of unemployment in Punjab. Finally it stated that the establishment of the factory as such is in furtherance of the industrial development of the Punjab State and is, therefore, for a public purpose.

On behalf of the petitioners Mr. Pathak has raised the following five contentions :

(1) The acquisition is not for a public purpose either within section 4 or section 6 of the Land Acquisition Act or for a purpose useful to the public as contemplated in section 41 and that the action of the Government amounted to acquiring property from one person and giving it to another.

(2) The alleged contribution of Rs. 100 made by the Government is a colourable exercise of power, that no such intention was mentioned prior to the notification and that the amount of Rs. 100 is so unsubstantial a sum compared to the value of the property that it cannot raise an inference of Government participation in the proposed activity.

(3) That the property is in fact being acquired for a company and, therefore, the provisions of Part VII of the Act should have been complied with. Non-compliance with those provisions vitiates the acquisition.

(4) The petitioners' proposed paper mill would be as good an industrial concern as the one intended to be established by respondent No. 6 and the Government, in preferring the latter to the former, has violated the guarantee of equal protection of law provided by Article 14 of the Constitution.

(5) That the notifications under sections 4 and 6 could not have been made simultaneously and are, therefore, without efficacy.

We may deal with the third point raised by Mr. Pathak first, that is, regarding non-compliance of provisions of Part VII. It is common ground that those provisions were not complied with. The reason for that is, that according to the respondents the acquisition is not for a company but for a public purpose, partly at public expense. Indeed, the respondents at no stage have relied on the provisions of Part VII of the Act and, therefore, the main question to be considered is whether the acquisition is for a public purpose partly at public expense or not. If it is not so, then, of course, the petitions must succeed. Therefore, it is the first two contentions raised by Mr. Pathak which primarily need our consideration.

According to learned counsel for the petitioners the statements made in the affidavits on behalf of the State as well as on behalf of the respondent No. 6 make it perfectly clear that the land is being acquired for the respondent No. 6. Reliance is placed particularly upon that portion of the affidavit of the State where it is stated that the land is acquired for enabling the respondent No. 6 to have access to the main road and for meeting their minimum requirements for establishing their factory. It is further stated that the compensation for all the land which is being acquired is to come out of the pockets not of the State Government but the respondent No. 6 itself. No doubt, the Government has said that it has sanctioned the payment of Rs. 100 towards the payment of compensation but that is only an insignificant fraction of the total amount of compensation that would be payable in respect of these lands, the petitioners themselves having paid Rs. 4,50,000 to the persons from whom they acquired these lands.

On behalf of the respondents the learned Advocate-General for Punjab contended that the declaration of the Government in the notification that the land is

required for a public purpose is made conclusive by sub-section (3) of section 6 of the Act and, therefore, it is not open to this Court to go behind it and try to satisfy itself whether in fact the acquisition is for a public purpose or not. Alternatively he contended that the land is being acquired for a public purpose because the object of the acquisition is to establish a new industry and do away with imports of refrigeration equipment and to enable technical education to be imparted to Indian personnel in a new field. He further said that the acquisition will not only save foreign exchange by lessening imports but will enable foreign exchange to be earned from the export of goods manufactured in the proposed factory. The new industry is said to be of great economic importance inasmuch as it will enable the preservation of food which will otherwise be destroyed. Refrigeration equipment also contributes towards the maintenance of health because it enables storage of medicines such as anti-biotics which are liable to be decomposed at normal temperatures prevailing in our country. The industry proposed to be started will open a new avenue of employment and diminish unemployment and generally advance the industrial development of the country. Finally he said that a part of the land is required for building houses and quarters for the workers of the factory and to give amenities to them. All these purposes are, therefore, said to be public purposes. Reliance was placed by him on Volume 19 of Encyclopaedia Britannica, pages 49 to 57 for showing the manifold applications of refrigeration in various industries and activities. Reference was also made to Volume 18 of Encyclopaedia Britannica, page 745, wherein facilities for providing refrigeration have been grouped under the heading 'public utility'. Reference was also made to the next page where it is stated "Every public utility must be in possession of natural resources upon which that industry is based. Their sites must have strategic locations. Limitation in the choice of this agent of production tends to make the cost of acquiring or leasing these facilities greater than it would be if the industry had a wider range of choice. Furthermore, utilities must make allowances in advance for probable increase in the required capacity. For these reasons utilities are provided with the governmental power of *eminent domain* which makes possible the compulsory sale of private property." Relying upon the affidavit of Mr. Bhagat, to which we have referred earlier, the learned Advocate-General of Punjab said that the object of the Government in acquiring these lands is to enable a new industry to be established not only for saving foreign exchange and earning foreign exchange but also for securing the industrial advancement of the country, enabling the citizens to obtain technical education in a new field, relieving to some extent the pressure of unemployment and so on. For all these reasons he contends that the acquisition must be deemed to be for a public purpose even though the bulk of the compensation for the acquisition will come from the pockets of respondent No. 6.

In our opinion the question whether any of the aforesaid purposes falls within the expression public purpose would arise for consideration only if the declaration of the Government is not conclusive or if the action of the Government is colourable. If, as contended by the learned Advocate-General, sub-section (3) of section 6 concludes the matter—and the validity of this provision is not challenged—and the action of the Government is not colourable the other question would not arise for consideration.

It is strenuously contended on behalf of the petitioners that sub-section (3) of section 6 does not debar this Court from considering whether a proposed acquisition is for a public purpose or not. It is said, in the first place, that this provision only makes the declaration "conclusive evidence" and not "conclusive proof" and then contended that the declaration is conclusive evidence only of a need and nothing more.

A distinction is sought to be made between "conclusive proof" and "conclusive evidence" and it is contended that where a law declares that a fact shall be conclusive proof of another, the Court is precluded from considering other evidence once such fact is established. Therefore, where the law makes a fact conclusive proof of another the fact stands proved and the Court must proceed on that basis. But, the argument

proceeds, where the law does not go that far and makes a fact only "conclusive evidence" as to the existence of another fact, other evidence as to the existence of the other fact is not shut out. In support of the argument reliance is placed on section 4 of the Evidence Act which in its third paragraph defines 'conclusive proof' as follows :

"When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."

This paragraph thus provides that further evidence is barred where, under the Evidence Act, one fact is regarded as proof of another. But it says nothing about what other laws may provide. There are a number of laws which make certain facts conclusive evidence of other facts : (see Companies Act, 1956, section 132 ; the Indian Succession Act, 1925, section 381 ; Christian Marriages Act, 1872, section 61 ; Madras Revenue Act, 1869, section 38 ; Oaths Act, 1873, section 11). The question is whether such provision also bars other evidence after that which is conclusive evidence is produced.

The object of adducing evidence is to prove a fact. The Evidence Act deals with the question as to what kind of evidence is permissible to be adduced for that purpose and states in section 3 when a fact is said to be proved. That section reads thus :

" 'Evidence' means and includes—

- (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry ; such statements are called oral evidence ;
- (2) all documents produced for the inspection of the Court ; such documents are called documentary evidence.

A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

Since evidence means and includes all statements which the Court permits or requires to be made, when the law says that a particular kind of evidence would be conclusive as to the existence of a particular fact it implies that the fact can be proved either by that evidence or by some other evidence which the Court permits or requires to be advanced. Where such other evidence is adduced it would be open to the Court to consider whether, upon that evidence, the fact exists or not. Where, on the other hand, evidence which is made conclusive is adduced, the Court has no option but to hold that the fact exists. If that were not so, it would be meaningless to call a particular piece of evidence as conclusive evidence. Once the law says that certain evidence is conclusive it shuts out any other evidence which would detract from the conclusiveness of that evidence. In substance, therefore, there is no difference between conclusive evidence and conclusive proof. Statutes may use the expression 'conclusive proof' where the object is to make a fact non-justiciable. But the Legislature may use some other expression such as 'conclusive evidence' for achieving the same result. There is thus no difference between the effect of the expression 'conclusive evidence' from that of 'conclusive proof', the aim of both being to give finality to the establishment of the existence of a fact from the proof of another.

Learned counsel contends that it is open to the Court to examine whether the action of the Executive, even in the absence of an allegation that it is *mala fide*, is related to the section or not and for this purpose to consider whether the acquisition is for a public purpose. In support of this contention he has relied upon the decision in *State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga and others*<sup>1</sup>. There, Mahajan, J. (as he then was) has expressed the view that the exercise of power to acquire compulsorily is conditional on the existence of public purpose and that being so this condition is not an express provision of Article 31 (2) but exists *altunde* in the content of the power itself. That, however, was not the view of the other learned Judges who constituted the Bench. Thus according to Mukherjea, J. (as he then was) the condition of the existence of a public purpose is implied in Article 31 (2).

(See pages 957, 958). Das, J. (as he then was) was also of the same view. (See pages 986-988). Similarly Patanjali Sastri, C.J., has also taken the view that the existence of public purpose is an express condition of clause (2) of Article 31.

The Constitution permits acquisition by the State of private property only if it is required for a public purpose. But can it, therefore, be said that the provisions of a statute must be so construed that the declaration by the Government as to the existence of public purpose is necessarily justiciable? We are not concerned here with a post-Constitution law but with a pre-Constitution law. The Act has been in operation since 1894. The validity of the law was challenged before this Court in *Babu Barkya Thakur v. The State of Bombay and others*<sup>1</sup>, on the ground that it infringes the provisions of Articles 31 (2) and 19 (1) (f) of the Constitution. But this Court held that the law being a pre-Constitution law is protected from the operation of Article 31 (2) by the provisions of Article 31 (5) (a). It also held, following the decision in the *State of Bombay v. Bhanji Munji and another*<sup>2</sup> and that in *Lilavati Bai v. The State of Bombay*<sup>3</sup>, that the attack under Article 19 (1) (f) of the Constitution is futile.

The argument, however, is that the protection which the Act enjoys is only to this extent that even though any of its provisions be in conflict with Article 31 (2) the Act cannot be challenged on that ground; the protection does not however extend to other provisions of Part III of the Constitution, such as Article 19 (1) (f). As we understand the decision in *Bhanji Munji's case*<sup>2</sup> what this Court has held is that for a right under Article 19 (1) (f) to hold property to be available to a person, he must have the property with respect to which he can assert such right. If the right to the possession of the property is taken away by a law protected by Article 31 (5) (a), Article 19 (1) (f) is not attracted. That is the decision of this Court and it has been followed in two other cases. All the decisions are binding upon us. It is contended that none of the decisions has considered the argument advanced before us that a law may be protected from an attack under Article 31 (2) but it will still be invalid under Article 13 (2) if the restriction placed by it on the right of a person to hold property is unreasonable. In other words, for the law before us to be regarded as valid it must also satisfy the requirements of Article 19 (5) and that only thereafter can the property of a person be taken away. It is sufficient to say that though this Court may not have pronounced on this aspect of the matter we are bound by the actual decisions which categorically negative an attack based on the right guaranteed by Article 19 (1) (f). The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided. That point has been specifically decided in the three decisions referred to above.

We, therefore, hold that since the Act provides that the declaration made by the State that a particular land is needed for a public purpose shall be conclusive evidence of the fact that it is so needed the Constitution is not thereby infringed.

For ascertaining the extent to which the determination by the State is conclusive it would be desirable to examine the relevant provisions of the Act. The Preamble states that the law is for the acquisition of land needed for public purposes and for companies and incidental matters connected therewith. Section 2 (f) defines public purpose as follows :

"the expression 'public purpose' includes the provision of village-sites in districts in which the appropriate Government shall have declared by notification in the Official Gazette that it is customary for the Government to make such provision."

This is an inclusive definition and not a compendious one and, therefore, does not assist us very much in ascertaining the ambit of the expression 'public purpose'. Broadly speaking the expression 'public purpose' would, however, include a purpose in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned. Then there is section 4 which

1. (1961) 2 S.C.J. 392 : (1961) 1 S.C.R. 128.      3. 1957 S.C.J. 557 : (1957) S.C.R. 721.  
2. (1955) S.C.J. 10 : (1955) 1 S.C.R. 777.

enables the State to publish a preliminary notification whenever it appears to it that land in any locality is needed or is likely to be needed for a public purpose. The other aspects of the section have no bearing upon the point before us and we need not refer to them. Then there is section 5-A which gives to the person interested in the land which has been notified as being needed or likely to be needed for a public purpose or for a company, the right to object to the acquisition of the land. Such objection has to be heard by the Collector and after making such further enquiry as he thinks necessary the record has to be submitted to the appropriate Government along with the report containing the Collector's recommendations and the objections. Sub-section (2) of section 5-A makes the decision of the Government on the objections final. This is followed by section 6, sub-section (1) of which provides that when the Government is satisfied that any particular land is needed for a public purpose, or for a company, a declaration should be made to that effect and such declaration should be published in the Official Gazette. Sub-section (2) specifies the matters including the purpose for which the land is needed which are to be set out in the declaration. Sub-section (3) makes the declaration conclusive evidence of the fact that the land is needed for a public purpose or for a company, as the case may be. Section 17 of the Act confers special powers on the Government which are exercisable in cases of emergency. Sub-section (4) thereof provides that in those cases which fall under sub-section (1) or sub-section (2) the appropriate Government may direct that the provisions of section 5-A of the Act shall not apply and also empowers the Government to make a declaration under section 6 in respect of the land to be acquired at any time after the publication of the notification under sub-section (1) of section 4. These are the provisions which have a bearing on the point under consideration.

It is clear from these provisions that the object of the law is to empower Government to acquire land only for a public purpose or for a company, and, where it is for a company the acquisition is subject to the provisions of Part VII. As has been pointed out by this Court in *R.L. Arora v. The State of Uttar Pradesh & Others*<sup>1</sup>, the acquisition for a company contemplated by Part VII is confined only to cases where the Government is satisfied that the purpose of obtaining the land is erection of dwelling houses for workmen employed by the company or for the provision of amenities directly connected therewith or for the construction of some work which is likely to prove directly useful to the public.

After a notification under sub-section (1) of section 4 is published a person interested in the land is entitled to object to the acquisition. That objection may be raised on any ground as for instance that the land is not in fact needed at all for any purpose or that it is not suitable for the purpose for which it is sought to be acquired or that the purpose is not a public purpose or what is said to be a company is not a company and so on. Finality is attached to the decision of the Government which ultimately has to decide such objections. Then follows section 6 which enables the Government to make a declaration provided that it is satisfied that a particular land is needed for a public purpose or for a company. No doubt, it is open to the State Government in an emergency, by exercising its powers under sub-section (4) of section 17, to say that the provisions of section 5-A would not apply. But for construing the provisions of section 6 it would be relevant to bear in mind that section. The scheme of the Act is that normally the provisions of section 5-A have to be complied with. Where, in pursuance of the provisions, objections are lodged, these objections will have to be decided by the Government. For deciding them the Government will have before it the Collector's proceedings. It would, therefore, be clear that the declaration that a particular land is needed for a public purpose or for a company is not to be made by the Government arbitrarily, but on the basis of material placed before it by the Collector. The provisions of sub-section (2) of section 5-A make the decision of the Government on the objections final while those of sub-section (1) of section 6 enable the Government to arrive at its satisfac-

1. Since reported in (1963) 1 S.C.J. 33.

tion. Sub-section (3) of section 6 goes further and says that such a declaration shall be conclusive evidence that the land is needed for a public purpose or for a company.

It is, however, argued by learned counsel that the conclusiveness or finality attached to the declaration of Government is only as regards the fact that the land is "needed" but not as regards the question that the purpose for which the land is needed is in fact a public purpose or what is said to be a company is really a company. Sub-section (1) does not effect a dichotomy between "need" and "public purpose or a company". There is no justification for making such a dichotomy. By making it, not only will the language of the section be strained but the purpose of the law will be stultified. The expression must be regarded as one whole and the declaration held to be with respect to both the elements of the expression.

The Government has to be satisfied about both the elements contained in the expression "needed for a public purpose or a company". Where it is so satisfied, it is entitled to make a declaration. Once such a declaration is made sub-section (3) invests it with conclusiveness. That conclusiveness is not merely regarding the fact that the Government is satisfied but also with regard to the question that the land is needed for a public purpose or is needed for a company, as the case may be. Then again, the conclusiveness must necessarily attach not merely to the need but also to the question whether the purpose is a public purpose or what is said to be a company is a company. There can be no "need" in the abstract. It must be a need for a 'public purpose' or for a company. As we have already stated the law permits acquisition only when there is a public purpose or when the land is needed for a company for the purposes set out in section 40 of the Act. Therefore, it would be unreasonable to say that the conclusiveness would attach only to a need and not to the fact that that need is for a public purpose or for a company. No land can be acquired under the Act unless the need is for one or the other purpose and, therefore, it will be futile to give conclusiveness merely to the question of need dissociated from the question of public purpose or the purpose of a company. Upon the plain language of the relevant provisions it is not possible to accept the contention put forward by learned counsel.

Learned counsel put the matter in a slightly different way and said that section 6 (3) pre-supposes that the jurisdictional fact exists, namely, that there is a public purpose or the purpose of a company behind the acquisition and, therefore, the question whether it exists or not is justiciable. The Act has empowered the Government to determine the question of the need of land for a public purpose or for a company and the jurisdiction conferred upon it to do so is not made conditional upon the existence of a collateral or extraneous fact. It is the existence of the need for a public purpose which gives jurisdiction to the Government to make a declaration under section 6 (1) and makes it the sole judge whether there is in fact a need and whether the purpose for which there is that need is a public purpose. The provisions of sub-section (3) preclude a Court from ascertaining whether either of these ingredients of the declaration exists.

It is, however, said that that does not mean that in so far as the meaning to be given to the expression public purpose is concerned the Courts have no power whatsoever. In this connection the decision of the Privy Council in *Hamabai Framjee Peti v. Secretary of State for India*<sup>1</sup>, was referred to. In that case certain land in Malabar Hill in Bombay was being acquired by the Government of Bombay for constructing residences for Government Officers and the acquisition was objected to by the lessee of the land on the ground that the land was not being taken or made available to the public at large and, therefore, the acquisition was not for a public purpose. When the matter went up before the High Court Batchelor, J., observed :

"General definitions are, I think, rather to be avoided where the avoidance is possible, and I make no attempt to define precisely the extent of the phrase 'public purpose' in the lease ; it is



enough to say that, in my opinion, the phrase, whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned."

In that case what was being considered was a re-entry clause in a lease deed and not provisions of the Land Acquisition Act. That clause left it absolutely to the lessor, the East India Company to say whether the possession should be resumed by it if the land was required for a public purpose. It was in this context that the question whether the land was needed for a public purpose was considered. The argument before the Privy Council rested upon the view that there cannot be a 'public purpose' in taking land if that land, when taken, is not in some way or other made available to the public at large. Rejecting it they held that the true view is that expressed by Batchelor, J., and observed :

"That being so, all that remains is to determine whether the purpose here is a purpose in which the general interest of the community is concerned. *Prima facie* the Government are good judges of that. They are not absolute Judges. They cannot say '*sic volo sic jubeo*', but at least a Court would not easily hold them to be wrong. But here, so far from holding them to be wrong, the whole of the learned Judges, who are thoroughly conversant with the conditions of Indian life, say that they are satisfied that the scheme is one which will redound to public benefit by helping the Government to maintain the efficiency of its servants. From such a conclusion their Lordships would be slow to differ, and upon its own statement it commends itself to their judgment".

Mr. Pathak strongly relied on these observations and said that the Privy Council have held that the matter is justiciable. It is enough to say that that was not a case under the Land Acquisition Act and, therefore, conclusiveness did not attach itself to the satisfaction of the Government that a particular purpose fell within the concept of public purpose.

Mr. Pathak then contended that the question as to the meaning to be given to the phrase 'public purpose' is not given conclusiveness by sub-section (3) of section 6. According to him, all that sub-section (3) of section 6 says is that the Government's declaration that particular land is needed for a public purpose or a company shall be conclusive and that it does not say that the Government is empowered to define what is a public purpose and then say that the particular purpose falls within that definition. As already stated no attempt has been made in the Act to define public purpose in a compendious way. Public purpose is bound to vary with the times and the prevailing conditions in a given locality and, therefore, it would not be a practical proposition even to attempt a comprehensive definition of it. It is because of this that the Legislature has left it to the Government to say what is a public purpose and also to declare the need of a given land for a public purpose.

It was contended on the basis of the decision of this Court in *R.L. Arora v. The State of U.P. & Others*<sup>1</sup>, that the Courts have power to consider whether the purpose for which land is being acquired is a public purpose. In that case land was being acquired, as already stated, for a company and the real question which arose for consideration was, what is the meaning to be attached to the words "useful to the public" occurring in clause (b) of sub-section (1) of section 40 of the Act. The land was required by the company to enable it to establish its works and it was contended before this Court that the products manufactured by the company will be useful to the public in general and, therefore, the acquisition would be covered by clause (b) of sub-section (1) of section 40. Negating this contention Wanchoo J., who spoke for the Court observed :

"It is true that it is for the Government to be satisfied that the work to be constructed will be useful to the public, ..... but this does not mean that it is the Government which has the right to interpret the words used in section 40 (1) (b)..... It is the Court which has to interpret what those words mean. After the Court has interpreted these words, it is the Government which has to carry out the object of sections 40 and 41 to its satisfaction. The Government cannot say that sections 40 and 41 mean this and further say that they are satisfied that the meaning they have given to the relevant words in these sections has been carried out in the terms of the agreement

1. Since reported in (1962) 1 S.C.J. 33.

provided by them.....The Government cannot both give meaning to the words and also say that they are satisfied on the meaning given by them. The meaning has to be given by the Court and it is only thereafter that the Government's satisfaction may not be open to challenge..... We have already indicated what these words mean and if it plainly appears that the Government are satisfied as a result of giving some other meaning to the words, the satisfaction of the Government is of no use, for then they are not satisfied about what they should be satisfied. In the present case the Government seems to have taken a wrong view that so long as the product of the works is useful to the public and so long as the public is entitled to go upon the words in the way of business, that is all that is required by the relevant works in sections 40 and 41".

It was no doubt argued before the Court that the declaration made by the Government under section 6 (1) that the land was needed for a company is conclusive and, therefore, the question as to the actual purpose of the acquisition is not justiciable. This Court pointed out that section 6 (3) makes the declaration under section 6 (1) conclusive evidence of the fact that the land is needed for a public purpose or for a company and that as the declaration stated that the land was needed for a company and that fact was not disputed by the parties, the provisions of section 6 (3) were of no assistance. We may point out that even according to that decision conclusiveness attaches itself to the declaration that the land is required for a public purpose and, therefore, instead of assisting the petitioners it in fact assists the respondents. No doubt, in so far as an acquisition for a company is concerned Part VII requires that before a declaration under section 6 (1) is made the Government should be satisfied that the land is required for one of the two purposes set out in section 40 (1) of the Act. The Government can consent to the making of a declaration under section 6 (1) after it is satisfied under section 41 about the fact that the land is required for a company for the purposes set out in clauses (a) and (b) of that section. But the declaration made thereafter is confined only to one matter and that is that the land is required for a company and nothing more. The question whether in fact the land is required by the company for the purposes set out in clauses (a) and (b) of section 40 (1) is not germane to the declaration. No doubt the power of the Government to make a declaration with respect to an acquisition for a company is circumscribed and, therefore, the Government is expected to exercise it with due regard to the limitation placed upon it. But it does not follow that sub-section (3) of section 6 makes the declaration conclusive evidence not only of the fact that the land is required for a company but also of the fact that the land is required by a company for a purpose specified in section 40 (1) of the Act. The observations made by Wanchoo, J., therefore, do not assist the petitioners.

Reliance was then placed on two decisions of this Court in which the meaning of the expression "public purpose" is considered. One is *Babu Barkya Thakur v. The State of Bombay & others*<sup>1</sup>. There this Court observed :

"It will thus be noticed that the expression 'public purpose' has been used in its generic sense of including any purpose in which even a fraction of the community may be interested or by which it may be benefited."

Later in the same judgment this Court pointed out that where a large section of the community is concerned its welfare is a matter of public concern. The other is *Pandit Jhandu Lal & others v. The State of Punjab & others*<sup>2</sup>. There this Court has pointed out that the purpose of public utility referred to in sections 40 and 41 are akin to the public purpose.

No doubt in these decisions this Court stated what, broadly speaking, the expression 'public purpose' means. But in neither case the question arose for consideration as to whether the meaning to be given to the expression 'public purpose, is justiciable.

Now whether in a particular case the purpose for which land is needed is a public purpose or not is for the State Government to be satisfied about. If the

1. (1961) 1 S.C.R. 128.

2. (1961) 1 S.C.J. 529 : (1961) 2 S.C.R. 459.

purpose for which the land is being acquired by the State is within the legislative competence of the State the declaration of the Government will be final subject, however, to one exception. That exception is that if there is a colourable exercise of power the declaration will be open to challenge at the instance of the aggrieved party. The power committed to the Government by the Act is a limited power in the sense that it can be exercised only where there is a public purpose, leaving aside for a moment the purpose of a company. If it appears that what the Government is satisfied about is not a public purpose but a private purpose or no purpose at all the action of the Government would be colourable as not being relatable to the power conferred upon it by the Act and its declaration will be a nullity. Subject to this exception the declaration of the Government will be final.

A number of decisions were cited before us by the learned Advocate-General in support of the contention that the declaration of the Government is final. One of those decisions is *Wijeyesekera v. Festing*<sup>1</sup>. In that case dealing with Ceylon Ordinance No. 3 of 1876 (Acquisition of Land Ordinance, (Ceylon), 1876) which incidentally did not contain a provision similar to that of sub-section (3) of section 6, their Lordships observed :

"The whole frame of the Ordinance shows that what the District Court is concerned with is the assessment of compensation but their Lordships do not desire to rest their opinion that the decision of the Governor is final merely upon the question of the Court before which the question is raised. It appears to their Lordships that the decision of the Governor that the land is wanted for public purposes is final, and was intended to be final, and could not be questioned in any Court."

There, the land was required for a road and the contention was that the Government did not take the opinion of the Surveyor General as to its fitness for such purpose. On this ground it was contended that the Governor's declaration could be questioned. But this was negated by the Privy Council. Following this decision in *Vadlapatla Suryanarayana v. The Province of Madras*<sup>2</sup>, a Full Bench of the Madras High Court held that a declaration by the Provincial Government under section 6 (1) of the Act that certain lands were required for a public purpose is final and, where there is no charge against the Provincial Government that it had acted in fraud of its powers its action in directing the acquisition cannot be challenged in a Court of law. Similar view has been taken in *Samruddin Sheikh v. Sub-Divisional Officer*<sup>3</sup> *V. Gopalakrishna v. The Secretary, Board of Revenue, Madras*<sup>4</sup>; *S. Jagannadha Rao v. The State of Andhra Pradesh*<sup>5</sup>; *Secretary of State in Council v. Akbar Ali*<sup>6</sup>. Several other decisions to the same effect, some of them post-Constitution, were also mentioned by the learned Advocate-General, which take the same view as in these decisions. Not a single decision was, however, brought to our notice in which it has been held that the question as to what is a public purpose or whether it exists can be enquired into by the Courts even in the absence of colourable exercise of power, because section 6 (3) has become void under Article 13 (2) of the Constitution.

It was next contended that sub-section (3) of section 6 cannot stand in the way in a proceeding under Article 226 or under Article 32 of the Constitution and in support of this argument reliance was placed upon the decision in *Chudalmuthu Pillai v. State & Another*<sup>7</sup>; *Maharaja Luchmeswar Singh v. Chairman of the Darbhanga Municipality*<sup>8</sup>; *Rajendra Kumar Ruia v. Government of West Bengal*<sup>9</sup>; *Major S. Arjan Singh v. State of Punjab*<sup>10</sup>. In the first mentioned case it was contended that the order was actuated by *mala fides* and also that there were various irregularities in the proceedings. As we have already indicated, if the declaration is vitiated by fraud, then the declaration is itself bad and what is bad cannot be protected by sub-section (3) of section 6. In the next case the act of the Court of Wards in handing over

1. L.R. (1919) A.C. 646.

2. (1945) 2 M.L.J. 237 : I.L.R. (1946) Mad. 153 (F.B.).

3. A.I.R. 1954 Assam 81.

4. (1953) 2 M.L.J. 744 : A.I.R. 1954 Mad. 362.

5. A.I.R. 1960 A.P. 343.

6. I.L.R. 45 All. 443.

7. I.L.R. (1952) Trav. Cochin 488.

8. L.R. 17 I.A. 90.

9. A.I.R. 1952 Cal. 573.

10. I.L.R. (1958) Punj. 1451.

the ward's lands for a nominal consideration for a public purpose was challenged in a suit. The challenge was upheld by the Privy Council on the ground that lawful possession could only be taken by the State in strict compliance with the provisions of the Land Acquisition Act. The question raised here did not arise for consideration in that case. In the other two cases the declaration was challenged under Article 226 and in both the cases the challenge failed. In the first of the two latter mentioned cases it failed on the ground that there was no fraud and in the second on the ground that the provisions of sub-section (3) of section 6 precluded the Court from challenging the validity of the declaration. None of these cases, therefore, supports the contention of the petitioners.

Moreover we are not concerned here with the powers of the High Court under Article 226 but with those of this Court. It is said, however, that the bar created by section 6 (3) would not stand in the way of this Court while dealing with a petition under Article 32 and, therefore it is open to us to ascertain whether an acquisition is for a public purpose or not. While it is true that the powers of this Court cannot be taken away by any law which may hereafter be made unless the Constitution itself is amended we are here faced with a provision of law which is a pre-Constitution law and which is protected by the Constitution—to the extent indicated in Article 31 (5) (a) and an attack on its validity on the ground that it infringes the right guaranteed by Article 19 (1) (f) has failed. Therefore, it is a good and valid law and the restriction placed by it on the powers of this Court under Article 32 must operate.

Though we are of the opinion that the Courts are not entitled to go behind the declaration of the Government to the effect that a particular purpose for which the land is being acquired is a public purpose we must emphasise that the declaration of the Government must be relatable to a public purpose as distinct from a purely private purpose. If the purpose for which the acquisition is being made is not relatable to public purpose then a question may well arise whether in making the declaration there has been, on the part of the Government a fraud on the power conferred upon it by the Act. In other words the question would then arise whether that declaration was merely a colourable exercise of the power conferred by the Act, and, therefore, the declaration is open to challenge at the instance of the party aggrieved. To such a declaration the protection of section 6 (3) will not extend. For, the question whether a particular action was the result of a fraud or not is always justiciable, provisions such as section 6 (3) notwithstanding.

We were referred by the learned Advocate-General to a recent decision of the House of Lords in *Smith v. East Elloe Rural District Council*<sup>1</sup> to which reference was made by the learned Advocate-General. In that case their Lordships were considering the Acquisition of Land (Authorisation of Procedure) Act, 1946, (9 and 10 Geo. 6, c. 49), Sch. I, Pt. IV, paras. 15 & 16. Paragraph 15 (1) of Part IV, Sch. I to the Act provides as follows :

"If any person aggrieved by a compulsory purchase order desires to question the validity thereof .....on the ground that the authorisation of compulsory purchase thereby granted is not empowered to be granted under this Act.....he may, within six weeks from the date on which notice of the confirmation or making of the order.....is first published.....make an application to the High Court....."

Paragraph 16 provides as follows :

"Subject to the provisions of the last foregoing paragraph, a compulsory purchase order.....shall not.....be questioned in any legal proceedings whatsoever....."

The land having been made the subject of compulsory purchase the owner brought an action in which, among other things, a declaration was added that the order was made and confirmed wrongfully and in bad faith and that the clerk acted wrongfully and in bad faith in procuring its order and confirmation. The House of Lords held

by majority that the action could not proceed except against the clerk for damages because the plain prohibition in paragraph 16 precluded the Court challenging the validity of the order. They also held that paragraph 15 gave no opportunity to a person aggrieved to question the validity of a compulsory purchase order on the ground that it was made or confirmed in bad faith. As we have already said the condition for the exercise of the power by the State Government is the existence of a public purpose (or the purpose of a company) and if the Government makes a declaration under section 6 (1) in fraud of the powers conferred upon it by that section the satisfaction on which the declaration is made is not about a matter with respect to which it is required to be satisfied by the provision and, therefore, its declaration is open to challenge as being without any legal effect. We are not prepared to go as far as the House of Lords in the above case.

This brings us to the second argument advanced before us on behalf of the petitioners. The learned counsel contends that there could be no acquisition for a public purpose unless the Government had made a contribution for the acquisition at public expense. According to him the acquisition in question was merely for the benefit of a company and that the action of the Government was only a colourable exercise by it of its power to acquire land for a public purpose. The contention is that before making a declaration under sub-section (1) of section 6 the Government ought to have taken a decision that it will contribute towards the acquisition. In the case before us no such decision was taken by the Government till 29th September, 1961, that is, just one day after this writ petition was admitted by this Court and stay order issued by it. It is then said that the contribution of the Government towards the cost of acquisition being a very small fraction of the total probable cost of acquisition the inference must be that the acquisition was not even partly at public expense and, therefore, the declaration was a colourable exercise of the power conferred by law. Then it is said that not only does the declaration omit to state that the contribution of the State towards the cost of acquisition was to be Rs. 100 only but also omits to mention that what was decided was that the Government was to bear only a part of the cost of acquisition and not the whole of it. The notification is said to be thus misleading and to create the impression that the entire cost of the acquisition is to come out of the public exchequer. Finally it is contended that the establishment of an industry by a private party for manufacturing refrigeration equipment cannot fall within the meaning of the expression 'public purpose'.

It is no doubt true that the financial sanction for the contribution of Rs. 100 as part of the expenses for acquisition was accorded by the Finance Department on 29th September, 1961. No doubt also that a day prior to the according of sanction this petition had been admitted by this Court and a stay order issued. But from these two circumstances it would not be reasonable to draw the inference that the declaration made by the Government was a colourable exercise of its power. The provisions of sub-section (1) of section 6, however, do not require that the notification made thereunder must set out the fact that the Government had decided to pay a part of the expenses of acquisition or even to state the extent to which the Government is prepared to make a part contribution to the cost of acquisition.

It is then contended that before the Government could spend any money from the public exchequer for acquiring land a provision has to be made in the budget and the absence of such provision would be a circumstance relevant for consideration. It is sufficient to say that the absence of a provision in the budget in respect of the cost of acquisition, whole or part, cannot affect the validity of the declaration and that if Government does spend some money without allotment in the budget, its expenditure may perhaps entitle the Accountant-General to raise an audit objection or may enable the Public Accounts Committee of the State Legislature to criticise the Government. But that is all. Again, where the expenditure is of a small amount like Rs. 100 it may be possible for the Government to make payment from Contingencies and thus avoid objections of this kind. Whatever that may be, these are not circumstances which would suffice to show that the declaration was colourable. It

was stated at the Bar by the learned Advocate-General that the entire scheme of establishing a refrigeration factory in Punjab was examined at various stages and at different levels of Government as well as by different Ministries and it was then decided to make a part contribution towards the cost of acquisition from public funds. As required by the Financial Rules the consent of the Finance Department had to be obtained for this purpose. This particular stage occupied considerable time and that is why there was a delay in according sanction. The statement of the learned Advocate-General was not challenged on behalf of the petitioners. Moreover the declaration under sub-section (1) of section 6 is clear on the point that the land is being acquired at public expense, and the provisions of sub-section (3) of section 6 preclude a Court from going behind such a declaration unless it is shown that the Government has in fact decided not to contribute any funds out of the public revenues for that purpose. For, if the Government had in fact taken a decision of that kind then the exercise of the power to make an acquisition would be open to challenge as being colourable.

Then it is contended that the contribution by the State towards the cost of acquisition must be substantial and not merely nominal or token as in this case. The argument is that though the law permits acquisition for a public purpose to be made by the State by contributing only a part of the cost of acquisition that part cannot be a particle and in this connection reliance was placed on the decision in *Frederick B. Chatterton and Benjamin Webster v. Joseph Arnold Cave*<sup>1</sup> which was followed in *Ponnia v. Secretary of State*<sup>2</sup>. In that latter case the High Court of Madras observed that.

"the Legislature, when they provided that a part of the compensation should be paid from public revenues, did not mean that this condition would be satisfied by payment of a particle, *e. g.*, one anna in Rs. 5,985".

In that case land was being acquired for making a road between two villages in Ramnad District. A sum of Rs. 5,985 was required for the acquisition. Out of this amount only one anna was agreed to be contributed by the Government and it was contended on its behalf that this contribution satisfied the requirements of section 6 of the Act. It was also contended that the declaration made under sub-section (1) of section 6 could not be challenged in view of the provisions of sub-section (3) of section 6 and reliance was placed on the decision in *Wijeyesekara v. Festing*<sup>3</sup>. According to the High Court the fact that Government's share in the cost of acquisition being 1/90,000 part of the amount, there was no real and *bona fide* compliance with the terms of the section and that this was an indication of the illusory character of the object for which the provisions of the Act were being made use of. The High Court then referred to the decision in *Chatterton's case*<sup>1</sup> and pointed out that the House of Lords were averse to putting an interpretation on the words "or part thereof" occurring in the Dramatic Copyright Act, (3 and 4 William IV, c. 15) as would make a part to mean a particle. The High Court also referred to the decision in *Maharaja Luchmeswar Singh's case*<sup>4</sup> and held that acquisition was a colourable exercise of the power conferred by the Act.

This decision was not followed by the same High Court in *Senja Naicken v. Secretary of State*<sup>5</sup> where it was held that the State's contribution of one anna out of Rs. 926-8-6 for acquiring land for a road, Rs. 926-7-6 having been contributed by the ryots, was sufficient compliance with section 6 (1) of the Act. Both these decisions came up for consideration in *Vadlapalla Suryanarayana's case*<sup>6</sup> and there *Ponnai's case*<sup>2</sup> was over-ruled and the view taken in *Senja Naicken's case*<sup>5</sup> was approved.

*Chatterton's case*<sup>1</sup> was a case of infringement of copyright where two plays had been adapted from a common source by the parties to the litigation. In that case it was accepted before the Court that the Dramatic Copyright Act protected "parts" of dramatic work and prohibited their use by persons other than the proprietor of the copyright. It was pointed out that in the case of ordinary copyright of published works the protection was restricted only to the whole of the work and did not extend to portions of those works. The Dramatic Copyright Act also contained a provision

1. (1877-8) L.R. 3 A.C. 483 at 491, 492.

2. 51 M.L.J. 338 : A.I.R. 1926 Mad. 1099.

3. L.R. (1919) A.C. 646.

4. L.R. 17 I.A. 30.

5. 51 M.L.J. 849 : I.L.R. 50 Mad. 308.

6. (1945) 2 M.L.J. 237 : I.L.R. 1946 Mad. 153.

directing that infringement of the copyright would entitle the proprietor to damages of not less than 40 shillings. It was suggested that these differences indicated an intention to prevent the invasion of the dramatic copyright independently of the quantity or materiality of the portion of dialogue or dramatic incident proved to have been copied by another. Dealing with this argument Lord Hatherley observed :

"Now it appears to me, my Lords, that this argument goes much too far. As was said by the counsel for the respondent, the appellant would wish to read the word 'part' in the Dramatic Copyright Act as 'particle', so that the crowing of the cock in 'Hamlet', or the introduction of a line in the dialogue, might be held to be an invasion of the copyright entitling plaintiff to 40s. damages and consequently, as the law stood I believe at the time of the passing of the statute of 3 and 4 Will. 4, to the costs of his action." (Pages 491-492).

Then after pointing out that while in the case of an ordinary copyright of published works a fair use made by others would not amount to a wrong justifying an action at law, the position of dramatic performance is not the same, he observed :

"They are not intended to be repeated by others or to be used in such a way as a book may be used, but still the principle *de minimis non curat lex* applies to a supposed wrong in taking a part of dramatic works, as well as in reproducing a part of a book." (page 492).

Finally he observed that the parts which were so taken were neither substantial nor material parts and as it was impossible to say that damage had accrued to the plaintiff from such taking, his action must fail.

Lord O'Hagan observed :

"'Part', as was observed, is not necessarily the same as 'particle', and there may be a taking so minute in its extent and so trifling in its nature as not to incur the statutory liability."

It is clear, therefore, that the analogy of *Chatterton's case*<sup>1</sup> cannot possibly apply to a case under the Act. As was pointed out in *Senja Naicken's case*<sup>2</sup> :

"Admittedly both of the litigants had derived their compositions from a common source and it stands to reason that before you can compel a man to pay damages for stealing the product of your brain, time and labour, you must be able to point out that any resemblance between his production and yours is not, merely accidental but is a designed theft of the product of your brain. Otherwise ..... one might go to the absurdity of objecting to a man using the same words though in a different collocation as you have done."

With these observations we agree.

Now, as regards *Maharaja Luchmeswar Singh's case*<sup>3</sup>. The facts were these. The plaintiff's land was under the management of the Court of Wards during his minority. A notification under section 6 (1) of the Land Acquisition Act, 1870 was made with respect to certain land belonging to the plaintiff for being acquired by the Government at the expense of the Darbhanga Municipality for a public purpose, that is, construction of a public ghat or landing place in the town of Darbhanga. But instead of complying with the provisions of the Land Acquisition Act and enquiring into the value of the land, the Collector who was the Chairman of the Municipality and also a representative of the Court of Wards took possession of the land and handed it over to the Municipality. The compensation paid to the plaintiff was Re. 1, an amount agreed to by the Manager. The plaintiff, after attaining majority, instituted a suit for possession of land and for mesne profits. His suit was dismissed by the Courts below and he preferred an appeal before the Judicial Committee of the Privy Council. Allowing the appeal, their Lordships observed :

"The offer and acceptance of the rupee was a colourable attempt to obtain a title under the Land Acquisition Act without paying for the land....."

How this case could at all have any bearing upon the point which arose for consideration in *Ponmaia's case*<sup>4</sup> we fail to see. This case is also relied on before us on behalf of the petitioners and we have referred to it earlier in this Judgment. It has nothing whatsoever to do with the question of contribution by the State towards the cost of acquisition.

We would like to add that the view taken in *Senja Naicken's case*<sup>2</sup> has been followed by the various High Courts in India. On the basis of the correctness of that

1. (1877-8) L.R. 3 A.C. 483 at 491, 492.

2. 51 M.L.J. 849 : I.L.R. 50 Mad. 308.

3 L.R. 17 I.A. 90.

4. 51 M.L.J. 338 : A.I.R. 1926 Mad. 1099.

view the State Governments have been acquiring private properties all over the country by contributing only token amounts towards the cost of acquisition. Titles to many such properties would be unsettled if we were now to take the view that 'partly at public expense' means substantially at public expense. Therefore, on the principle of *stare decisis* the view taken in *Senja Naicken's case*<sup>1</sup> should not be disturbed. We would, however, guard ourselves against being understood to say that a token contribution by the State towards the cost of acquisition will be sufficient compliance with the law in each and every case. Whether such contribution meets the requirements of the law would depend upon the facts of every case. Indeed the fact that the State's contribution is nominal may well indicate, in particular circumstances, that the action of the State was a colourable exercise of power. In our opinion 'part' does not necessarily mean a substantial part and that it will be open to the Court in every case which comes up before it to examine whether the contribution made by the State satisfies the requirement of the law. In this case we are satisfied that it satisfies the requirement of law. What is next to be considered is whether the acquisition was only for a company because the compensation was to come almost entirely out of its coffers and, therefore, it was in reality for a private purpose as opposed to public purpose. In other words, the question is whether there was on the part of the Government a colourable exercise of power. Elaborating the point it is said that the establishment of a factory for manufacturing refrigeration equipment is nothing but an ordinary commercial venture and can by no stretch of imagination fall within the well-accepted meaning of the expression 'public purpose', that even if it were to fall within that expression the factory is to be established not by the Government, nor by Government participation but solely by the respondent No. 6, a public limited concern and that, therefore, the concern could acquire land for such a purpose only after complying with the provisions of Part VII and that the use of the provisions of section 6 (1) is merely a colourable device to enable the respondent No. 6 to do something, which, under the terms of section 6 (1), could not be done.

"Public Purpose" as explained by this Court in *Babu Barkaya Thakur's case*<sup>2</sup> means a purpose which is beneficial to the community. But whether a particular purpose is beneficial or is likely to be beneficial to the community or not is a matter primarily for the satisfaction of the State Government. In the notification under section 6 (1) it has been stated that the land is being acquired for a public purpose, namely, for setting up a factory for manufacturing various ranges of refrigeration compressors and ancillary equipment. It was vehemently argued before us that manufacture of refrigeration equipment cannot be regarded as beneficial to the community in the real sense of the word and that such equipment will at the most enable articles of luxury to be produced. But the State Government has taken the view that the manufacture of these articles is for the benefit of the community. No materials have been placed before us from which we could infer that the view of the Government is perverse or that its action based on it constitutes a fraud on its power to acquire land or is a colourable exercise by it of such power.

Further, the notification itself sets out the purpose for which the land is being acquired. That purpose, if we may recall, is to set up a factory for the manufacture of refrigeration compressors and ancillary equipment. The importance of this undertaking to a State such as the Punjab which has a surplus of fruit, dairy products etc., the general effect of the establishment of this factory on foreign exchange resources, spread of education, relieving the pressure on unemployment etc., have been set out in the affidavit of the respondent and their substance appears in the earlier part of this judgment. The affidavits have not been controverted and we have, therefore, no hesitation in acting upon them.

On the face of it, therefore, bringing into existence a factory of this kind would be a purpose beneficial to the public even though that is a private venture. As has already been pointed out, facilities for providing refrigeration are regarded in modern

1. 51 M.L.J. 849 : I.L.R. 50 Mad. 308.

2. (1961) 1 S.C.R. 128.



times as public utilities. All the greater reason, therefore, that a factory which manufactures essential equipment for establishing public utilities must be regarded as an undertaking carrying out a public purpose. It is well established in the United States of America that the power of eminent domain can be exercised for establishing public utilities. Such a power could, therefore, be exercised for establishing a factory for manufacturing equipment upon which a public utility depends. It is, therefore, clear that quite apart from the provisions of sub-section (3) of section 6 the notification of the State Government under section 6 cannot be successfully challenged on the ground that the object of the acquisition is not to carry out a public purpose. We cannot, therefore, accept the petitioner's contention that the action of the Government in making the notification under sub-section (1) of section 6 was a colourable exercise of the power conferred by the Act.

The next argument to be considered is whether there has been a discrimination against the petitioners. They claim that as they intend to establish a factory for manufacturing paper which is also an article useful to the community they are as good an industrial concern as the respondent No. 6 and the State Government in taking away land from them and giving it to respondent No. 6 is practising discrimination against them.

In the first place it is denied on behalf of the respondent that the petitioners are going to establish a paper factory. It is not disputed that no new factory can be established without obtaining a licence from the appropriate authority under the Industries Development and Regulation Act, 1951 and that the petitioners do not hold any licence of this kind. According to the petitioners, however, they had entered into an agreement with the firm of Messrs. R. S. Madhoram & Sons for establishing such a factory and that in collaboration with them they propose to establish a factory on the lands which are now being acquired. It is true that a licence for erecting a paper factory was granted to Messrs. R. S. Madhoram & Sons but the location of that factory is to be in Uttar Pradesh and not in the State of Punjab. Without, therefore, obtaining the approval of the appropriate authority the location of the factory could not be shifted to the land in question which, as already stated, is situate in the State of Punjab. Moreover this licence has since been cancelled on the ground that Messrs. R. S. Madhoram & Sons have taken no steps so far for establishing a paper factory. It is necessary to mention that the petitioners allege that this cancellation was procured by the respondents with the object of impeding the present petitioners. With that, however, we need not concern ourselves because that licence as it stood on the date of the petitions did not entitle Messrs. R. S. Madhoram & Sons to establish a factory in the State of Punjab.

Apart from that it is always open to the State to fix priorities amongst public utilities of different kinds, bearing in mind the needs of the State, the existing facilities and other relevant factors. In the State like the Punjab where there is a large surplus of fruit and dairy products there is need for preserving it. There are already in existence a number of cold storages in that State. The Government would, therefore, be acting reasonably in giving priority to a factory for manufacturing refrigeration equipment which would be available for replacement in these storages and which would also be available for equipping new cold storages.

Apart from this it is for the State Government to say which particular industry may be regarded as beneficial to the public and to decide that its establishment would serve a public purpose. No question of discrimination would, therefore, arise merely by reason of the fact that Government has declared that the establishment of a particular industry is a public purpose. The challenge to the notification based on Article 14 of the Constitution must, therefore, fail.

It is the last and final contention of the petitioners in these petitions that the notifications under sections 4 and 6 cannot be made simultaneously and that since both the notifications were published in the Gazette of the same date, that is, 25th

August, 1961, the provisions of law have not been complied with. The argument is that the Act takes away from a person his inherent right to hold and enjoy that property and, therefore, the exercise of the statutory power by the State to take away such property for a public purpose by paying compensation must be subject to the meticulous observance of every provision of law entitling it to make the acquisition. It is pointed out that under sub-section (1) of section 4 the Government has first to notify that a particular land "is likely to be needed for a public purpose." Thereafter under section 5-A a person interested in the land has a right to object to the acquisition and the whole question has to be finally considered and decided by the Government after hearing such person. It is only thereafter that in a normal case the Government is entitled to make a notification under sub-section (1) of section 6 declaring that it is satisfied "after considering the report, if any, made under section 5-A, sub-section (2)" that the land is required for a public purpose. This is the sequence in which the notifications have to be made. The reason why the sequence has to be followed is to make it clear that the Government has applied its mind to all the relevant facts and then come to a decision or arrived at its satisfaction even in a case where the provisions of section 5-A need not be complied with. Undoubtedly the law requires that notification under sub-section (1) of section 6 must be made only after the Government is satisfied that a particular land is required for a public purpose. Undoubtedly also where the Government has not directed under sub-section (4) of section 17 that the provisions of section 5-A need not be complied with the two notifications, that is, under sub-section (1) of section 4 and sub-section (1) of section 6 cannot be made simultaneously. But it seems to us that where there is an emergency by reason of which the State Government directs under sub-section (4) of section 17 of the Act that the provisions of section 5-A need not be complied with, the whole matter, that is, the actual requirement of the land for a public purpose must necessarily have been considered at the earliest stage itself that is when it was decided that compliance with the provisions of section 5-A be dispensed with. It is, therefore, difficult to see why the two notifications cannot in such a case, be made simultaneously. A notification under sub-section (1) of section 4 is a condition precedent to the making of notification under sub-section (1) of section 6. If the Government, therefore, takes a decision to make such a notification and, thereafter, takes two further decisions, that is, to dispense with compliance with the provisions of section 5-A and also to declare that the land comprised in the notification is in fact needed for a public purpose, there is no departure from any provision of the law even though the two notifications are published on the same day. In the case before us the preliminary declaration under section 4 (1) was made on 18th August, 1961 and a declaration as to the satisfaction of the Government on 19th August, 1961 though both of them were published in the Gazette of 25th August, 1961. The preliminary declaration as well as the subsequent declaration are both required by law to be published in the Official Gazette. But the law does not make the prior publication of notification under sub-section (1) of section 4 a condition precedent to the publication of a notification under sub-section (1) of section 6. Where acquisition is being made after following the normal procedure the notification under the latter section will necessarily have to be published subsequent to the notification under the former section because in such a case the observance of procedure under section 5-A is interposed between the two notifications. But where section 5-A is not in the way there is no irregularity in publishing those notifications on the same day. The serial numbers of the notifications are No. 5809/4 IB (I)/61/18755 dated 18th August, 1961 and 5809-4 IB (I)/61/18760 dated 19th August, 1961 and it would appear from them that the preliminary notification did in fact precede the final declaration.

These were the only objections raised before us and as everyone of them has failed the petitions must be dismissed. We accordingly dismiss them with costs. As, however, all petitions were heard together there will be only one hearing fee.

*Subba Rao, J.*—I have perused the judgment prepared by my learned brother, *Mudholkar, J.*, With great respect, I cannot agree.

The facts are fully stated by my learned brother and they need not be restated except to the extent relevant to the question I propose to consider.

About six acres of land purchased by the petitioners in Writ Petition No. 246 of 1961 for a sum of Rs. 4,60,000 in February, 1961 is situate in village Meola Maharajpur, Tehsil Balabharaghar, District Gargaon. On 25th August, 1961 the Governor of Punjab published a notification, dated 18th August, 1961 in the Official Gazette under section 4 of the Land Acquisition Act, 1894, hereinafter called the Act, to the effect that the said land was likely to be needed by the Government at public expense for a public purpose, namely, for setting up a factory for manufacturing various ranges of refrigeration compressors and ancillary equipment. Under section 17 of the Act the appropriate Government directed that the provisions of section 5-A will not apply to the said acquisition. On the same day, another notification under section 6 of the Act dated 19th August, 1961 was published to the effect that the Governor of Punjab was satisfied that the land specified therein was required by the Government at public expense for the said purpose. On 29th September, 1961, the Government of Punjab sanctioned an expense of Rs. 100 for the purpose of acquisition of the said land. The validity of the said notification is questioned on various grounds. But as I am in favour of the petitioners on the question of interpretation of the Proviso to section 6 of the Act, I do not propose to express my opinion on any other question raised in the case. The material part of section 6 (1) of the Act reads :

“Subject to the provisions of Part VII of this Act, when the appropriate Government is satisfied after considering the report, if any, made under section 5-A, sub-section (2), that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of Secretary to such Government or of some officer duly authorized to certify its order.”

Provided that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.”

Under that section, the Government may declare that a particular land is needed for a public purpose or for a company; and the Proviso imposes a condition on the issuance of such a declaration. The condition is that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by the company or, wholly or partly, out of the public revenues. A reasonable construction of this provision uninfluenced by decisions would be that in the case of an acquisition for a company, the entire compensation will be paid by the company, and in the case of an acquisition for a public purpose the Government will pay the whole or a substantial part of the compensation out of public revenues. The underlying object of the section is apparent : it is to provide for a safeguard against abuse of power. A substantial contribution from public coffers is ordinarily a guarantee that the acquisition is for a public purpose. But it is argued that the terms of the section are satisfied if the appropriate Government contributes a nominal sum, say a pie, even though the total compensation payable may run into lakhs. This interpretation would lead to extraordinary results. The Government may acquire the land of A for B for a declared public purpose, contributing a pie towards the estimated compensation of, say, Rs. 1,00,000. If that was the intention of the Legislature, it would not have imposed a condition of payment of part of the compensation, for that provision would not serve the purpose for which it must have been intended. Therefore, a reasonable meaning should be given to the expression “wholly or partly.” The Proviso says that the compensation shall be paid by the company or, wholly or partly, out of public revenues. A contrast between these two modes of payment suggests the idea that in one case the compensation must come out of the company's coffers and in the other case the whole or some reasonable part of it should come from public revenues. This idea excludes the assumption that practically no compensation need come out of public revenues. The juxtaposition of the words “wholly or partly” and the disjunctive between them emphasize the same idea. It will be incongruous to say that public revenue shall contribute rupees one lakh or one pie. The payment of a part of a compensa-

tion must have some rational relation to the compensation payable in respect of the acquisition for a public purpose. So construed "part" can only mean a substantial part of the estimated compensation. There cannot be an exhaustive definition of the words "substantial part of the compensation." What is substantial part of a compensation depends upon the facts of each case, the estimate of the compensation and other relevant circumstances. While a Court will not go meticulously into the question to strike a balance between a part and a whole, it will certainly be in a position to ascertain broadly whether in a particular case the amount contributed by the Government towards compensation is so illusory that it cannot conceivably be a substantial part of the consideration. There is some conflict of view on this question. The House of Lords in *Frederick B. Chatterton v. Cave*<sup>1</sup>, defined the word "part" in the context of the provisions of the Dramatic Copyright Act. The words in the statute were "production or any part thereof." The plaintiffs therein were the proprietors of a drama called "The Wandering Jew" and it was alleged that the defendant produced a drama on the same subject. It was found that the drama of the defendant was not, except in respect of two scenes or points, a copy from, or a colourable imitation of, the drama of the plaintiffs. In that context the House of Lords construed the relevant words "production or any part thereof." Lord O'Hagan observed :

" 'Part', as was observed, is not necessarily the same as 'particle', and there may be a taking so minute in its extent and so trifling in its nature as not to incur the statutable liability."

This decision may not be directly in point, but the construction placed upon the expression "part" is of general application. In the context of that statute, the Court found that the Legislature clearly intended by the words "any part" a real substantial part. A Division Bench of the Madras High Court, consisting of Spencer and Ramesam, JJ., directly considered this point in *Ponnaia v. Secretary of State*<sup>2</sup>. There, a total sum of Rs. 5,985 was required for the acquisition of the property of the appellant therein and the Government contributed from Provincial revenues an amount of one anna towards that compensation. The learned Judges held that it was an indication of the illusory character of the object for which the provisions of the Act had been made use of. Adverting to the argument that any small contribution by the Government would satisfy the requirement of section 6 of the Act, Ramesam, J., observed at page 1100 :

"We think that the Legislature, when they passed the Land Acquisition Act, did not intend that owners should be deprived of their ownership by a mere device of private persons employing the Act for private ends or for the gratification of private spite or malice."

These are weighty observations of a Judge of great experience who was also the Government Pleader before he became a Judge of the Madras High Court. The observations also indicate the statutory object in insisting on a substantial contribution from public revenues, for a strict insistence thereon would prevent to a large extent the abuse of power under the Act. But unfortunately the correctness of this decision was not accepted by another Division Bench of the same High Court, consisting of Odgers and Madhavan Nair, JJ., in *Senja Naicken v. Secretary of State for India*<sup>3</sup>. I have carefully gone through the judgment in that case, and, with great respect to the learned Judges, I cannot see any acceptable reasons for departing from the earlier view of the same Court. Odgers, J., concentrated his criticism of the earlier judgment more on the reliance by the earlier Bench on the decision of the House of Lords than on the intrinsic merits of the decision itself. It is true that the learned Judges in the earlier decision relied upon the observations of the House of Lords, but that was only in support of their conclusion why the expression "part" should not be understood as a particle. But the main reason they gave was that, having regard to the object of that Proviso, the Legislature in using the word "part" could have only meant a substantial part or otherwise the object would be defeated and the abuse of power which it intended to prevent could easily be perpetrated

1. (1877-78) L.R. 3 A.C. 483, 498.

2. (1926) 51 M.L.J. 338 : A.I.R. 1926 Mad.

1099.

3. (1927) I.L.R. 50 Mad. 308 : 51 M.L.J. 849

under the colour of the Act. The second reason given by Odgers, J., was stated by the learned Judge thus at page 314 :

"I invited the learned advocate for the appellant to say where a "particle" would end and "part" begin of this sum of Rs. 600. It is true an anna is a very small part of Rs. 600. But nevertheless it is a part."

This adherence to the strict letter in complete disregard of the spirit of the section certainly defeats the purpose of the legislation. The word "partly" in the Proviso should be construed in the setting in which it is used and not in vacuum, as the learned Judge sought to do. The third reason the learned Judge gives for his conclusion was stated at page 315 thus :

"Suppose on appeal the compensation had been enhanced. . There is no doubt the Government would have to defray the extra sum out of the public revenues and having once undertaken the acquisition they could not call on the constituents again."

This comment again, in my view, is beside the point. It is not the duty of the Government to meticulously fix a figure ; it may agree to bear a definite proportion of the compensation that may ultimately be awarded to a claimant and in that event subsequent variations by hierarchy of tribunals would not cause any difficulty, for the proportion would attach itself to the varying figures. That apart, it need not be a particular fraction of the compensation ultimately awarded. If the Government agrees to contribute a substantial part of the estimated compensation that would meet the requirements of the section. The other learned Judge, Madhavan Nair, J., in substance agreed with the judgment of Odgers, J., and did not disclose any additional reasons for differing from the decision of the earlier Bench. In my view, the decision in *Senja Naicken v. Secretary of State*<sup>1</sup>, is not correct. These two were considered by a Full Bench of the Madras High Court in *Suryanarayana v. Province of Madras*<sup>2</sup>. There Sir Lionel Leach, C.J., delivering the judgment of the Full Bench, noticed the judgment of the division Bench in *Ponnaia v. Secretary of State*<sup>3</sup>, and the criticism offered on the judgment by the later Division Bench in *Senja Naicken v. Secretary of State*<sup>1</sup> and observed :

"We are in entire agreement with this criticism."

Then the learned Chief Justice proceeded to observe :

"In interpreting the Proviso we can only have regard to the words used and, in our judgment, it is sufficient compliance with the Proviso if any part of the compensation is paid out of public funds. One anna is a part of the compensation. It is true it is a small part, but it is nevertheless a part."

This literal interpretation of the word "part" *de hors* the setting in which that word appears in the section, in my view, makes the condition imposed on the exercise of the jurisdiction by the Government meaningless and also attributes to the Legislature an intention to impose a purposeless and ineffective formality. For the reasons already given, I cannot accept the correctness of this judgment. I, therefore, hold that unless the Government agrees to contribute a substantial part of the compensation, depending upon the circumstances of each case, the condition imposed by the Proviso on the exercise by the appropriate Government of its jurisdiction is not complied with. In the instant case it is impossible to say that a sum of Rs. 100 out of an estimated compensation which may go even beyond Rs. 4,00,000 is in any sense of the term a substantial part of the said compensation. The Government has clearly broken the condition and, therefore, it has no jurisdiction to issue the declaration under section 6 of the Act.

In this view it is not necessary to express my opinion on the other questions raised in this case.

In the result the said notification is quashed and respondents 1 to 5 are hereby prohibited from giving effect to the said notification and taking any proceedings thereunder.

1. (1927) 51 M.L.J. 849 : I.L.R. 50 Mad. 308. 3. (1926) 51 M.L.J. 338 : A.I.R. 1926 Mad.

2. (1945) 2 M.L.J. 237 : I.L.R. (1946) Mad. 1099.

It is common case that the order in Writ Petition No. 246 of 1961 would govern Writ Petitions Nos. 247 and 248 of 1961 also. A similar order will issue in these two petitions also. The respondents will pay the costs of the petitioners in all the petitions.

ORDER OF THE COURT:—In view of the majority opinion the Court dismissed the Writ Petitions with costs. There will be one set of hearing fee.

V.S.

*Petitions dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—B.P. SINHA, *Chief Justice*, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR, J.R. MUDHOLKAR AND T.L. VENKATARAMA AYYAR, JJ.

Dr. Indramani Pyarelal Gupta and others

.. *Appellants\**

*v.*

W.R. Natu and others

.. *Respondents.*

The East India Cotton Association, Ltd.

.. *Intervener.*

*Forward Markets Regulation Act (LXXIV of 1952), sections 4, 11 and 12—Functions of the Forward Markets Commission—To perform duties and exercise powers assigned 'by or under the Act'—Scope of the powers.*

The East India Cotton Association is an association which has been recognised by the Central Government under section 6 of the Act. The three appellants are members of the Association carrying on business in partnership and they had entered into "hedge contract" in respect of cotton with other members of the Association. In 1955 the Government apprehending that the Forward Market in cotton was heading for a crisis directed the Association to suspend its business temporarily and subsequently followed by action under powers conferred on them by section 12 of the Act and made new bye-law in substitution of bye-law 52-AA. The Forward Markets Commission took action under the powers vested under them under the new bye-law 52-AA and intimated to the Association that the continuation of trading in certain types of forward contracts in cotton including that known as "hedge contracts" was 'detrimental to the interest of the trade and the public interest and to the larger interests of the economy of India' and directed these contracts to be closed out to be settled at prices fixed in its notification. The notification was attacked on the grounds that it was *ultra vires* for the reason that bye-law 52-AA as amended was invalid, and that the bye-law could not act retrospectively.

So far as the terms of clause (f) of section 4 of the Act are concerned, there is no limitation upon the nature of the power that might be conferred except, of course, that which might flow from its having to be done in relation to the regulation of forward-trading in goods which the Act is designed to effectuate. Whether it is legally competent to vest a particular power in a statutory body, and in regard to this the proper rule of interpretation would be that unless the nature of the power is such as to be incompatible with the purpose for which the body is created, or unless the particular power is contra-indicated by any specific provision of the enactment bringing the body into existence, any power which would further the provisions of the Act could be legally conferred on it. Judged by this test it would be obvious that the power conferred by the bye-law is one which could be validly vested in the Commission.

The meaning of the word "under the Act" is well known. "By" an Act would mean by a provision directly enacted in the statute in question and which is gatherable from its express language or by necessary implication therefrom. The words "under the Act" would, in that context, signify what is not directly to be found in the statute itself but is conferred or imposed by virtue of powers enabling this to be done; in other words, bye-laws made by a subordinate law-making authority which is empowered to do so by the parent Act. The distinction is thus between what is directly done by the enactment and what is done indirectly by rule-making authorities which are vested with powers in that behalf by the Act.

That in such a sense bye-laws would be subordinate-legislation "under the Act" is clear from the terms of sections 11 and 12 themselves.

There was no incompetency in the Forward Markets Commission being the recipient of the power which was conferred upon them by bye-law 52-AA as amended.

Apart from the amended bye-law occurring in the group of existing bye-laws making provision for emergencies to which sub-clause (d) of section 11 (2) refers, there is no dispute that there was an emergency in the forward market and that the impugned bye-law was framed to meet such a contingency. The method by which the emergency was resolved by the impugned bye-law (*viz.*, by closing out subsisting contract) was the usual method employed for the purpose. If therefore the bye-law was a provision for an emergency within section 11 (2) (d), then it would seem to follow that for the resolution of that emergency, every one of the matters which could be included in such bye-laws would be attracted to it.

Bye-law 52-AA is well within the bye-law making power under section 11 of the Act and therefore within section 12.

Per *Subba Rao, J.*, contra :—The duties and powers that may be assigned to the Commission under clause (f) can be only supervisory or advisory functions other than those mentioned in clauses (a) to (e). The power conferred on the Commission under the bye-law made by the Government to close out contracts and thus terminate the contracts is neither an advisory nor a supervisory power, and, therefore, the Commission cannot legally exercise the same.

The non-mention of bye-laws in clause (f) is not because of any accidental omission but a deliberate one, because of the incongruity of an assignment of a function to the Commission under a bye-law. "By this Act" applies to powers assigned *proprio vigore* by the provision of the Act; "under this Act" applies to an assignment made in exercise of an express power conferred under the provisions of the Act; and "may be prescribed" takes in an assignment made in exercise of a power conferred under a rule. This constructio gives a natural meaning to the plain words used in the section and avoids stretching the language of a statutory provision to save an illegal bye-law.

Appeal by Special Leave from the Judgment and Order dated the 1st March 1956, of the Bombay High Court, in Appeal No. 20 of 1956.

*G.S. Pathak*, Senior Advocate (*K.H. Bhabha, H.M. Vakeel and I.N. Shroff*, Advocates with him), for Appellants.

*C.K. Daphtary*, Solicitor-General of India (*B.K. Khanna and P.D. Menon*, Advocates with him), for Respondents.

*C.K. Daphtary*, Solicitor-General of India (*S.N. Andley, Rameshwar Nath and P.L. Vohra*, Advocates of *M/s. Rajinder Narain & Co.*, with him), for Intervener.

The Court delivered the following Judgments—

*Rajagopala Ayyangar, J.* (on behalf of the majority).—This is an appeal by Special Leave from the judgment of a Division Bench of the Bombay High Court affirming the judgment of a learned Single Judge whereby a petition filed under Article 226 of the Constitution by the appellants was dismissed. By their petition the appellants challenged the validity of a notification issued by the Forward Markets Commission—a statutory body created by the Forward Markets Regulation Act, 1952 (LXXIV of 1952) (hereinafter referred to as the Act) to the authorities of the East India Cotton Association, Bombay (which will be referred to as the Association) intimating to them that the continuation of trading in certain types of forward contracts in cotton including that known as "hedge contracts" was "detrimental to the interest of the trade and the public interest and to the larger interests of the economy of India" and directed these contracts to be closed out, to be settled at prices fixed in the notification.

It is necessary to set out briefly certain facts in order to appreciate the points raised by the appeal. The East India Cotton Association is an "association" which has been recognised by the Central Government under section 6 of the Act. The three appellants are members of the Association carrying on business in partnership. The appellants, had, prior to December, 1955, entered into "hedge contracts" in respect of cotton with other members of the Association for settlements in February and May, 1956. There was no dispute that these contracts were in accordance with the bye-laws of the Association as they stood at the date when the contracts were entered into. The terms and conditions of forward contracts in cotton including "hedge contracts", and the manner of their implementation, were governed by the provisions contained in certain bye-laws of the Association and of these that relevant to the consideration of the matters in this appeal was bye-law 52-AA which on the date when the appellants entered into their contracts ran as follows :—

52-AA. (1) Whether or not the prices at which the cotton may be bought or sold are at any time controlled under the provisions of the Essential Commodities Act, 1955, if the Textile Commissioner with the concurrence of the Forward Markets Commission and after consultation with the Chairman (of the Board), be of opinion that the continuation of hedge trading is likely to result in a situation detrimental to the larger interest of the economy of India and so informs the Board, the Board shall forthwith cause a notice to be posted on the Notice Board to that effect and on the posting of such notice and notwithstanding anything to the contrary contained in these bye-laws or in any hedge or on call contract made subject to these Bye-laws, the following provisions shall take effect.

(2) Every hedge contract and every on call contract in so far as the cotton is uncalled thereunder or in so far as the price has not been fixed thereunder entered into between a member and a member or between a member and a non-member then outstanding shall be deemed closed out at such rate, appropriate to such contract as shall be fixed by the Textile Commissioner and the provisions of clauses (3), (4) and (6) of bye-law 52-A in so far as they apply to hedge and on call contracts, shall apply as if they formed part of this Bye-law. After the affixation of the said Notice on the Notice Board trading in hedge and on call contracts shall be prohibited until the Textile Commissioner with the concurrence of the Forward Markets Commission and after consultation with the Chairman, permits resumption."

Towards the end of 1955 the Chairman of the Association appears to have apprehended that the Forward Market in cotton was heading for a crisis which was in part due to the transacting of unbridled option business, which though prohibited by the Act and also by the bye-laws of the Association was nevertheless indulged in on a large scale. The Chairman brought this situation to the notice of the members of the Board of the Association at a meeting held on 16th December, 1955 and suggested that they should give serious thought to this vital problem. It may be mentioned that the Government also were anxiously considering the steps to be taken to solve or avert the crisis. The action which the Government took in this matter is reflected in a notification issued by them on 23rd December, 1955 by which in exercise of the powers conferred on them by section 14 of the Act they directed the Association to suspend its business in Indian cotton hedge contracts for delivery in February, 1956 and May, 1956 for a period of 7 days with effect from the date of the notification. The situation did not apparently improve as a result of this temporary suspension so that before the expiry of the week, action under the same provision was again taken under a notification, dated 30th December, 1955 by which the period of 7 days was extended by a further period of 7 days, i.e., till 6th January, 1956. A meeting of the Board of Association was held on 6th January, 1956, i.e., the day on which the suspension of forward business expired when the following resolution was unanimously passed :—

"In view of the suspension of forward trading by Government the Board hereby resolves under bye-law 52 that an emergency has arisen or exists and prohibits until further notice, subject to the concurrence of the Forward Markets Commission as from Saturday the 7th January, 1956 trading in hedge contracts for February and May, 1956 deliveries above a maximum rate of Rs. 700 per-candy."

Thereupon a suit (numbered as suit 2/1956) was filed by a member of the Association as representing himself and all other members, on the Original Side of the High Court, Bombay, against the Association and its Board, challenging the validity of the notification of Government suspending forward trading, as also of the resolution of the Board, just now extracted. An application for the grant of interim stay was made for restraining the Board from giving effect to its resolution but this was refused by the learned trial Judge and an appeal was filed against the refusal.

While things were in this state the Central Government, in exercise of the powers conferred on them by section 12 of the Act, made a new bye-law which was published in a Gazette of India *Extraordinary*, dated 21st January, 1956 in substitution of bye-law 52-AA set out earlier. The new bye-law ran :

"52-AA. (1) Whether or not prices at which cotton may be bought or sold are at any time controlled under the provisions of the Essential Commodities Act, 1955, if the Forward Markets Commission is of the opinion that continuation of trading in hedge contracts for any delivery or deliveries is detrimental to the interest of the trading or the public interest or to the larger interests of the economy of India and so notifies the Chairman, then notwithstanding anything to the contrary contained in these bye-laws or in any hedge or on call contract made subject to these bye-laws the following provisions shall take effect.

(2) Every hedge contract and every on call contract in so far as the cotton is uncalled thereunder or in so far as the price has not been fixed thereunder and relating to the delivery or deliveries notified under clause (1) entered into between a member and a member or between a member and a non-member then outstanding shall be deemed closed out at such rate appropriate to such contract and with effect from such date as shall be fixed by the Forward Markets Commission and the provisions of clauses (3), (4) and (6) of Bye-law 52-A in so far as they apply to hedge and on call contracts shall apply as if they formed part of this Bye-law."

This bye-law was communicated to the Board of the Association on the 23rd January, 1956.



We might here state that the validity of this new bye-law has been impugned on various grounds and the alleged invalidity of this bye-law serves as the main foundation for challenging the validity of the notification of the Forward Markets Commission issued under the powers conferred by it.

On 24th January, 1956, the appeal from the order refusing the interim injunction in Suit No. 2 of 1956 was settled between the parties on these terms :

“(1) The impugned resolution dated 6th January, 1956, declared to be valid.

(2) The Board of Directors to meet on 25th January, 1956 and consider under bye-law (2) whether the rate of Rs. 700 fixed under the said resolution should continue or whether it should be waived. In considering the same the Board will apply its own mind and exercise its own judgment.”

On the same day, i.e., 24th January, 1956, the Forward Markets Commission took action under the powers vested in them under the new bye-law 52-AA which had been made by Government three days earlier. By a communication addressed to the Chairman of the Association, the Commission stated :

“In pursuance of clause (1) of the bye-law 52-AA of the Bye-laws of the E.I.C.A. Ltd., Bombay I hereby notify to you that the Forward Markets Commission is of the opinion that continuation of trading in the hedge contracts for February and May, 1956 delivery is detrimental to the interests of the trade and the public interest and the larger interest of the economy of India and fixed under clause (2) of the said bye-law ; that the rates prevailing at the time at which the trading in the said contracts closed on 24th January, 1956, viz., Rs. 700 for February and Rs. 686/8 for May delivery as the rates at which and 25th January, 1956 as the date with effect from which the hedge contracts and on call contracts in so far as the cotton is uncalled thereunder or in so far as the price has not been fixed thereunder relating to the said delivery shall be deemed to be closed out.”

Thereupon the three appellants who are partners carrying on business in cotton under the name and style of Indramani Pyarelal Co. moved the High Court of Bombay by a petition under Article 226 of the Constitution on 27th January, 1956 for a writ of *mandamus* or a direction in the nature of *mandamus* against the members of the Forward Markets Commission who were individually impleaded as respondents to the petition, ordering them to cancel or withdraw the notification, dated 24th January, 1956, whose validity was impugned on various grounds. The petition was heard by a learned Single Judge who dismissed it by his order, dated 23rd February 1956. An appeal was filed therefrom to a Bench of the High Court and when this was also dismissed the petitioners moved for a certificate of fitness to appeal to this Court but the same having been rejected, they applied for and obtained Special Leave from this Court, and that is how the matter is now before us.

The submissions of Mr. Pathak learned counsel for the appellant in support of the appeal may be classified under three main heads : (1) The notification, dated 24th January, 1956 served on the Board of the Association by the Forward Markets Commission was *ultra vires* for the reason that Bye-law 52-AA as amended by the Central Government on 21st January, 1956 was invalid. (2) Assuming the bye-law to be valid it could not operate retrospectively or be availed of retrospectively so as to affect rights under existing contracts subsisting on the day the amended bye-law was notified in the Gazette but that it could if at all, be validly applied only to Forward hedge contracts entered into thereafter. (3) The notification by the Forward Markets Commission was improper and *mala fide* and was therefore invalid.

It would be convenient to deal with these points in that order : (1) The first of the points raised raises the question of the validity of Bye-law 52-AA as amended by the Central Government on 21st January, 1956. Learned counsel divided his submission on this matter into two sub-heads : (a) that the Forward Market Commission could not, on a proper construction of the Act, be validly vested with the power with which it was clothed by the amended bye-law, and (b) that it was beyond the power of the Association to have conferred the power which it purported to do under the amended Bye-law, 52-AA. Put in other words, the objections were that the Forward Markets Commission could not, having regard to the terms of the statute under which it was created, be a proper recipient of the power with which it was

vested by the bye-law and secondly that the Association was in law incapable of conferring that power on the Forward Markets Commission or on any other body.

We shall first take up for consideration the argument that the Forward Markets Commission was in law incapable of being the recipient of the power conferred by the bye-law under which it was empowered to issue the impugned notification. For this purpose it is necessary to examine in detail the relevant provisions of the Act. Section 2 (b) defines "Commission" as meaning "The Forward Markets Commission" established under section 3. Section 3 (1) enacts :

"3. (1) The Central Government may, by notification in the Official Gazette establish a Commission to be called the Forward Markets Commission for the purpose of exercising such functions and discharging such duties as may be assigned to the Commission by or under this Act."

The point urged by learned counsel was that the function or the duty cast upon it by the amended Bye-law 52-AA was not such as could be assigned to the Commission "by or under this Act." The meaning of the words "by or under" and the extent and nature of the duties assigned to the Commission by the Act will therefore require careful examination. Section 4 relates to the functions of the Commission and it is the proper construction of this section that has loomed large in the arguments on this point. It is, therefore, necessary to set this out in full :

"4. The functions of the Commission shall be—

(a) to advise the Central Government in respect of the recognition of, or the withdrawal of recognition from any association or in respect of any other matter arising out of the administration of this Act ;

(b) to keep forward markets under observation and to draw the attention of the Central Government or of any other prescribed authority to any development taking place, in or in relation to, such markets, wherein the opinion of the Commission is of sufficient importance to deserve the attention of the Central Government and to make recommendations thereon ;

(c) to collect and whenever the Commission thinks it necessary publish information regarding the trading conditions in respect of goods to which any of the provisions of this Act is made applicable, including information regarding supply, demand and prices, and to submit to the Central Government periodical reports on the operation of this Act and on the working of forward markets relating to such goods ;

(d) to make recommendations generally with a view to improving the organisation and working of forward markets ;

(e) to undertake the inspection of the accounts and other documents of any recognised association whenever it considers it necessary ; and

(f) to perform such other duties and exercise such other powers as may be assigned to the Commission by or under this Act, or as may be prescribed."

Pausing here it is necessary to add that the expression "prescribed" found at the end of clause (f) has been defined by section 2 (h) of the Act to mean "prescribed by Rules made under the Act."

Before considering the points urged as regards the construction of this section taken in conjunction with the terms of section 3 (1) we shall refer to a few other provisions which are of some relevance in the present context. Section 8 (2) which confers power on the Central Government to call for periodical returns from Recognised Associations and to direct such enquiries as they consider necessary to be made, empowers the Government to direct the Commission to inspect the accounts and other documents of any recognised Association or of any of its members and submit its report thereon to the Central Government (*vide* section 8 (2) (c)). Sub-section (4) of this section enacts :

"8. (4) Every recognised association and every member thereof shall maintain such books of account and other documents as the Commission may specify and the books of account and other documents so specified shall be preserved for such period not exceeding three years as the Commission may specify and shall be subject to inspection at all reasonable times by the Commission."

Section 28 reads :

"28. (1) The Central Government may, by notification in the Official Gazette, make Rules for the purpose of carrying into effect the objects of this Act."

(2) In particular, and without prejudice to the generality of the foregoing power, such Rules may provide for—

- (a) the terms and conditions of service of members of the Commission ;
- (b) the manner in which applications for recognition may be made under section 5 and the levy of fees in respect thereof ;
- (c) the manner in which any inquiry for the purpose of recognising any association may be made and the form in which recognition shall be granted ;
- (d) the particulars to be contained in the annual reports of recognised associations ;
- (e) the manner in which the bye-laws to be made, amended or revised under this Act shall before being so made, amended or revised be published for criticism ;
- (f) the constitution of the Advisory Committee established under section 25, the terms of office of and the manner of filling vacancies among members of the Committee ; the interval within which meetings of the Advisory Committee may be held and the procedure to be followed at such meetings ; and the matters which may be referred by the Central Government to the Advisory Committee for advice ;
- (g) any other matter which is to be or may be prescribed."

The argument on this part of the case was briefly this : The Forward Markets Commission is a statutory body specially created for the purposes of the Act. The powers which may be conferred upon the Commission and the duties which it may be called on to discharge are therefore subject to the provisions of the Act. No more power can be conferred upon this body than what the Act allows and the power under the amended Bye-law 52-AA is not one which is contemplated by the Act as conferable on it. Section 4 defines the functions of the Commission under five general heads (a) to (e) with a residuary clause contained in clause (f). The powers or duties dealt with in clauses (a) to (e) are in their essence either recommendatory or advisory. In the context therefore "the other" duties or "other" powers which may be assigned to the Commission under clause (f) must be either *ejusdem generis* with advisory or recommendatory powers or of a nature similar to those enumerated in the previous sub-clauses.

In support of these submissions learned Counsel invited our attention to several decisions in which ancillary powers which might be implied from the grant of certain express powers were referred to. In particular it was submitted that the Court would not imply a power which it was not absolutely necessary to effectuate an express grant or was needed to prevent the nullification of an express power that was granted. In our opinion, these decisions afford no assistance for resolving the controversy before us. There is no question here of deducing an implied power from the grant of an express one. What we are concerned with is the scope of the grant of an express power or rather whether the grant of the power conferred upon the Commission by the bye-law could be held to be a power which could be assigned to the Commission under clause (f). So far as the terms of clause (f) are concerned, there is no limitation upon the nature of the power that might be conferred except, of course, that which might flow from its having to be one in relation to the regulation of forward-trading in goods which the Act is designed to effectuate. Any limitation therefore would have to be deduced from outside clause (f) of section 4. Taking each of the clauses (a) to (e), it is not possible to put them positively under one genus in order that there might be scope for the application of the *ejusdem generis* rule of construction. Negatively, no doubt it might be said that none of these five clauses confer an executive power such as has been vested in them by the amended Bye-law 52-AA but this cannot be the foundation for attracting the rule of construction on which learned counsel relies. On the other hand, if there is no common positive thread running through clauses (a) to (e) such as would bring them under one genus and negatively they do not expressly include any administrative or executive functions, that itself might be a reason why the expression "other" occurring in clause (f) should receive the construction that it is intended to comprehend such a function. Learned counsel further suggested that even if the rule of *ejusdem generis* did not apply, the allied rule referred to at page 76 of the Report of *Western India Theatres Ltd. v.*

*Municipal Corporation of Poona*<sup>1</sup>, that the matters expressly referred to might afford some indication of the kind and nature of the power, might be invoked, but we consider that, in the context, there is no scope for the application of this variant either. What we are here concerned with is whether it is legally competent to vest a particular power in a statutory body, and in regard to this the proper rule of interpretation would be that unless the nature of the power is such as to be incompatible with the purpose for which the body is created, or unless the particular power is contradicted by any specific provision of the enactment bringing the body into existence, any power which would further the provisions of the Act could be legally conferred on it. Judged by this test it would be obvious that the power conferred by the bye-law is one which could be validly vested in the Commission.

A more serious argument was advanced by learned Counsel based upon the submission that a power conferred by a bye-law framed under section 11 or 12 was not one that was conferred "by or under the Act or as may be prescribed". Learned Counsel is undoubtedly right in his submission that a power conferred by a Bye-law is not one conferred "by the Act", for in the context the expression "conferred by the Act" would mean "conferred expressly or by necessary implication by the Act itself". It is also common ground that a bye-law framed under section 11 or 12 could not fall within the phraseology "as may be prescribed", for the expression "prescribed" has been defined to mean "by Rules under the Act", i.e., those framed under section 28 and a bye-law is certainly not within that description. The question therefore is whether a power conferred by a bye-law could be held to be a power "conferred under the Act". The meaning of the word "*under the Act*" is well known. "*By*" an Act would mean by a provision directly enacted in the statute in question and which is gatherable from its express language or by necessary implication therefrom. The words "*under the Act*" would, in that context, signify what is not directly to be found in the statute itself but is conferred or imposed by virtue of powers enabling this to be done; in other words, bye-laws made by a Subordinate law-making authority which is empowered to do so by the parent Act. The distinction is thus between what is directly done by the enactment and what is done indirectly by rule-making authorities which are vested with powers in that behalf by the Act. (*Vide Hubli Electricity Company, Ltd. v. Province of Bombay*<sup>2</sup>, and *Narayanaswamy Naidu v. Krishna Murthi*<sup>3</sup>). That in such a sense Bye-laws would be subordinate-legislation "*under the Act*" is clear from the terms of sections 11 and 12 themselves. Section 11 (1) enacts :

"11. (1) Any recognised association may, subject to the previous approval of the Central Government, make Bye-laws for the regulation and control of forward contracts,"

and sub-section (2) enumerates the matters in respect of which Bye-laws might make provision. Sub-section (3) refers to the Bye-laws *as those made under this section* and the provisions of sub-section (4) puts this matter beyond doubt by enacting:

"11. (4) Any Bye-laws made *under this section* shall be subject to such conditions in regard to previous publication as may be prescribed, and when approved by the Central Government, shall be published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the recognised association is situate :

....."

Section 12 under which the impugned bye-law was made states in sub-section (2):

"12. (2) Where, in pursuance of this section, any bye-laws have been made or amended, the bye-laws so made or amended shall be published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the recognised association is situate, and on the publication thereof in the Gazette of India the Bye-laws so made or amended shall have effect as if they had been made or amended by the recognised association",

and in sub-section (4) :

"12. (4) The making or the amendment or revision of any Bye-laws *under this section* shall in all cases be subject to the condition of previous publication :

....."

1. (1959) S.G.J. 390 : (1959) 2 S.G.R. (Supp.) 71 at 76.

2. (1949) 2 M.L.J. 30 : L.R. 76 I.A. 57 at 66.

3. (1958) 1 M.L.J. 367 : I.L.R. (1958) Mad. 513 at 547.

Having regard to these provisions it would not be possible to contend that notwithstanding that the Bye-laws are Rules made by an Association under section 11 or compulsorily made by the Central Government for the Association as its Bye-laws under section 12, they are not in either case subordinate legislation under section 11 or 12 as the case may be, of the Act and they would therefore squarely fall within the words "under the Act" in section 4 (f). Indeed, we did not understand Mr. Pathak to dispute this proposition.

His contention however was that when clause (f) specifically made provision for powers conferred by "Rules" by the employment of the phrase "or as may be prescribed" and, so to speak, took the "Rules" out of the reach of the words "under the Act" it must necessarily follow that every power conferred by a subordinate law-making body must be deemed to have been excepted from the content of that expression and that consequently in the context the words "by the Act" should be held to mean "directly by the Act", i.e., by virtue of positive enactment, and the words "under the Act" should be held to be a reference to powers gatherable by necessary implication from the provisions of the Act. As an instance learned Counsel referred us to the power of the Central Government to direct the Commission to inspect the accounts and other documents of any recognised association or of any of its members and submit its report thereon to the Central Government under section 8 (2) (c) and suggested that this would be a case of a power or duty which would be covered by the words "under the Act". We find ourselves wholly unable to accept this argument. If without the reference to the phrase "as may be prescribed" the words "under the Act" would comprehend powers which might be conferred under "Bye-laws" as well as those under "Rules" we are unable to appreciate the line of reasoning by which powers conferred by Bye-laws have to be excluded, because of the specific reference to powers conferred by 'Rules'. Undoubtedly, there is some little tautology in the use of the expression "as may be prescribed" after the comprehensive reference to the powers conferred "under the Act", but in order merely to avoid redundancy you cannot adopt a rule of construction which cuts down the amplitude of the words used except, of course, to avoid the redundancy. Thus the utmost that could be said would be that though normally and in their ordinary signification the words "under the Act" would include both "Rules" framed under section 28 as well as "Bye-laws" under section 11 or 12, the reference to "Rules" might be eliminated as tautologous since they have been specifically provided by the words that follow. But beyond that to claim that for the reason that it is redundant as to a part, the whole content of the words "under the Act" should be discarded, and the words "by the Act" should be read in a very restricted and, if one may add, in an unnatural sense as excluding a power conferred by necessary implication, when such a power would squarely fall within the reach of these words would not, in our opinion be any reasonable construction of the provision. We need only add that the construction we have reached of section 4 (f) is reinforced by the language of section 3 (i) which is free from the ambiguity created by the occurrence of the expression "as may be prescribed" in the former. We have therefore no hesitation in holding that there was no incompetency in the Forward Markets Commission being the recipient of the power which was conferred upon them by Bye-law 52-AA as amended.

The next part of the submission in relation to this matter was that it was not competent for the Association to have framed this bye-law and that the powers of the Central Government under section 12 and of the Association under section 11 in regard to the framing of Bye-laws being co-extensive, the bye-law framed was not competent to confer any power on the Commission.

This contention was urged with reference to two considerations :

(a) that a bye-law of the type now in controversy was not within section 11 of the Act, and

(b) that having regard to the provision contained in the Articles of Association of the Association the bye-law was beyond the powers of the Association to frame. These we shall deal in that order.

The first objection naturally turns upon whether the bye-law is one which could be comprehended with section 11 of the Act. Its first sub-section enacts :

" 11. (1) Any recognised association may, subject to the previous approval of the Central Government, make bye-laws for the regulation and control of forward contracts."

That the impugned bye-law is one for the regulation and control of forward contracts cannot be disputed, and the terms being very general would include a bye-law of the type now impugned. In this connection reference may be made to Bye-law 52-AA which the impugned bye-law amended, under which power was vested in the Textile Commissioner with the concurrence of the Forward Markets Commission (though after consultation with the Chairman of the Board), to direct the closure of hedge contracts and fix the rates at which such contracts might be closed out—a provision whose validity was not impugned in the present proceedings. Mr. Pathak no doubt submitted that he was not precluded from challenging before us even the earlier bye-law for the purpose of sustaining his argument that the amended bye-law was *ultra vires*. Nevertheless it must be apparent that it was always assumed that Bye-laws which vest in authorities external to the Association the power to interfere with forward dealings was within the scope of the bye-law making powers under section 11.

This general provision apart, sub-section (2) of section 11 enacts :

" 11. (2) In particular, and without prejudice to the generality of the foregoing power, such bye-laws may provide for—

- (a) .....
- (b) .....
- (c) .....
- (d) fixing, altering or postponing day for settlement ;
- (e) determining and declaring market rates, including opening, closing, highest and lowest rates for goods ;
- (f) .....
- (g) .....
- (h) .....
- (i) .....
- (j) .....
- (k) .....
- (l) .....
- (m) .....
- (n) the regulation of fluctuations in rates and prices ;
- (o) the emergencies in trade which may arise and the exercise of powers in such emergencies including the power to fix maximum and minimum prices ;
- (p) ....."

As the power of the Central Government to make Bye-laws under section 12 is admittedly co-extensive with the power of the Associations to frame Bye-laws, it is not necessary to refer to the terms of the later section.

Before considering in detail the argument on this part of the case we consider it useful to set out a few of the Bye-laws of the Association whose validity has not been challenged and which would show the manner in which the Association has been functioning in emergencies such as that for which the impugned bye-law provides. Bye-law 52 which still exists runs :

" 52. (1) If in the opinion of the Board an emergency has arisen or exists, the Board may, by a resolution,

(i) passed by a majority of not less than....., and

(ii) confirmed..... prohibit, as from the date of such confirmation or from such later date as may be fixed by the Board in the resolution referred to in sub-clause (1),

(a) trading in the Hedge Contract for any delivery or deliveries.....

.....or

(b) all trading in such contracts as are referred to in clause (a) for a specified period,.....

....."

" 52-A. If the Board, at a meeting specially convened in this behalf, resolve that a state of emergency exists or is likely to occur such as shall in the opinion of the Board make free trading in

forward contracts extremely difficult, the Board shall so inform the Forward Markets Commission and upon the Forward Markets Commission intimating to the Board its agreement with such resolution, then notwithstanding anything to the contrary contained in these bye-laws or in any forward contract made subject to these Bye-laws, the following provisions shall take effect—

- (1) The Board shall at a meeting specially convened in this behalf,
  - (a) fix a date for the purposes hereinafter contained,
  - (b) fix settlement process for forward contracts,
  - (c) fix a special Settlement Day.

(2) .....Every hedge contract entered into between a member and a member or between a member and a non-member outstanding on the date fixed under clause (1) (a) hereof shall be deemed closed out at the rate appropriate to such contracts fixed under clause (1) (b) hereof."

- (3)—(6).....

and then follows Bye-law 52-AA.

Apart for the amended bye-law occurring in the group of existing Bye-laws making provision for emergencies to which sub-clause (o) of section 11 (2) refers, there is no dispute that there was an emergency in the forward market and that the impugned bye-law was framed to meet such a contingency. It was not contended before us that the method by which the emergency was resolved by the impugned Bye-law—*viz.*, by closing out subsisting contracts was not the usual method employed for the purpose. If therefore the bye-law was a provision for an emergency within section 11 (2) (o) then it would seem to follow that for the resolution of that emergency, every one of the matters which could be included in such Bye-laws would be attracted to it, and so we find it impossible to accept Mr. Pathak's submission regarding the invalidity of the bye-law.

An analysis of the impugned Bye-law 52-AA and a comparison of it with that which it replaced would show that the main point of difference is that whereas formerly action to stop forward trading and for closing out contracts and to fix the rate at which contracts were to be closed out was vested in the Textile Commissioner, acting with the concurrence of the Forward Markets Commission, under the amended bye-law the power is directly vested in the Forward Markets Commission itself. The arguments addressed to us on this point are concerned not so much with the propriety as with the vices of a provision by which the power to close out contracts by the issue of a notification is vested in the Commission. Apart from an argument immediately to be noticed, we do not see how, if such a power could validly be conferred upon a Textile Commissioner or even exercised by the Board of the Association under a Bye-law framed under section 11, the same would be beyond the power to make Bye-laws under section 11 by the mere fact that the authority vested with the power is the Forward Markets Commission. We are clearly of the opinion that Bye-law 52-AA is well within the Bye-law making power under section 11 of the Act and therefore within section 12.

It was then said that the amended Bye-law 52-AA was invalid as in violation of the Articles of Association of the Association being an impermissible delegation of the powers vested in the Board of the Association by its Memorandum and Articles. In this context Mr. Pathak placed reliance on Clause 64 of the Articles as laying down the limits within which the Board might delegate their powers. He contended that the conferment of the power to take action on the Forward Markets Commission was thus contrary to and inconsistent with the powers of the Association under this Article. It would be seen that if learned Counsel is right, this would render invalid not merely Bye-law 52-AA as now amended but even the Bye-law as it originally stood, but as already stated learned Counsel urged that he was not precluded from raising this contention. This point was not raised in the Court below but having heard arguments on it we shall pronounce upon it. We consider that there is no substance in this objection. Article 64 on which reliance was placed runs in these terms :

"The Board may delegate any of their powers, authorities and duties to committees consisting of such member or members of their body or consisting of such other member or members or Associate

Members, Special Associate Members or Temporary Special Associate Members of the Association not being Directors, or partly of Directors and partly of such other members and/or Associate Members, Special Associate Members or Temporary Special Associate Members as the Directors may think fit. Any Committee so formed shall in the exercise of the powers so delegated conform to any regulation that may from time to time be imposed on it by the Directors."

In so far as the Memorandum is concerned, its Paragraph III states the objects for which the Association was established, as being, *inter alia* :

"....."

(e) To make from time to time Bye-laws for....., the opening and closing of markets in cotton and the times during which they shall be open or closed ; the making performance and determination of contracts....., the prohibition of specified classes of dealings and the time during which such prohibition shall operate ; the prevention of and dealing with 'Croppers' or 'Bear Pairs' in any and every kind of cotton and cotton transactions so as to prevent or stop or mitigate undue speculation inimical to the trade as a whole ; the course of business between Original Members *inter se* or between any of them on the one hand, and their constituents on the other hand, the forms of contracts between them and their rights and liabilities to each other in respect of dealings in cotton....."

The Articles dealing with Bye-laws, the manner in which they are to be made as well as the subject to which they might relate is to be found in Articles 73 and 74. The relevant portion of Article 73 runs :

"Under and in conformity with any Statutory provisions for the time being in force, the Board may pass and bring into effect such Bye-laws as may be considered in the interest of or conducive to the objects of the Association....."

and Article 74 runs :

"Without prejudice to the generality of the powers to make Bye-laws conferred by the Memorandum of Association and by these Articles and under or in the absence of any statute or statutes in force in that behalf, it is hereby expressly declared that the said powers to make, alter, add to, or rescind Bye-laws including power to do so in regard to all or any of the following matters....."

Sub-paragraph (7) repeats *inter alia* the contents of Paragraph III (e) of the Memorandum of Association which we have extracted. The entire argument of Mr. Pathak on Article 64 was based on the footing that the power to make a Bye-law was vested solely in the Board, because it is only the powers of the Board that are subject to the limitation imposed by Article 64. If however the power to make a bye-law was not confined to the Board but bye-laws might be framed by the Association itself, the argument based on Article 64 would be seen to have no validity. That the latter is the true position is clear from Article 73 which reads :

"The Board's powers as aforesaid in relation to Bye-laws shall not derogate from the powers hereby conferred upon the Association who may also in the same way and for the same purpose from time to time pass and bring into effect new Bye-laws and rescind or alter or add to any existing Bye-law by resolution passed by a majority of two-thirds at the least of the Members present and voting at a General Meeting previous to which at least fourteen days' notice has been given that a Member intends at such meeting to propose the making of such bye-law or the rescission, alteration of or addition to a Bye-law or Bye-laws."

If therefore a bye-law could be made by the Association it is manifest that there is no limitation upon its powers such as is to be found in Article 64 which applies only to the Board. The validity of the bye-law therefore cannot be challenged by reference merely to the powers of the Board, because what is contemplated by section 11 is the power of the "recognised Association" to frame the bye-law. We have therefore no hesitation in rejecting the contention that the bye-law as framed contravenes the Rules of the Association.

Mr. Pathak next contended that the impugned bye-law was invalid because it operated retrospectively. This argument he presented under two heads. His first submission was that consistently with the rule that an enactment would not be construed as retrospective unless the same were to have that effect by express language or by necessary intendment, the impugned bye-law should be held to affect and close out only those contracts which were entered into after the date on which the bye-law came into operation and that if he was right in this construction, the impugned notification had gone beyond the powers conferred on the Com-



mission by the new bye-law. We are wholly unable to accept this submission as to the construction of the bye-law. The first paragraph of the bye-law by its last words points out the consequence of a notification by the Forward Markets Commission. It provides that if the Chairman were notified that the continuation of trading in hedge contracts for any delivery, etc., "was detrimental to the interests of the general public or the larger interests of the economy of India," then notwithstanding anything to the contrary contained in the Bye-laws of the Association or in any hedge, etc., contract the provisions contained in the second paragraph should have effect. If one had regard only to paragraph 1 and nothing more there might be some room for a plausible argument that subsisting contracts were not to be affected, though the expression "notwithstanding anything to the contrary contained in any hedge, etc. contract" would undoubtedly militate against any such contention. But such ambiguity if any is cleared by the provision in paragraph 2 which has effect on the notification under paragraph 1, for by express terms it refers to "every hedge contract" and "every on-call contract" "in so far as cotton is uncalled thereunder or in so far as the price has not been fixed thereunder". This therefore places it beyond doubt that executory contracts which were subsisting on the date of the notification were within its scope and were intended to be affected by it. And this, if anything more were needed, is made more certain by the reference in paragraph (2) to the provisions of clauses (3), (4) and (6) of Bye-law 52-A. Bye-law 52-A deals with cases where the Board of the Association resolves, to repeat its terms

"that a state of emergency exists or is likely to occur which makes free trading in forward contracts difficult and on obtaining the concurrence of the Forward Markets Commission, then notwithstanding anything to the contrary contained in these Bye-laws or in any forward contract made subject to these Bye-laws, the following provision shall have effect :

- ' (1) The Board shall at a meeting specially convened in this behalf,
- (a) fix a date for the purposes hereinafter contained,
- (b) fix settlement prices for forward contracts,
- (c) fix a special Settlement Day."

Clause (3) of Bye-law 52-A runs :

"52-A. (3) All differences arising out of every such contract between members shall be paid through the Clearing House on the Settlement Day fixed under clause (1) (c) hereof....."

Clause (4) :

"52-A. (4) All differences arising out of every such contract between a member and a non-member shall become immediately due and payable,"

and Clause (6) :

"52-A. (6) In hedge and on-call contracts entered into between a member and a non-member and in contracts to which clause (5) applies, any margin received shall be adjusted and the whole of the balance thereof, as the case may be, shall be immediately refundable."

It is thus clear that the entire machinery for resolving emergencies such as is contemplated by Bye-law 52-A includes the suspension of forward business together with the closing out of forward contracts of hedge and on-call types whose volume or nature had led to the emergency. It proceeds on the basis that the crisis could not be met unless subsisting contracts were closed out and, so to speak, a new chapter begun. That is the ratio underlying the combined effect of Bye-laws 52-AA and 52-A and in view of this circumstance the argument that on a reasonable construction of the amended bye-law it would apply to contracts to be entered into in future and not to subsisting contracts must be rejected.

If he was wrong in his argument that the bye-law on its proper construction did not affect subsisting contracts such as these of the Appellants, Mr. Pathak's further submission was, that the impugned bye-law was invalid and *ultra vires* of the Act because it purported to operate retrospectively affecting vested rights under contracts which were subsisting on the day on which the bye-law came into force.

Mr. Pathak invited our attention to a passage in Craies' Statute Law, 5th Edition, page 366 reading :

" Sometimes a statute, although not intended to be retrospective, will in fact have a retrospective operation. For instance, if two persons enter into a contract, and afterwards a statute is passed, which as Cockburn, C.J., said in *Duke of Devonshire v. Barrow, etc., Co.*<sup>1</sup>, 'engrafts an enactment upon existing contracts' and thus operates so as to produce a result which is something quite different from the original intention of the contracting parties, such a statute has, in effect a retrospective operation."

The bye-law in so far as it affects executory contracts requiring such contracts to be closed out on a day not originally contracted for and at a price fixed by law is in the above sense undoubtedly retrospective. The submission of learned Counsel was that though a Legislature which had plenary power in this regard could enact a statute having a retrospective operation, subordinate legislation, be it a rule, a bye-law or a notification, could not be made so as to have retrospective operation and that to that extent the rule, bye-law or notification would be *ultra vires* and would have to be struck down, relying for this position on the decision of the Mysore High Court reported in *India Sugars and Refineries Ltd. v. State of Mysore*<sup>2</sup>. We do not however consider it necessary to canvass the correctness of this decision or the broad propositions laid down in it. It is clear law that a Statute which could validly enact a law with retrospective effect could in express terms validly confer upon a rule-making authority a power to make a rule or frame a bye-law having retrospective operation and we would add that we did not understand Mr. Pathak to dispute this position. If this were so the same result would follow where the power to enact a rule or a bye-law with "retrospective effect" so as to affect pending transactions, is conferred not by express words but where the necessary intendment of the Act confers such a power. If in the present case the power to make a bye-law so as to operate on contracts subsisting on the day the same was framed, would follow as a necessary implication from the terms of section 11, it would not be necessary to discuss the larger question as to whether and the circumstances in which subordinate legislation with retrospective effect could be validly made.

Before proceeding further it is necessary to notice a submission that under the Act, far from there being a conferment of a power to make a bye-law so as to affect rights under subsisting contracts, there was a contra indication of such a power being conferred. In this connection Mr. Pathak invited our attention to the terms of sections 16, 17 and 19 of the Act under which the Act has itself made special provision for affecting rights such as those of the appellants in the present case. Detailing the consequences of a notification under section 15, section 16 (a) enacts :—

"16. (a) Every forward contract for the sale or purchase of any goods specified in the notification, entered into before the date of the notification and remaining to be performed after the said date and which is not in conformity with the provisions of section 15, shall be deemed to be closed out at such rate as the Central Government may fix in this behalf."

Section 17 (3) enacts :—

"17. (3) Where a notification has been issued under sub-section (1), the provisions of section 16 shall, in the absence of anything to the contrary in the notification, apply to all forward contracts for the sale or purchase of any goods specified in the notification entered into before the date of the notification and remaining to be performed after the said date as they apply to all forward contracts for the sale or purchase of any goods specified in the notification under section 15."

and section 19 (2) runs :—

"19. (2) Any option in goods which has been entered into before the date on which this section comes into force and which remains to be performed, whether wholly or in part, after the said date shall, to that extent, become void."

Based on these provisions the submission was that the Act had made special provisions for retrospective operation of certain notifications so as to affect rights under subsisting contracts and that in cases where there was no such specific provision it was not intended that a bye-law or a notification could have that effect.

We see no force in this argument. The fact that the Act itself makes provision for subsisting contracts being affected, would in our opinion far from supporting the appellants indicate that in the context of a crisis in forward trading the closing out of contracts was a necessary method of exercising control and was the mechanism by which the enactment contemplated that normally could be restored and healthy trading resumed.

If therefore we eliminate the provisions in sections 16, 17 and 19 as not containing any indication that a power to frame a bye-law with retrospective effect was withheld from the Association, the question whether such bye-law making power was conferred has to be gathered from the terms of section 11 itself. Thus considered we are clearly of the opinion that a power to frame a bye-law for emergencies such as those for which a Bye-law like 52-AA is intended includes a power to frame one so as to affect subsisting contracts for resolving crisis in Forward Markets. We have already referred to the terms of Bye-law 52-A which shows that when an emergency of the type referred to in section 11 (2) (o) arises it is not practicable to rescue a forward market from a crisis without (1) putting an end to forward trading; and (2) closing out subsisting contracts so as to start with a clean slate for the future. When therefore under section 11 (2) power is conferred to frame a bye-law to provide for :

“(o) the emergencies in trade which may arise and the exercise of powers in such emergencies including the power to fix maximum and minimum prices ;”

and this is read in conjunction with clause (g) reading :

“ regulating the entering into, making, performance, rescission and termination of contracts.....”

It is manifest that the section contemplates the making of a bye-law regulating the performance of contracts, the rescission and termination of contracts and this could obviously refer only to the bye-law affecting rights under contracts which are subsisting on the day the action is taken. It is therefore manifest that section 11 authorises the framing of a bye-law which would operate retrospectively in the sense that it affects rights of parties under subsisting contracts. Finally it should be borne in mind that ultimately what we are concerned in section 11 of the Act is the power of the Association to frame the bye-law, for if the Association could validly frame such a bye-law, the Central Government could under section 12 have a similar power. We did not hear any argument to establish that the Association had no such power.

There is one other aspect in which the same problem might be viewed and it is this : The contract entered into by the respondents purported to be one *under the bye-laws for the time being in force* and any change in the bye-laws therefore would seem to be contemplated and provided for by the contract itself, so that it might not be correct to speak of the new bye-law as affecting any accrued rights under contract. For when those bye-laws were altered the changes would get incorporated into the contracts themselves, so as to afford no scope for the argument that there has been an infringement of a vested right. In the view however which we have taken about the validity of the bye-law on the ground that it was well within the terms of sections 11 and 12 we do not consider it necessary to pursue this aspect further or to rest our decision on it.

What remains to consider is the challenge to the notification based on the ground that it was vitiated by having been issued *mala fide*. The ground of *mala fides* alleged was that the impugned notification was issued in order to prevent the Board of Directors of the Association from applying their minds and exercising their judgment which they were directed to do by the terms of the Consent Memo. filed on which the appeal from the judgment in C.S. No. 2 of 1956 was disposed of on 24th January, 1956. To the allegation made in this form in the petition the first res-

pondent, the Chairman of the Forward Markets Commission, filed an affidavit in the course of which he pointed out that the continuance of trading in futures was in the circumstances then prevailing in the market detrimental to the interests of the trade and that a conclusion on this matter had been reached by the Commission even before Bye-law 52-AA was amended, that the question of closing out existing contracts was engaging the attention of even the Board of the Association from as early as the beginning of January, 1956 and it was for the purpose of enabling the Commission to take action to set right matters that Bye-law 52-AA was amended and that immediately the amended bye-law came into force the Commission took action and issued the notification now impugned. He also pointed out that the liberty given to the Association to consider the matter under the terms of the Compromise Memo. was a factor which had also been taken into account before the notification had been issued. The learned Judges of the High Court accepted this explanation of the circumstances in which the notification came to be issued and considered that on the allegation in the petition no *mala fides* could be inferred. We are in entire agreement with the learned Judges of the High Court on this point. No personal motive or *mala fides* in that sense has been attributed to the members of the Commission and in these circumstances we consider that there is no basis for impugning the notification on the ground that it was not issued *bona fide*.

This completes all the points urged by the learned Counsel for the appellants. We consider that there is no merit in the appeal which fails and is dismissed with costs.

*Subba Rao, J.*—I regret my inability to agree with the judgment prepared by my learned brother Rajagopala Ayyangar, J. As the facts have been fully stated in the judgment of my learned brother, I need not repeat them except to the extent necessary to appreciate the two points on which I propose to express my opinion.

The appellants carry on business in Cotton under the name and style of Indramani Pyarelal Gupta & Co. The said firm is a member of the East India Cotton Association Limited, which is a recognized Association within the meaning of the Forward Contracts (Regulation) Act, 1952, hereinafter called "the Act". The Association has been formed for the purpose of, *inter alia*, promoting and regulating trade in cotton and providing a Cotton Exchange and a Clearing House. Under the Act a Forward Markets Commission was formed by the Central Government and respondent 1 is its Chairman and respondents 2 and 3 are its Members. Prior to 21st January, 1956, on behalf of themselves and their constituents, the appellants entered into hedge contracts in cotton for February, 1956 and May, 1956 Settlements with other members of the Association in accordance with its Bye-laws. When the said contracts were effected, Bye-law 52-AA ran as follows :

"(1) Whether or not the prices at which cotton may be bought or sold are at any time controlled under the provisions of the Essential Commodities Act, 1955, if the Textile Commissioner with concurrence of the Forward Markets Commission and after consultation with the Chairman, be of opinion that the continuation of hedge trading is likely to result in a situation detrimental to the larger interests of the economy of India and so informs the Board, the Board shall forthwith cause a notice to be posted on the Notice Board to that effect and on the posting of such notice and notwithstanding anything to the contrary contained in these Bye-laws or in any hedge or on-call contract made subject to these Bye-laws, the following provisions shall take effect.

(2) Every hedge contract and every on-call contract in so far as the cotton is uncalled thereunder or in so far as the price has not been fixed thereunder, entered into between a member and a member or between a member and a non-member then outstanding shall be deemed closed out at such rate, appropriate to such contract, as shall be fixed by the Textile Commissioner and the provisions of clauses (3), (4) and (6) of Bye-law 52-A, in so far as they apply to hedge and on-call contracts, shall apply as if they formed part of this Bye-law. After the affixation of the said notice on the Notice Board, trading in hedge and on-call contracts shall be prohibited until the Textile Commissioner with the concurrence of the Forward Markets Commission and after consultation with the Chairman permits resumption."

On 21st January, 1956 the Central Government, in exercise of powers conferred upon it by sub-section (1) of section 12 of the Act, notified a new Bye-law 52-AA to be substituted in place of the earlier Bye-law 52-AA. The new bye-law reads as follows :

"(1) Whether or not prices at which cotton may be bought or sold are at any time controlled under the provisions of the Essential Commodities Act, 1955, if the Forward Markets Commission is of the opinion that continuation of trading in hedge contract for any delivery or deliveries is detrimental to the interest of the trading or the public interest or the larger interests of the economy of India and so notified the Chairman, then notwithstanding anything to the contrary contained in these Bye-laws or in any hedge or on-call contract made subject to these Bye-laws the following provisions shall take effect.

(2) Every hedge contract and every on-call contract in so far as cotton is uncalled thereunder and relating to the delivery or deliveries notified under clause (1) entered into between a member and a member or between a member and non-member then outstanding shall be deemed closed out at such rate appropriate to such contract and with effect from such date as shall be fixed by the Forward Markets Commission and the provisions of clauses (3), (4) and (6) of Bye-law 52-A in so far as they apply to hedge and on-call contracts shall apply as if they formed part of this Bye-law."

On 24th January, 1956, the Forward Markets Commission, in exercise of the power conferred on it under the new Bye-law, issued a notification closing out all contracts of February, 1956 and May, 1956 *Settlements* at the rates mentioned in the said notification. The petition for a writ of *mandamus* filed by the appellants in the High Court of Judicature at Bombay for ordering the respondents to cancel or withdraw the said notification dated 24th January, 1956, was dismissed in the first instance by Coyajee, J., and the appeal preferred against the judgment of Coyajee, J. was also dismissed by a Division Bench consisting of Chagla, C.J., and Tendolkar, J. Hence the appeal.

I propose, as I have already indicated, to consider the following two questions, as in the view I will be taking on those questions, the appeal will have to be allowed, and no other question, therefore, will arise for consideration. The said questions are : (1) Whether under section 12 (1) of the Act the Central Government has power to make a bye-law with retrospective effect ; and (2) whether under section 4 (f) of the Act, the Forward Markets Commission can exercise a power assigned to it under a bye-law made by the Government under section 12 of the Act.

Before considering the scope of the power of the Central Government under section 12 (1) of the Act, it is necessary to consider whether the new bye-law notified on 21st January, 1956, has retrospective effect. There are material differences between the old Bye-law 52-AA and the new one substituted in its place. Under the new Bye-law the important provision is that all hedge contracts outstanding at the time it came into force shall be deemed to be closed out at such rates as shall be fixed by the Textile Commissioner. Whereas under the old bye-law the Textile Commissioner had to form his opinion with the concurrence of the Forward Markets Commission and after consultation with the Chairman, under the new bye-law the said power of forming an opinion is conferred solely on the Forward Markets Commission. Whereas under the old Bye-law the opinion formed was in regard to the question whether hedge trading was likely to result in a situation detrimental to the larger interests of the economy of India, under the new Bye-law the opinion is in respect of the question whether the continuation of trading in hedge contracts will be detrimental to the interests of trading or the public interest or the larger interests of the economy of India. While under the old Bye-law the question to be considered was in regard to hedge trading as such, under the new Bye-law it is in respect of the continuation of trading in hedge contracts for any delivery or deliveries. While under the old Bye-law the said opinion was communicated to the Board for action, under the new Bye-law it is notified to the Chairman. While under the old Bye-law trading in hedge and on-call contracts could be resumed if the Textile Commissioner, with the concurrence of the Forward Markets Commission and after consultation with the Chairman, permitted the resumption, under the new Bye-law the said provision for resumption is omitted. It is, therefore, manifest that the power of closing out a contract under the new Bye-law differs from that under the old Bye-law in respect of the purpose of closing out, the authority empowered to order the close out and the consequences of such closing out. It is idle to contend that the new Bye-law makes only inconsequential changes in the old Bye-law. The new Bye-law operates upon an important term of a contract entered into before it came into

force, namely, the mode of performance: it carries on its face the vice of retroactivity. In Craies on Statutes, 5th Edition, page 366, the following passage appropriate to the question now raised is found:

".....if a statute is passed which renders the performance of a contract impossible, the rule of law is that the contract is frustrated by supervening impossibility, consequently in this case also the statute operates retrospectively."

The learned author proceeds to state at page 367:

"The principle of this case has been applied in later cases to contracts the performance of which in manner contemplated by the parties has been rendered impossible by reason of some change in the law."

It is, therefore, clear that the said Bye-law, in so far as it purports to affect the mode of performance of the pre-existing contracts, is certainly retrospective in operation. I am assuming for the purpose of the present question that the Bye-law cannot be construed in such a way as to confine its operation only to contracts that are entered into after it came into force. If so, the question arises whether the Central Government had power to make a Bye-law under section 12 (1) of the Act with retrospective effect. Section 12 (1) of the Act reads:

"The Central Government may, either on a request in writing received by it in this behalf from the governing body of a recognised association, or if in its opinion it is expedient so to do, make Bye-laws for all or any of the matters specified in section 11 or amend any Bye-laws made by such association under that section."

Section 11 enumerates the matters in respect of which the recognized associations can make Bye-laws for the regulation and control of forward contracts. Neither section 12 nor section 11 expressly states that a Bye-law with retrospective operation can be made under either of those two sections. Full effect can be given to both the sections by recognizing a power only to make Bye-laws prospective in operation, that is, Bye-laws that would not affect any vested rights. In the circumstances, can it be held that the Central Government to which the power to make Bye-laws is delegated by the Legislature without expressly conferring on it a power to give them retrospective operation can exercise a power thereunder to make such Bye-laws. Learned counsel for the respondents contends that, as the Legislature can make a law with retrospective operation, so too a delegated authority can make a Bye-law with the same effect. This argument ignores the essential distinction between a Legislature functioning in exercise of the powers conferred on it under the Constitution and a body entrusted by the said Legislature with a power to make subordinate legislation. In the case of the Legislature, Article 246 of the Constitution confers a plenary power of legislation subject to the limitations mentioned therein and in other provisions of the Constitution in respect of appropriate entries in the Seventh Schedule. This Court, in *Union of India v. Madan Gopal Kobra*<sup>1</sup>, held that the Legislature can always legislate retrospectively, unless there is any prohibition under the Constitution which has created it. But the same rule cannot obviously be applied to the Central Government exercising delegated legislative power, for the scope of their power is not co-extensive with that of Parliament. This distinction is clearly brought out by the learned Judges of the Allahabad High Court in *Modi Food Products Ltd. v. Commissioner of Sales-tax, U.P.*<sup>2</sup>, wherein the learned Judges observed:

"A Legislature can certainly give retrospective effect to pieces of Legislation passed by it but an executive Government exercising subordinate and delegated legislative powers, cannot make legislation retrospective in effect unless that power is expressly conferred."

In *Strawboard Manufacturing Co., Ltd. v. Gutta Mill Worker's Union*<sup>3</sup> a question arose whether the Governor of U.P., who referred an industrial dispute to a person nominated by him with a direction that he should submit the award not later than a particular date could extend the date for the making of the award so as to validate the award made after the prescribed date. Reliance was placed upon section 21 of the U.P. General Clauses Act, 1904, in support of the contention that the power of amendment and modification conferred on the State Government under that section

1. (1954) S.C.J. 110 : 1954 S.C.R. 541.

2. A.I.R. 1956 All. 35.

3. (1953) 1 M.L.J. 427 : (1953) S.C.J. 104 : (1953) S.C.R. 439, 447-448.

might be so exercised as to have retrospective operation. In rejecting that contention, Das, J., as he then was, observed :

"It is true that the order of April 26, 1950, does *ex facie* purport to modify the order of February 18, 1950, but, in view of the absence of any distinct provision in section 21 that the power of amendment and modification conferred on the State Government may be so exercised as to have retrospective operation the order of April 26, 1960, viewed merely as an order of amendment or modification, cannot, by virtue of section 21, have that effect."

This decision is, therefore, an authority for the position that unless a statute confers on the Government an express power to make an order with retrospective effect, it cannot exercise such a power. The Mysore High Court in a considered judgment in *India Sugar and Refineries Ltd. v. State of Mysore*<sup>1</sup> dealt with the question that now arises for consideration. There, the Government issued three notifications, dated 9th April, 1956, 15th October, 1957 and 13th February, 1958 purporting to act under section 14 (1) of the Madras Sugar Factories Control Act, 1949, whereby cess was imposed on sugarcane brought and crushed in petitioner's factory for the crushing season 1955-56, 1956-57 and 1957-58 respectively. One of the questions raised was whether under the said section the Government had power to issue the notifications imposing a cess on sugarcane brought and crushed in petitioner's factory for a period prior to the date of the said notifications. Das Gupta, C.J., delivering the judgment of the Division Bench, held that it could not. The learned Advocate-General, who appeared for the State, argued, as it is now argued before us, that in a case where power to make Rules is conferred on the Government and if the provisions conferring such a power does not expressly prohibit the making of Rules with retrospective operation, the Government in exercise of that power can make Rules with retrospective operation. In rejecting that argument, the learned Chief Justice, delivering the judgment of the Division Bench, observed at page 332 :

"In my opinion a different principle would apply to the case of an executive Government exercising subordinate and delegated legislative powers. In such cases, unless the power to act retrospectively is expressly conferred by the Legislature on the Government, the Government cannot act retrospectively."

With respect, I entirely agree with the said observations. The same question was again raised and the same view was expressed by the Kerala High Court in *C. W. Motor Service (P.) Ltd. v. State of Kerala*<sup>2</sup>. There the Regional Transport Authority, Kozhikode, granted a stage carriage permit to the third respondent therein in respect of a proposed Ghat Route. The grant of the permit was challenged on the ground that when that order was passed there was no constituted Regional Transport Authority for the district. It was contended on behalf of the contesting respondent that the said defect was cured by a subsequent notification issued by the Government whereby the Government ordered the continuance of the Road Transport Authority from the date of the expiry of the term of the said authority till its successor was appointed. The High Court held that the notification with retrospective operation was bad. In that context, Varadaraja Iyengar, J., observed :

"The rule is well-settled that even in a case where the executive Government acts as a delegate of a legislative authority, it has no plenary power to provide for retrospective operation unless and until that power is expressly conferred by the parent enactment."

The House of Lords in *Howell v. Falmouth Boat Construction Co. Ltd*<sup>3</sup> expressed the same opinion and also pointed out the danger of conceding such a power to a delegated authority. There, a licence was issued to operate retrospectively and to cover works already done under the oral sanction of the authority. Their Lordships observed :

"It would be a dangerous power to place in the hands of Ministers and their subordinate officials to allow them, whenever they had power to license, to grant the licence *ex post facto* ; and a statutory power to license should not be construed as a power to authorise or ratify what has been done unless the special terms of the statutory provisions clearly warrant the construction."

It is true that this is a case of a licence issued by an authority in exercise of a statutory power conferred on it, but the same principle must apply to a Bye-law made by an

1. A.I.R. 1960 Mys. 326.

2. A.I.R. 1959 Ker. 347, 348.

3. L.R. (1951) A.C. 837.

authority in exercise of a power conferred under a statute. Our Constitution promises to usher in a Welfare State. It involves conferment of powers of subordinate legislation on government and governmental agencies affecting every aspect of human activity. The regulatory process is fast becoming an ubiquitous element in our life. In a Welfare State, perhaps, it is inevitable, for the simple reason that Parliament or Legislature cannot be expected to provide for all possible contingencies. But there is no effective machinery to control the rule-making powers, or to prevent its diversion through authoritarian channels. If the conferment of power to make delegated legislation *proprio vigore* carried with it power to make a rule or Bye-law with retrospective operation, it may become an instrument of oppression. In these circumstances, it has been rightly held that the provisions conferring such a power must be strictly construed and unless a statute expressly confers a power to make a rule or bye-law retrospectively, it must be held that it has not conferred any such power. It is said that such a strict construction may prevent a rule-making authority from making a rule in an emergency, though the occasion demands or justifies a rule with retrospective effect. The simple answer to this alleged difficulty is that if the Legislature contemplates or visualizes such emergencies, calling for the making of such rules or Bye-laws with retrospective effect, it should expressly confer such power. It is also said that the Government can be relied upon to make such rules only on appropriate occasions. This Court cannot recognise implied powers pregnant with potentialities for mischief on such assumptions. That apart, the scope or ambit of a rule cannot be made to depend upon the status of a functionary entrusted with a rule-making power. In public interest the least the Court can do is to construe the provisions conferring such a power strictly and to confine its scope to that clearly expressed therein.

Applying that rule of strict construction, I would hold that section 12 (1) does not confer a power on the Central Government to make a Bye-law with retrospective effect and, therefore, the new Bye-law made on 21st January, 1956, in so far as it purports to operate retrospectively, is invalid.

Assuming that it is permissible to infer such a power by necessary implication, can it be said that it is possible to so imply under section 12 of the Act? The phrase "necessary implication", as applied in the law of statutory construction, means an implication that is absolutely necessary and unavoidable; that is to say, a Court must come to the conclusion that unless such an implication is made, the provisions of the section could not be given full effect on the wording as expressed therein. Under section 12 of the Act, the Central Government may either on a request in writing received by it from the governing body of a recognized association, or if in its opinion it is expedient so to do, make Bye-laws for all or any of the matters specified in section 11 or amend any Bye-law made by such association under that section. Now section 11 says that any recognized association may, subject to the previous approval of the Central Government, make Bye-laws for the regulation and control of forward contracts; under sub-section (2) thereof, the association is authorized to make laws providing for any of the matters mentioned therein. A glance at those matters shows that all the Bye-laws providing for those matters could be framed without giving section 12 any retrospective effect. It is said that section 11 (o) gives an indication that a bye-law contemplated by that sub-clause must necessarily provide for its retrospective operation. It reads:

"the emergencies in trade which may arise and the exercise of powers in such emergencies including the power to fix maximum and minimum prices;"

The learned Solicitor-General contends that an occasion may arise when by a determined action of a "bear" or a "bull" the rates may shoot up beyond a reasonable level or fall down steeply below a particular point creating an emergency in the market and in that emergency it would be necessary for the authorities concerned to step in and close out the contracts, and unless the bye-law is made retrospective such an emergency cannot be met and, therefore, the power to make a Bye-law to meet an emergency contemplated in section 11 (o) of the Act must necessarily imply a power to make a Bye-law retrospectively. There is an underlying fallacy in this argument. The conferment of a power on the Government to make a Bye-law with retrospective



operation must be absolutely necessary and unavoidable to provide for the matter mentioned in sub-clause (o) of section 11 or any other clause of sub-section (2) of section 11. A Bye-law could certainly be made to provide for an emergency visualized by the learned Solicitor-General or for any other emergency contemplated by that clause with only prospective operation. It cannot, therefore, be said that unless retrospective operation was given to the provisions of section 12, the objects of the legislation would be defeated or the purposes for which the power was conferred could not be fulfilled. I, therefore, hold that section 12 (1) of the Act does not confer any such power on the Central Government by necessary implication.

The second question turns upon the interpretation of section 4 of the Act. It reads :

“The functions of the Commission shall be—

(a) to advise the Central Government in respect of the recognition of, or the withdrawal of recognition from, any association or in respect of any other matter arising out of the administration of this Act ;

(b) to keep forward markets under observation and to take such action in relation to them as it may consider necessary, in exercise of the powers assigned to it by or under this Act ;

(c) to collect and whenever the Commission thinks it necessary publish information regarding, the trading conditions in respect of goods to which any of the provisions of this Act is made applicable including information regarding supply, demand and prices, and to submit to the Central Government periodical reports on the operation of this Act and on the working of forward markets relating to such goods ;

(d) to make recommendations generally with a view to improving the organisation and working of forward markets ;

(e) to undertake the inspection of the accounts and other documents of any recognized association or registered association or any member of such association whenever it considers it necessary ; and

(f) to perform such other duties and exercise such other powers as may be assigned to the Commission by or under this Act, or as may be prescribed.”

Two questions arise under this section, namely, (i) whether the duties imposed and the powers conferred on the Commission under clause (f) of section 4 shall be read *ejusdem generis* with those imposed or conferred under clauses (a) to (e), and (ii) whether the powers assigned to the Commission by or under a bye-law can be performed by the Commission under clause (f). To appreciate the first question it would be necessary to know the constitution of the Commission and its role in the scheme of control provided by the Act. Under section 2 (b), “Commission” means the Forward Markets Commission established under section 3. Section 3 empowers the Central Government to

“establish a Commission to be called the Forward Markets Commission for the purpose of exercising such functions and discharging such duties as may be assigned to the Commission by or under this Act.”

Clauses (a) to (e) of section 4 show that the functions of the Commission are wholly supervisory and advisory in nature. It keeps the forward markets under observation, collects and publishes information, undertakes the inspection of the accounts and other documents and makes recommendations to the Central Government in respect of matters mentioned in that section. Under section 8 (2) (e), the Central Government may also direct the Commission to inspect the accounts and other documents of any recognized association or any of its members and submit its report thereon to the Central Government. It is, therefore, manifest that the Commission has no administrative functions or powers of management or powers of interference in the internal management of the registered associations ; on the other hand, section 11 and the Bye-law framed thereunder—it is not necessary to go into them in detail—show that the regulation and control of the business of forward contracts and other business is entirely in the hands of the association. The doctrine of *ejusdem generis* is very well-settled. The expression “*ejusdem generis*” means “of the same kind”, and

“it is only an illustration or specific application of the broader, *maxim noscitur a sociis*, i.e., general and specific words which are capable of an analogous meaning, being associated together, take colour from each other, so that the general words are restricted to a sense, analogous, to the less general.”

While to invoke the application of the doctrine of *ejusdem generis* there must be a distinct genus or category, that is to say, the specific words preceding the general word must belong to the same class, the maxim *noscuntur a sociis* is of wider application. This Court in *The Western India Theatres Ltd. v. Municipal Corporation of the City of Poona*<sup>1</sup>, though it did not expressly say so, in my view, was dealing with the said two doctrines, and it observed therein :

“.....although the rule of construction based on the principle of *ejusdem generis* cannot be invoked in this case, for items (i) to (x) do not, strictly speaking, belong to the same genus, but they do indicate, to our mind the kind and nature of tax which the municipalities are authorized to impose.”

So, in the present case, it may be said that clauses (a) to (f) may not belong to the same class, but they indicate that the functions described in the said clauses, being supervisory and advisory in character, are so analogous to each other that they take colour from each other and therefore the general words following must be restricted to a sense analogous to the said functions. It is said that clause (f) provides for duties and powers, whereas clauses (a) to (e) only deal with functions and, therefore, clause (f) must be deemed to provide for altogether a different subject-matter. I cannot agree with this contention, for the heading of section 4 is “Functions of the Commission”, and the section opens out with the words “The functions of the Commission shall be” and the functions are mentioned in clauses (a) to (f). It is, therefore, manifest that the duties and powers mentioned in clause (f) are also functions. To put it differently, all the clauses deal with functions of the Commission. That apart, a power and a duty are, as often as not, the two facets of the same concept. Clauses (a) to (e) also though *ex facie* they read as if they impose only duties, on a closer scrutiny indicate that the duties cannot be exercised without the corresponding powers for the discharge of those duties. I would, therefore, hold that the duties and powers that may be assigned to the Commission under clause (j) can be only supervisory or advisory functions other than those mentioned in clauses (a) to (e). The power conferred on the Commission under the Bye-law made by the Government to close out contracts and thus terminate the contracts is neither an advisory nor a supervisory power, and, therefore, the Commission cannot legally exercise the same.

The second question turns upon the interpretation of the provisions of clause (f) of section 4. The said clause reads :

“to perform such other duties and exercise such other powers as may be assigned to the Commission by or under this Act, or as may be prescribed.”

The crucial words are “by or under this Act, or as may be prescribed.” Under section 2 (h) of the Act “prescribed” means “prescribed by Rules made under this Act”; and section 2 (k) defines “Rules” thus :

“‘Rules’, with reference to the rules relating in general to the constitution and management of an association, includes in the case of an incorporated association its memorandum and articles of association.”

If read with the definition of the word “prescribed” clause (f) indicates that the Commission can perform the functions assigned to it by or under the Act, or as may be prescribed by the Rules made under the Act. The specific mention of the Rules made under the Act in the clause makes its abundantly clear that the phrase “under the Act” excludes a rule made in exercise of the power conferred under the Act, for if the said phrase takes in a rule, the word “prescribed” becomes redundant. Such ineptitude and want of precision in drafting shall not be attributed to the Legislature, except for compelling reasons. If a rule was not comprehended by the phrase “under the Act”, it would be illogical to hold that it would take in a Bye-law. It would mean that the Legislature specially provided for a rule, which has certainly a higher status than a Bye-law in legislative practice, while it treated a bye-law as a provision of the Act : that cannot be. The other reason that may be suggested is that the word “prescribed” was used in superabundant caution

or by mistake. If superabundant caution was required to mention separately the Rules, greater caution would have been necessary to provide separately for a Bye-law. A Court ordinarily shall attempt to give meaning to every word used by the Legislature, unless it is impossible to do so. Here there is not only no such impossibility, but there is also a good reason for the Legislature in excluding the Bye-laws from the operation of clause (f) of section 4 of the Act.

Subordinate or delegated legislation takes different forms. Subordinate legislation is divided into two main classes, namely, (i) statutory rules, and (ii) Bye-laws or regulations made, (a) by authorities concerned with local government, and (b) by persons, societies, or corporations. The Act itself recognizes this distinction and provides both for making of the Rules as well as Bye-laws. A comparative study of sections 11 and 12 whereunder power is conferred on the Central Government and the recognized associations to make Bye-laws on the one hand, and section 28, whereunder the Central Government is empowered to make Rules on the other, indicate that the former are intended for conducting the business of the association and the latter for the purpose of carrying into effect the objects of the Act. In considering the question raised in this case this distinction will have to be borne in mind.

It would be unreasonable to assume that a private association, though registered under the Act, could confer powers on a statutory authority under the Act. That is why under section 4 (f), the Legislature did not think fit to provide for the assignment of a function to the Commission in exercise of a power under a Bye-law. The non-mention of Bye-laws in clause (f) is not because of any accidental omission but a deliberate one, because of the incongruity of an assignment of a function to the Commission under a Bye-law. I would, therefore, construe the words "by or under this Act, or as may be prescribed" as follows: "by this Act" applies to powers assigned *proprio vigore* by the provisions of the Act; "under this Act" applies to an assignment made in exercise of an express power conferred under the provisions of the Act; and "may be prescribed" takes in an assignment made in exercise of a power conferred under a rule. This construction gives a natural meaning to the plain words used in the section and avoids stretching the language of a statutory provision to save an illegal Bye-law. In this context two decisions are cited at the Bar. The first is that of the Judicial Committee in *Hubli Electricity Company Ltd. v. Province of Bombay*<sup>1</sup>. There, under section 3 (2) (f) of the Indian Electricity Act (IX of 1910) "the provisions contained in the Schedule shall be deemed to be incorporated with, and to form part of, every licence granted under this Part." Under section 4 (1) (a) of the said Act, "The Provincial Government may, if in its opinion the public interest so requires, revoke a licence," *inter alia*, if "the licensee in the opinion of the Provincial Government makes wilful and unreasonably prolonged default in doing anything required of him by or under this Act." Under sub-clause (6) of the Schedule, a licensee had to comply with certain conditions. The Government revoked the licence on the ground that the licensee did not comply with the conditions laid down in Schedule VI, which were deemed to be incorporated in the licence by virtue of section 3 (2), and therefore he did not do the thing required of him within the meaning of section 4 of that Act. The Privy Council held that the performance by the licensee of the conditions of the Schedule to the Act was clearly required to be made under the Act. This decision does not help us very much in the present case, as the question of Bye-law did not arise therein. Nor is the decision of the Madras High Court in *Naraswamy v. Krishnamurthi*<sup>2</sup> of any assistance. There the question was whether the regulations framed by the Life Insurance Corporation by virtue of the powers vested in it by Act XXXI of 1956 prohibiting the employees from standing for election fell within the meaning of the words "under any law" in Article 191 (1) (e) of the Constitution. The High Court held that the regulations were law made under the Act of Parliament. The conclusion was based on the principle that the rule

1. (1949) 2 M.L.J. 30 : (1948) L.R. 76 I.A. 57. 2. (1958) 1 M.L.J. 367; I.L.R. (1958) Mad. 513.

made in pursuance of the delegated power has the same validity and has the same characteristic as a law made directly by the Parliament. Apart from the fact that the words to be construed there were different and in a sense wider than the words to be construed in the present case, the principle accepted in the decision is only of a general application and does not help to construe the specific words of clause (f) of section 4; their meaning can be gathered only by interpreting the said words, having regard to the setting and the context in which they are used.

For the foregoing reasons, I would hold that the Government had no power under section 12 of the Act to make a bye-law assigning any function to the Commission. It follows that the notification dated 24th January, 1956, by the Forward Markets Commission was illegal and the appellants would be entitled to the issue of a writ of *mandamus* in the terms prayed for. In the result, the appeal is allowed with costs.

*Sinha, C.J.*—In view of the judgment of the majority, the appeal stands dismissed with costs.

V.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, J. L. KAPUR, M. HIDAYATULLAH, J. C. SHAH AND J. R. MUDHOLKAR: JJ.

The Commissioner of Income-tax, Madras and another

.. *Appellants\**

*v.*

S. V. Angidi Chettiar

.. *Respondent.*

*Income-tax Act (XI of 1922), section 28 (1) (c)*—*Penalty under—If can be levied on a dissolved firm.*

The penalty provisions under section 28 of the Income-tax Act, would in the event of the default contemplated by clause (a), (b) or (c) be applicable in the course of assessment of a registered firm. If a registered firm is exposed to liability of paying penalty, by committing any of the defaults contemplated by clause (a), (b) or (c) by virtue of section 44, notwithstanding the dissolution of the firm the assessment proceedings are liable to be continued against the registered firm, as if it has not been dissolved.

Appeals from the Judgment and Order dated the 3rd May, 1957, of the Madras High Court in Writ Petitions Nos. 943 to 945 of 1955.†

*K. N. Rajagopal Sastri*, Senior Advocate (*P. D. Menon*, Advocate, with him), for Appellants.

*V. S. Venkataram* and *K. P. Bhat*, Advocates for Respondent.

The Judgment of the Court was delivered by

*Shah, J.*—These are three appeals with certificates of fitness granted by the High Court of Madras against orders passed in Petitions for the issue of writs of *certiorari* setting aside orders imposing penalty upon the firm of Messrs. S. V. Veerappan Chettiar & Co., passed by the Income-tax Officer under section 28 (1) (c) of the Indian Income-tax Act.

Four persons carried on business in cloth at Virudhunagar in the name and style of S. V. Veerappan Chettiar & Co.—hereinafter called the firm. The firm was registered under section 26-A of the Income-tax Act, 1922, for the assessment years 1947-48, 1949-50 and 1950-51. The firm concealed particulars of its income in submitting its returns, and the Income-tax Officer, Virudhunagar, in the course of assessment proceedings directed, by order dated 20th May, 1954, payment of penalty of Rs. 20,000 for the year 1947-48, Rs. 10,000 for the year 1949-50 and Rs. 5,000 for the year 1950-51. Against the orders imposing penalty, one of the partners

\* Civil Appeals Nos. 6 to 8 of 1961.

18th January, 1962.

† (1957) 2 M.L.J. 286.

of the firm moved the Commissioner of Income-tax, Madras, in revision but without success. Thereafter, petitions under Article 226 of the Constitution for issue of writs of *certiorari* or other appropriate writs calling for records relating to the orders dated 20th May, 1954, passed by the Income-tax Officer, Virudhunagar, in respect of the three assessment orders and the record relating to the order of the Commissioner and for quashing the penalty orders were filed by the two partners of the firm in the High Court at Madras. It was submitted by the petitioners that by agreement between the partners the firm stood dissolved on 13th April, 1951 and intimation in that behalf was given to the Income-tax Officer, and that in any event the firm stood dissolved on 5th May, 1953, when one of the partners died and the Income-tax Officer could not, in exercise of the power under section 28(1) make an order imposing penalty after dissolution of the firm. The High Court accepted the plea of the petitioners and directed that the orders of the Income-tax Officer dated 20th May, 1954 and the further action of the Commissioner thereon declining to revise the order of the Income-tax Officer in each of the petitions be set aside. Against the orders passed by the High Court the Commissioner appeals to this Court.

This Court in a recent judgment—*C. A. Abraham v. Income-tax Officer, Kottayam and another*<sup>1</sup>.—held that the Income-tax Officer had power under section 28 of the Income-tax Act to impose penalty in the course of assessment of a firm even if the firm stood at the date of the order dissolved by the death of one of its partners. In so holding, this Court observed that section 44 of the Income-tax Act sets up machinery for assessing tax liability of a firm which has discontinued its business and that the expression “assessment” in the different sections of Chapter IV of the Income-tax Act was not used merely in the sense of computation of income, and when section 44 declared that the partners or members of the firm shall be jointly and severally liable to assessment, it referred to the liability to computation of income under section 23 as well as the application of the procedure for declaration and imposition of tax liability and the machinery for enforcement thereof.

Counsel for the respondents, however, contended that *C. A. Abraham's case*<sup>1</sup> was one of an unregistered firm and the principle of that case has no application where the firm is a registered firm. But section 44 makes the provisions of Chapter IV, so far as may be, applicable to assessment when any business, profession or vocation carried on by a firm has been discontinued: the section declares liability of all discontinued firms and not merely of unregistered firms. There is nothing in section 44 or the context in which it occurs, to indicate that it does not apply to registered firms. This Court in *C. A. Abraham's case*<sup>1</sup> approved the decision of the Andhra Pradesh High Court in *Mareddy Krishna Reddy v. Income-tax Officer, Tenali*<sup>2</sup>, which was a case of a registered firm, which was dissolved before imposition of penalty.

Counsel then argued that in any event, no penalty under section 28 can be imposed against a registered firm either before or after dissolution, even if the defaults set out in clauses (a), (b) or (c) are proved. This, counsel submits, is the result of the scheme of the Act under section 23(5) for assessment of tax liability of a registered firm. This plea was not set up in the petition, and there is no reference to it in the judgment of the High Court and even in the statement of the case filed in this Court there is no trace of it. On that ground alone the plea raised by the appellant is liable to be rejected. Even if the appellant is permitted to raise the contention there is, in our judgment, no force in it. Section 28(1) of the Act (in so far as it is material to these appeals) provides:

“If the Income-tax Officer \* \* \* \* \* in the course of any proceedings under this Act is satisfied that any person—

(a) has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under sub-section (1) or sub-section (2) of section 22 or section 34 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by such notice, or

1. (1961) 1 S.C.J. 673; (1961) 1 M.L.J. (S.C.). 2. (1957) 1 An.W.R. 207; (1957) 31 I.T.R. 183; (1961) 1 An. W.R. (S.C) 183. 67s.

(b) has without reasonable cause failed to comply with a notice under sub-section (4) of section 22 or sub-section (2) of section 23, or

(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income,

he or it may direct that such persons shall pay by way of penalty, in the case referred to in clause (a), in addition to the amount of the income-tax and super-tax, if any, payable by him, a sum not exceeding one and a half times that amount, and in the cases referred to in clauses (b) and (c), in addition to any tax payable by him, a sum not exceeding one and a half times the amount of the income-tax and super-tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income."

The expression "person" is defined in section 2 (a) of the Act as including "a Hindu undivided family and a local authority. That evidently is not an exhaustive definition and recourse is permissible to the General Clauses Act which says in section 3(42) that a "person" includes "any company or association or body of individuals whether incorporated or not". A firm is manifestly a body of individuals and would therefore fall within the definition of "person", and may be exposed to an order for payment of penalty in the circumstances set out in clauses (a), (b) and (c) of section 28 of the Income-tax Act. That a firm, registered or un-registered, may be liable to pay penalty has been further clarified by Proviso (d) which declares the quantum of penalty payable by firms, registered as well as un-registered. Counsel for the respondent however contends that even if a firm be regarded as a person within the meaning of the operative part of section 28 and the Proviso thereof, because of an obvious defect in drafting no liability for payment of penalty can be imposed upon a registered firm and in support of that contention he relies upon the last clause of the 1st sub-section which provides for imposition of penalty "in addition to any tax payable by him". Counsel submits that only the person liable to pay tax, may if found guilty of wrongful conduct specified in clauses (a), (b) and (c) be ordered to pay penalty, and by the scheme adopted by the Legislature for imposing tax liability upon registered firms under section 23 (5) tax is never payable by a registered firm. Counsel says that when the Legislature by Act XL of 1940 enacted clause (d) of the Proviso, only the quantum of penal liability of a registered firm was declared but the liability could not still be enforced because by the substantive provision, it depended solely upon the existence of an enforceable obligation of the firm, and so long as an obligation was not imposed upon the firm to pay tax by an adequate amendment of section 23 (5), the liability though quantified was unenforceable. It is urged that there were two defects in section 28(1), as originally drafted: (1) that the penalty could be imposed only upon a person who was liable to pay income-tax or super-tax, and (2) that the penalty which may be imposed was a multiple of the income-tax and super-tax, if any, which would have been avoided if the income as returned by such person would have been accepted as the correct income, and by the enactment of clause (d) to the Proviso, the second defect was removed, but not the first. In support of this argument, counsel relied upon section 23 (5) as it stood, before it was amended by section 14 of the Finance Act of 1956. The clause provided that where an assessee is a firm and the total income of the firm has been assessed under sub-section (1), sub-section (3) or sub-section (4), as the case may be, the sum payable by the firm shall not be determined but the total income of each partner of the firm, including therein his share of its income, profits or gains of the previous year shall be assessed and the sum payable by him on the basis of such assessment shall be determined. Under this scheme the income of the registered firm was to be computed but tax was not assessed on the total income of the registered firm: the income was distributed according to the terms of the agreement amongst the partners of the registered firm, and added to the separate income of the partners and tax was levied on the partners individually. Relying upon this scheme of levying tax, it was urged by counsel for the respondent that as the registered firm was not liable to pay tax it could be rendered liable to pay penalty under section 28 (1) (c).

Section 28, as it was originally enacted, was somewhat obscure. The penalty which could be imposed in cases referred to in clauses (b) and (c) was to be a sum not exceeding one and a half times the amount of the tax which would have been

avoided if the income as returned by such person had been accepted as the correct income. But the Legislature did not give any indication whether the penalty was related to the tax avoided by the partners of the firm, or by the firm on the footing that it was to be regarded as an unregistered firm. By section 23 (5), income-tax not being made payable by the firm but by the individual partners of a registered firm the legislative intention was not clearly expressed. The Legislature to rectify the defect fixed an artificial basis for computing the penalty payable by a registered firm : it provided that in the cases referred to in clauses (b) and (c), the amount of the income-tax and super-tax which would have been avoided if the income as returned had been accepted as the correct income, shall be taken to be the difference between the amount of the tax which would have been payable by an unregistered firm, on an income equal to the firm's total income. But the provision relating to imposition of liability to pay penalty by registered firms was clearly expressed. The assumption that the expression "any tax" used in section 28(1) is intended to indicate that there must be some tax payable by the assessee before penalty could be imposed is wholly unwarranted. The futility of the assumption is exhibited by the terms of clause (b). Penalty may be imposed for failure to comply with the notice under sub-section (4) of section 22 or sub-section (2) of section 23 even if the assessee has no assessable income. To the imposition of a penalty liability to pay tax by the person against whom the penalty is sought to be imposed is therefore not a condition precedent.

The Calcutta High Court in *Khushiram Murarilal v. Commissioner of Income-tax, Central, Calcutta*<sup>1</sup>, was called upon to deal with the submission made before us in this case. In that case the question which fell to be determined was whether imposition of a penalty on a registered firm under section 28 (1) (b) of the Income-tax Act was justified in law. It was urged in that case on behalf of the assessee—a registered firm—that inasmuch as under section 28 (1) (b) a person can be made liable to pay penalty, in addition to the amount of income-tax, and super-tax, if any, payable by him in cases falling under clauses (b) and (c), no order for payment of penalty can be made against a registered firm, because under the Income-tax Act no tax is made payable by the firm. Chief Justice Chakravarti, speaking for the Court, observed :

" . . . even when construed by its own language the concluding paragraph of section 28 (1) cannot be said to make it a condition precedent that a person must be liable to pay some income-tax or it may be also super-tax if he is to be made liable for a penalty. Clause (b) of the Proviso to my mind emphasizes that meaning of the concluding paragraph of section 28 (1) and rests on an assumption that under that provision a person may be chargeable to penalty although he may not be chargeable to tax."

The learned Chief Justice also observed :

" . . . it was not really necessary for clause (d) of the Proviso to enact specifically that a registered firm would be liable to pay a penalty despite the fact that it could not be charged and was not, in fact, charged to income-tax or super-tax. The whole argument of Dr. Sen Gupta was that the concluding paragraph of section 28 (1) had left a gap which had been attempted to be filled up by clause (d) of the Proviso, but the attempt had not been successful. In my view the gap which undoubtedly existed in the concluding paragraph of section 28 (1) was only an absence of a provision regarding the quantum of the penalty that could be levied from a registered firm because the quantum depends upon the amount of income-tax payable."

In our view the learned Chief Justice was right in so enunciating the law. Under section 23 (5) of the Indian Income-tax Act, before it was amended in 1956 in the case of a registered firm the tax payable by the firm itself was not required to be determined but the total income of each partner of the firm including therein the share of its income, profits and gains of the previous year was required to be assessed and the sum payable by him on the basis of such assessment was to be determined. But this was merely a method of collection of tax due from the firm.

The penalty provisions under section 28 would therefore in the event of the default contemplated by clauses (a), (b) or (c) be applicable in the course of assessment of a registered firm. If a registered firm is exposed to liability of paying penalty, by committing any of the defaults contemplated by clauses (a), (b) or (c) by

virtue of section 44, notwithstanding the dissolution of the firm the assessment proceedings are liable to be continued against the registered firm, as if it has not been dissolved.

Counsel contended that in any event, penalty for the assessment year 1949-50 could not be imposed upon the assessee firm because there was no evidence that the Income-tax Officer was satisfied in the course of any assessment proceedings under the Income-tax Act that the firm had concealed the particulars of its income or had deliberately furnished inaccurate particulars of the income. The power to impose penalty under section 28 depends upon the satisfaction of the Income-tax Officer in the course of proceedings under the Act; it cannot be exercised if he is not satisfied about the existence of conditions specified in clauses (a), (b) or (c) before the proceedings are concluded. The proceeding to levy penalty has, however, not to be commenced by the Income-tax Officer before the completion of the assessment proceedings by the Income-tax Officer. Satisfaction before conclusion of the proceeding under the Act, and not the issue of a notice or initiation of any step for imposing penalty is a condition for the exercise of the jurisdiction. There is no evidence on the record that the Income-tax Officer was not satisfied in the course of the assessment proceeding that the firm had concealed its income. The assessment order is dated the 10th of November, 1951, and there is an endorsement at the foot of the assessment order by the Income-tax Officer that action under section 28 had been taken for concealment of income indicating clearly that the Income-tax Officer was satisfied in the course of the assessment proceeding that the firm had concealed its income.

In our view, the High Court was in error in holding that penalty could not be imposed under section 28 (1)(c) upon the firm Messrs. S.V. Veerappan Chettiar & Co. after its dissolution.

The appeals will therefore be allowed and the orders passed by the High Court will be set aside and the petitions filed by the respondents dismissed with costs in this Court and the High Court. One hearing fee.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, J. L. KAPUR, M. HIDAYATULLAH, J. C. SHAH AND J. R. MUDHOLKAR, JJ.

The Income-tax Officer, Circle II, Madurai and another

.. *Appellants\**

v.

M. R. Vidyasagar

.. *Respondent.*

*Income-tax Act (XI of 1922), section 18-A, clause (6), Fifth Proviso enacted by Act (XXV of 1953)*  
—Scope—Applicability to assessments completed before Income-tax Officer before 1st April, 1952, but pending in appeal before the Appellate Assistant Commissioner or Appellate Tribunal.

The jurisdiction under the Fifth Proviso to clause (6) of section 18-A of the Income-tax Act enacted by Act XXV of 1953 may be exercised by the Income-tax Officer in all cases which are pending on 1st April, 1952 before the Income-tax Officer or any superior authority having under the Income-tax Act power to modify the assessment of income, or are commenced after that date where though the assessment was completed by the Income-tax Officer before 1st April, 1952, such assessments were modified in view of the orders passed by the Appellate Tribunal on 12th April, 1953 i.e., after the date on which Act XXV of 1953 came into operation, the Income-tax Officer has to exercise the powers with which he has been invested since April, 1952, if the circumstances of the case warrant such exercise.

Appeals from the Judgment and Order dated the 13th August, 1954, of the Madras High Court in Writ Petitions Nos. 743 and 748 of 1954.

K. N. Rajagopal Sastri, Senior Advocate (P. D. Menon, Advocate, with him), for Appellants.



The Judgment of the Court was delivered by

*Shah, J.*—These are two appeals with certificates of fitness granted by the High Court of Judicature at Madras against certain orders passed in Writ Petitions under Article 226 of the Constitution.

One Ramaswami Iyer—father of the respondent—was assessed to income-tax in the status of a Hindu undivided family. Ramaswami Iyer died in 1949 and the respondent M.R. Vidyasagar became the manager of the family. The family was a partner through its manager in a firm styled “The Madura Knitting Company”, and the share in the profits of the partnership which was registered under the Indian Income-tax Act was the principal source of its assessable income. Under section 18-A of the Indian Income-tax Act, the Hindu undivided family was liable to pay advance tax for each of the assessment years 1946-47, 1947-48 and 1948-49. The Income-tax Officer, Madura, issued notices under section 18-A (1) of the Indian Income-tax Act for payment of advance tax on the basis of the preceding year's income. It was open to the assessee to submit a revised estimate of his income under section 18-A (2) in respect of the year in question and Ramaswami Iyer—who was at the material time the manager—availed himself of the option to submit a revised estimate and estimated the income for each of the assessment years 1946-47 and 1948-49 at Rs. 45,000. The assessments of these two years were completed respectively on 28th November, 1950 and 29th February, 1951 and the income received from the Madura Knitting Company was included in the assessments under section 23 (5). The Income-tax Officer assessed the total income of the Hindu undivided family for the year 1946-47 at Rs. 1,01,335 and for the year 1948-49 at Rs. 3,10,697. As the total income assessed far exceeded the estimate of Rs. 45,000, submitted by the manager of the assessee family, the Income-tax Officer in making the assessment ordered the respondent to pay Rs. 6,999-12-0 and Rs. 36,687, respectively for the assessment years 1946-47 and 1948-49 as interest. In appeals against the orders of assessment by the Madura Knitting Company, by order dated 12th March, 1954 the Income-tax Appellate Tribunal reduced the income of the firm, and on that basis reduced the share of the family in the income of the firm for the year 1946-47 to Rs. 83,335 and for the year 1948-49 to Rs. 2,83,868. The Income-tax Officer, Madura in giving effect to the order passed by the Appellate Tribunal under the *Third Proviso* to section 18-A(6) reduced the interest to Rs. 4,358, for the year 1946-47 and to Rs. 32,714-10-0 for the year 1948-49 and called upon the respondent to pay the arrears of tax inclusive of interest so adjusted. The respondent then called upon the Income-tax Officer not to levy interest under section 18-A (6) submitting that the levy was illegal and unjustified, and in the alternative requested that the interest be waived under the powers vested under the *Fifth Proviso* to section 18-A (6) which was added by section 13 of the Indian Income-tax (Amendment) Act XV of 1953. The Income-tax Officer declined to accede to the request and the respondent's application to the Inspecting Assistant Commissioner for cancelling the levy of interest was also rejected. The respondent then moved two petitions (Nos. 743 and 748) under Article 226 of the Constitution in the High Court of Judicature at Madras for writs cancelling the orders imposing liability for payment of interest, contending that the levy of penal interest was opposed to law and was *prima facie*, unjustified on the facts and circumstances of the case. The respondent submitted that the levy of interest under section 18-A (6) was penal in character and could not be imposed upon the legal representative of the deceased manager who was not in any manner responsible for the original return filed by the firm of which the manager was a partner. He also contended that the levy was not warranted by the provisions of the Indian Income-tax Act inasmuch as in respect of the assessment years in question the respondent was not the assessee, that the delay in completing the assessment was not attributable either to the then manager of the family, Ramaswami Iyer or to himself and therefore, no liability for payment of interest could be imposed, and that in any event refusal to cancel the levy of interest was arbitrary and not based on any judicial exercise of discretion vested in the Income-tax Officer.

A Division Bench of the Madras High Court held that the provision imposing liability to pay interest under sub-section (6) of section 18-A was not opposed to law and could be enforced against the legal representative of the deceased manager, who was a

partner of the assessee firm. The High Court, however, was of the view that as the Income-tax Officer and the Inspecting Assistant Commissioner had failed to consider whether in the circumstances of the case, the reduction or waiver of the interest was justified, it be ordered that the Income-tax Officer do decide whether the petitioner had made out a case for the exercise of the discretion vested in the Income-tax Officer to waive or reduce the interest under the powers conferred on him by the *Fifth Proviso* of clause (6) of section 18-A. Against that order with certificates of fitness these appeals are preferred by the Commissioner of Income-tax.

Section 18-A which imposes liability upon the tax-payer to make advance payment of tax was incorporated into the Indian Income-tax Act by Act XI of 1944. That section enables the Income-tax Officer on or after the 1st day of April in any financial year, by order in writing, to require an assessee to pay to the Central Government in specified instalments income-tax and super-tax payable on so much of such income as is included in the assessee's total income of the previous year in respect of which he had been assessed. Under sub-section (2), if the assessee who is required to pay tax by an order under sub-section (1) estimates at any time before the last instalment is due that the part of his income to which the sub-section applies for the period which would be the previous year for an assessment for the year next following is less than the income on which he is required to pay tax and accordingly wishes to pay tax which is less than the amount he is required to pay, he may send to the Income-tax Officer an estimate of the tax payable by him, and pay tax as accords with his statement. It is, however, provided by sub-section (6) *inter alia* that where in any year the assessee had paid tax under sub-section (2) on the basis of his own estimate and the tax paid is less than 80 per cent of the tax determined on the basis of his regular assessment (so far as such tax relates to income to which the provisions of section 16 do not apply) simple interest at the rate of 6 per cent per annum from the 1st day of January in the financial year in which the tax was paid up to the date of the said regular assessment shall be payable by the assessee upon the amount by which the tax so paid falls short of the said 80 per cent. As originally enacted the liability to pay interest upon the amount by which the tax paid fell short of 80 per cent of tax was absolute. The Income-tax Officer had no discretion in the matter, and was bound to impose liability for payment of interest. But by section 13 of the Indian Income-tax (Amendment) Act, 1953 (XXV of 1953), an additional Proviso was enacted to sub-section (6) in the following form:

"Provided further that in such cases and under such circumstances as may be prescribed, the Income-tax Officer may reduce or waive the interest payable by the assessee."

This Proviso was given retrospective effect as from 1st April, 1952. Thereafter in exercise of powers conferred by section 59 the Central Board of Revenue added Rule 48 to the following effect :—

"48. The Income-tax Officer may reduce or waive the interest payable under section 18-A in the cases and under the circumstances mentioned below, namely :—

(1) Where the relevant assessment is completed more than one year after the submission of the return, the delay in assessment not being attributable to the assessee.

(2) Where a person is under section 43 deemed to be an agent of another person and is assessed upon the latter's income.

(3) Where the assessee has income from an unregistered firm to which the provisions of clause (b) of sub-section (5) of section 23 are applied.

(4) Where the "previous year" is the financial year or any year ending near about the close of the financial year and large profits are made after the 15th of March in circumstances which could not be foreseen.

(5) Any case in which the Inspecting Assistant Commissioner considers that the circumstances are such that a reduction or waiver of the interest payable under section 18-A (6) is justified."

The effect of the incorporation of the *Fifth Proviso* in section 18-A (6) and of Rule 48 was manifestly to authorise the Income-tax Officer in exercise of his discretion to relieve against the rigour of the inflexible rule originally enacted in clause (6) about payment of interest by the assessee when the tax paid by him on his estimate fell below 80 per cent of the tax payable on regular assessment.

The only question which falls to be determined in these appeals is whether the benefit of the *Fifth Proviso* to section 18-A (6) could be claimed in respect of the assessments of the income of the respondent's family which were completed by the Income-tax Officer before 1st April, 1952. The High Court was of the view that even if the assessment by the Income-tax Officer was completed before 1st April, 1952, if the final adjustment pursuant to the order of the Appellate Tribunal was made after that date the Income-tax Officer was competent, in exercise of the powers with which he was invested by the *Fifth Proviso* to clause (6) of section 18-A to reduce or waive the interest payable by the assessee and the Income-tax Officer having failed to exercise his discretion a case was made out for the issue of a writ under Article 226 of the Constitution directing that Officer to consider whether in the circumstances of the case relief may be granted to the respondent.

On behalf of the Commissioner of Income-tax it is urged that the power conferred by the *Fifth Proviso* may undoubtedly be exercised in those cases where assessment is completed on or after 1st April, 1952, but where the assessment was completed and liability to pay interest had crystallized under sub-section (6) as it originally stood, the Income-tax Officer has no power under the amended sub-section to reduce or waive the interest ordered to be paid by the assessee even if the proceedings in assessment are pending in appeal before the Appellate Assistant Commissioner or the Appellate Tribunal. It was urged that the interest under section 18-A (6) is payable upto the date of the regular assessment and if in the contingencies prescribed by section 18-A (6), as originally enacted liability to pay interest crystallized the Income-tax Officer could not, in exercise of a power invested by the amending Act re-open the order, because the Legislature had given to the amending statute only a partial retroactive operation, and its retroactivity could not be enlarged: to do so, would be plainly to defeat the plain intendment of the Legislature. It is unnecessary for the purpose of these appeals to consider whether an assessment which has become final before the date on which the *Fifth Proviso* came into operation, and which is not subject to any pending appeal, can be reopened and the benefit of the power conferred by the *Fifth Proviso* be afforded to an assessee. The question which falls to be determined is whether in an assessment subject to an appeal which is pending, or which may be lawfully filed, the power to reduce or waive the interest can be exercised. There is, in our judgment, inherent evidence in the rule indicating that such a power can be exercised even if the regular assessment is completed by the Income-tax Officer before 1st April, 1952. The power vested in the Income-tax Officer to reduce or waive interest payable by an assessee is exercisable "in such cases or such circumstances as may be prescribed" by the Rules. By Rule 48 the Income-tax Officer is given the power to reduce or waive interest payable under section 18-A (6) in the events specified therein. By the 1st clause of Rule 48 where the assessment is completed more than one year after the submission of the return—the delay in assessment not being attributable to the assessee—the power of the Income-tax Officer may be exercised. There is nothing in the rule which indicates that the power to grant relief may be exercised only before the regular assessment is completed by the Income-tax Officer. The terms of clauses (1) and (5) of the rule clearly support the view that the order reducing or waiving interest may be passed even after the order of assessment is made, and interest is included. Again, by making Act XXV of 1953 operative retrospectively from 1st April, 1952, the Legislature has evinced an intention that to regular assessments made between 1st April, 1952 and the date on which the Act was enacted, the *Fifth Proviso* to section 18-A (6) may apply. The argument that liability to pay interest crystallizes when the Income-tax Officer incorporates the direction for payment of interest, because the order is not made appealable has no force. The order for payment of interest was liable to be modified if the assessment of income was varied by the Appellate Assistant Commissioner, or by the Tribunal. It is true that interest could be charged up to the date of regular assessment by the Income-tax Officer but that does not support the theory of crystallisation of liability. If therefore the quantum of liability was capable of being altered even after the date of the regular assessment, the assumption made that the power to give relief against a rigid statutory provision should be

restricted to cases which are decided by the Income-tax Officer only after 1st April, 1952 is not warranted. The power of the Income-tax Officer arose only after 1st April, 1952, but there is nothing in the Act to show that it was to be exercised only in respect of assessments made by the Income-tax Officer after that date. In our judgment, the jurisdiction under the *Fifth Proviso* may be exercised by the Income-tax Officer in all cases which are pending on 1st April, 1952 before the Income-tax Officer or any superior authority having under the Income-tax Act power to modify the assessment of income, or are commenced after that date.

In the present case, the original assessments made by the Income-tax Officer in both the years in question were modified in view of the orders passed by the Appellate Tribunal in the assessment of the Madura Knitting Co. The order of the Appellate Tribunal was passed on 12th April, 1953, *i.e.*, after the date on which Act XXV of 1953 came into operation. After that date the Income-tax Officer was bound to give effect to the orders of the Appellate Tribunal and to adjust liability in computing the assessable income and the tax payable thereon. The Income-tax Officer being bound to adjust liability to pay interest under clause (6) of section 18-A, we see no reason why in adjusting that liability he may not exercise the powers with which he has been invested since April, 1952, if the circumstances of the case warrant such exercise.

In our view the High Court was right in holding that the Income-tax Officer had the power in the case of the assessments in question to exercise the authority conferred by the *Fifth Proviso* to section 18-A (6) and he having failed to exercise the discretion, a writ requiring him to consider whether a case is made out for the exercise of his discretion was properly issued.

These appeals therefore fail and are dismissed.

*Appeals dismissed.*

### THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT :—J. L. KAPUR, K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

The State of Bihar

.. *Appellant\**

*v.*

Kameshwar Prasad Verma

.. *Respondent.*

*Criminal Procedure Code (V of 1898), section 491 and Constitution of India (1950) Article 226—Petition for issue of writ of habeas corpus—Rule issued by High Court to respondent—Filing of proper return is essential.*

Where a rule is issued to the respondent on a petition for issue of writ of *habeas corpus* filing a proper return is necessary and insisted upon in most jurisdictions. Where it is not shown that there was any lawful authority under which the petitioner (who was undergoing sentence of rigorous imprisonment had been released under the provisions of the rules of the Jail Manual when the unexpired period was four months and three days on the ground that he was seriously ill) was re-arrested, in the absence of such lawful authority the petitioner's detention cannot be supported and is illegal and the remedy under Article 226 is rightly applicable.

Appeal by Special Leave from the Judgment and Order dated the 2nd June, 1958, of the Patna High Court in Criminal Misc. No. 124 of 1958.

S. P. Varma, Advocate, for Appellant.

A. S. R. Chari, Senior Advocate (D. P. Singh, R. K. Garg, S. C. Aggarwal and M. K. Ramamurthi, Advocates of M/s. Ramamurthi & Co., with him), for Respondent.

The Judgment of the Court was delivered by

*Kapur, J.*—The State of Bihar has brought this appeal against the judgment and order of the High Court of Patna and it arises out of proceedings under Article 226 of the Constitution and section 491 of the Criminal Procedure Code for a writ of *habeas corpus* in the matter of detention of one Bipat Gope. The present respondent was the petitioner in the High Court.

Bipat Gope, a resident of the district of Patna, was convicted under section 323 and section 324 read with section 511 of the Indian Penal Code and sentenced on 29th November, 1957, to six months' rigorous imprisonment by the High Court on appeal against acquittal under section 417 of the Code of Criminal Procedure but he was not taken into custody till 6th January, 1958 and even then he was kept under armed guard in the Patna Medical College Hospital in one of the paying wards, on the ground that he was seriously ill. On an application by the respondent and on the recommendation of the appropriate medical authority Bipat Gope was released by the District Magistrate on 11th March, 1958 under the rules of the Jail Manual when his unexpired period of imprisonment was four months and three days. The contention of the appellant State is that he was released under rule 549 which is the rule providing for conditional release of prisoners but the respondent challenges the factum of release under this rule. The sureties for Bipat Gope were called upon to produce him but as they had failed to do so notices were issued to them by an order dated 27th April, 1958, to show cause why their surety bonds should not be forfeited. By the same order non-bailable warrant for arrest was ordered to be issued.

On 29th April, 1958, Bipat Gope moved a petition under Article 226 against the order of the District Magistrate and the High Court directed on 1st May, 1958, that Bipat Gope should appear on Monday following which was 5th May, 1958, when the petition was to be taken up for preliminary hearing.

On 1st May, 1958, Bipat Gope appeared in the Court of the District Magistrate, Patna and made an application stating that he had filed the abovementioned petition in the High Court and that he had to appear there on Monday and he prayed that he be allowed an opportunity to present his case to the High Court and to avoid his maltreatment at the hands of the police of which he was apprehensive. There is no order on the record showing what the District Magistrate did but from the respondent's petition in the High Court it appears that the application before the District Magistrate was taken up by the Senior Deputy Collector, Patna, who ordered Bipat Gope to be taken into custody and sent him to jail. The earlier petition of Bipat Gope filed in the High Court was withdrawn on 2nd May, 1958.

The High Court heard the petition filed by the respondent on 5th May, 1958 and after some amendments were made the petition was allowed and Bipat Gope was ordered to be released from custody. The High Court held that the order of release by the District Magistrate of Patna above referred to was an order for his unconditional release and therefore he could not be re-arrested. It is against that order that the State has come to this Court by Special Leave, its application under Article 134 (1) (c) having been dismissed by the High Court.

On the petition under Article 226 filed by the respondent, the High Court issued a rule calling upon the appellant State to show cause why a writ of *habeas corpus* should not issue. It is unfortunate that no return was filed by the State and it is not clear from the record as to how exactly or under what authority Bipat Gope was taken into custody and under what authority the Jailor was detaining him in Jail. The order of the District Magistrate shows that a non-bailable warrant was ordered to be issued. The petition of the respondent shows that Bipat Gope was arrested under the order of the Senior Deputy Collector; what authority the Senior Deputy Collector had of ordering Bipat Gope's re-arrest is not clear from this record. The High Court has stated that Bipat Gope surrendered on 1st May, 1958, to whom he surrendered is not clear. It is also stated in the petition that non-bailable warrant of arrest was ordered to be withdrawn and the record was sent to the District Magistrate for confirmation who withdrew the non-bailable warrant ordered to be issued. When the record was sent to the District Magistrate for confirmation and what was done by the District Magistrate thereafter is also not shown. In the absence of a properly drawn up return accompanied by proper documents it is not possible to find out what exactly happened in regard to the re-arrest of Bipat Gope and it is for that reason that the filing of a proper return is necessary and is insisted upon in most jurisdictions.

It was argued on behalf of the appellant that the release of Bipat Gope was under rule 549 of the Jail Manual Rules which are issued under the Prisons Act and that releases thereunder are conditional. The appellant was anxious to get the opinion of this Court as to the true meanings and extent of rule 549 under which, according to the appellant, Bipat Gope was released. On this record it is not clear as to the rule under which he was released. It appears from the petition of the respondent under Article 226 that the respondent made an application for the release of Bipat Gope on the ground that he was seriously ill. There are on the record certificates by Dr. V. N. Sinha, F. R. C. S., Professor of Clinical Surgery at the Patna Medical College, stating the disease Bipat Gope was suffering from and that he was not improving under the treatment he was being given. It was also stated therein that he would improve if he was released. This was on 21st February, 1958. The Civil Surgeon of Patna on 1st March, 1958, again enquired from Dr V. N. Sinha if the prisoner (Bipat Gope) was in danger of death from illness. Upon this on March 3, 1958, Dr. V. N. Sinha said :—

“The complications of the disease *i.e.*, of ventral hernia, peptic ulcer and stress and strain syndrome sometime prove fatal,”

and on 5th March, 1958, it was stated that he was in danger of death but was likely to improve if released. The Superintendent of District Jail, Patna, sent a letter to the District Magistrate giving all these various particulars. Upon that a note was made by Judicial Peshkar in which he stated :

“In this connection Jail Manual Rule 548 (1) and (2) and (3) and Rule 549 may be seen. The District Magistrate has power to pass order for the release of the prisoner, if the petitioner's sentence does not exceed six months under the above rules. From the sentence sheet of release from the Jail authority it appears that the prisoner has only 4 (four) months and 3 (three) days unexpired period of sentence. These rules may kindly be seen and necessary orders passed.”

The order of the District Magistrate was “Allowed release in the circumstances”. It is not clear from this as to the rule under which Bipat Gope was released. It was contended on behalf of the appellant that the release must have been under rule 549 and not under any other rule and in support reliance is placed on the release order of Bipat Gope which is in Form No. 105. That Form mentions rules 548, 549 and 552 and the rule which was not appropriate had to be scored out but none of these rules was scored out. But at the bottom of the Form there is a declaration of two persons who stated that they are willing to take charge of Bipat Gope and bound themselves to surrender him at any time before the date of his expiry, *i.e.*, 9th July, 1958 if required to do so. Here it may be stated that the purport of the relevant rules is set out in Form 105 as follows :—

“(i) Rule 548—There is no hope of his recovery either in or out of Jail ; I consider it desirable that he be allowed the comfort of dying at home.

(ii) Rule 549—The prisoner is in danger of death from illness and there is probability of his recovery if he is released.”

On the basis of the order of the District Magistrate which is referred to above dated 7th March, 1958 and from Form 105 it was submitted that the release must have been under rule 549. The orders on the record do not make that clear. Neither the order of the District Magistrate nor the Form 105 shows that Bipat Gope was released under rule 549 and not under any other rule. The State has not cared to make it clear in any return made on an affidavit filed as to the rule under which Bipat Gope was released and then it is not shown as to what lawful authority there was for his re-arrest. In this connection the observations of Lord Atkin in *Eshugbayi Eleko v. The Officer Administering The Government of Nigeria & another*<sup>1</sup>, are appropriate and applicable :

“In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice. And it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the executive.”

It is the same jurisprudence which has been adopted in this country on the basis of which the Courts of this country exercise jurisdiction. It has not been shown in

this case that there was any lawful authority under which Bipat Gope was re-arrested and in the absence of such lawful authority Bipat Gope's detention cannot be supported and is illegal. In the circumstances the remedy under Article 226 is rightly applicable to the facts of this case.

We therefore dismiss this appeal.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT :—J. L. KAPUR, K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

Achyut Adhichary

.. Appellant\*

v.

The State of West Bengal

.. Respondent.

*Constitution of India (1950), Article 134 (1) (c)—Mere error of fact or mere delay in delivering judgment—If justifies certifying the case as fit one for appeal to the Supreme Court.*

It is not open to a High Court to give certificates of fitness under clause (c) of Article 134 (1) of the Constitution of India merely because in its opinion the judgment of the Court delivered by another Bench suffers from an error in regard to certain facts. A mere ground of delay in giving a judgment does not fall within the words "fit one for appeal to the Supreme Court" even if it is felt by the High Court that the delay might have led to omission to consider arguments on questions of fact and law. If a party had any such real grievance it was open to him to apply to the Supreme Court under Article 136, but the mere ground of delay is not a ground on which the High Court can certify a case to be fit one for appeal to the Supreme Court.

Appeal from the Judgment and Order dated the 18th September, 1959, of the Calcutta High Court, in Government Appeal No. 14 of 1958.

Ram Lal Anand, Senior Advocate (Ganganarayan Chandra and D. N. Mukherjee, Advocates, with him, for Appellant.

K. B. Bagchi, S. N. Mukerji and P. K. Bose, Advocates, for Respondent.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal against the Judgment and Order of the High Court of Calcutta in which a preliminary objection has been taken that the certificate under Article 134 (1) (c) is not a proper certificate and should therefore be cancelled. A further question would arise as to whether it is a case in which Special Leave to appeal should be granted under Article 136 if we find that the preliminary objection is well founded.

The appellant was tried for murder under section 302 of the Indian Penal Code in the Court of the Additional Sessions Judge at Alipore sitting with a jury. The jury returned a verdict of not guilty and the appellant was acquitted. Against that order the State took an appeal to the High Court and the Division Bench found that there was misdirection in the charge to the jury and therefore after consideration of the evidence it set aside the verdict of the jury, allowed the appeal and sentenced the appellant to imprisonment for life. The appellant then applied to the High Court for a certificate under Article 134 (1) (c) which was granted by another Division Bench of the Court which had not heard the appeal.

Three points were urged before the Bench hearing the application for certificate: (1) that there was unusual delay in delivering the judgment and the Division Bench hearing the appeal forgot to consider many of the questions of fact which were raised and argued before it; (2) that the High Court had no power to substitute its own estimate of the evidence in an appeal against the order of acquittal in a trial by jury and (3) that as a matter of fact there were no such misdirections as caused a failure of justice or a mis-trial and therefore the High Court was not entitled to examine the evidence. The learned Judges were of the opinion that there was no substance in points Nos. 2 and 3 but the first point did raise a question of importance. The learned Chief Justice observed :—

"The delay in delivering judgment is certainly a very unusual fact, and it may lead to the result that some of the points which were argued on behalf of the petitioner before the Division Bench were lost sight of by the learned judges while delivering their judgment. As already stated, these points have been summarised by the petitioner in that paragraph 18 of the petition. The points raised in that paragraph may or may not be good points, but if these points were advanced on behalf of the petitioner, the learned Judges of the Division Bench owed it to themselves to come to a decision on those points. In the arguments before us, it is not denied on behalf of the State that the points which have been summarised in paragraph 18 of the petition were canvassed by the defence Counsel at the hearing of the appeal and having regard to that fact, I am inclined to hold that the petitioner is entitled to a certificate under Article 134 (1) (c) of the Constitution on that ground."

This is the ground on which the certificate was granted. This Court has had occasion to consider the grounds on which a certificate can be granted under Article 134 (1) (c) of the Constitution. In *Haripada Dey v. The State of West Bengal*<sup>1</sup>, it was held that the High Court has no jurisdiction to grant a certificate under Article 134 (1) (c) on a mere question of fact and it is not justified in passing on such a question to the Supreme Court for further consideration thus converting the Supreme Court into a Court of Appeal on facts. Bhagwati, J., there said at page 641 :—

"Whatever may have been the misgivings of the learned Chief Justice in the matter of a full and fair trial not having been held we are of the opinion that he had no jurisdiction to grant a certificate under Article 134 (1) (c) in a case where admittedly in his opinion the question involved was one of fact—where in spite of a full and fair trial not having been vouchsafed to the appellant, the question was merely one of a further consideration of the case of the Appellant on fact."

In a later case *Sidheswar Ganguly v. The State of West Bengal*<sup>2</sup>, the High Court of Calcutta granted a certificate on the ground that because of the summary dismissal of the appeal the appellant did not have the satisfaction of having been fully heard and it was held by this Court that that was no ground for the grant of a certificate and that no certificate should be granted on a mere question of fact. In that case Sinha J., (as he then was) said :—

"This Court has repeatedly called the attention of the High Courts to the legal position that that under Article 134 (1) (c) of the Constitution, it is not a case of 'granting leave' but of 'certifying' that the case is a fit one for appeal to this Court. 'Certifying' is a strong word and therefore, it has been repeatedly pointed out that a High Court is in error in granting a certificate on a mere question of fact, and that the High Court is not justified in passing on an appeal for determination by this Court when there are no complexities of law involved in the case, requiring the authoritative interpretation by this Court."

In the present case the High Court has granted leave on the mere ground that there was delay in delivering the judgment of the Court and it may have led to the result that some of the points urged by counsel were lost sight of while delivering judgment. Those points were all questions of fact. The High Court observed that the questions which were sought to be raised in the petition might or might not be good points but if those points were advanced the judges "owed it to themselves to come to a decision on those points".

After the pronouncements of this Court in two judgments it is somewhat surprising that the High Court should have granted a certificate on the mere ground of delay in pronouncing a judgment and the equally slender ground that some of the questions which were raised were forgotten at the time of the judgment. If the appellant did have any such real grievance it was open to him to apply to this Court under Article 136 but the mere ground of delay is not a ground on which the High Court can certify a case to be fit one for appeal to this Court. In *Banarsi Parshad v. Kashi Krishna*<sup>3</sup>, and *Radhakrishna v. Swaminatha*<sup>4</sup>; the Privy Council in construing section 109 (c) of the Code of Civil Procedure pointed out that under that clause for a certificate to be granted a case had to be of great or wide public importance. A mere ground of delay in giving a judgment does not, in our opinion, fall within the words "fit one for appeal to the Supreme Court" even if it is felt by the High Court that the delay might have led to omission to consider arguments on questions

1. (1956) 2 M.L.J. (S.G.) 65 : (1956) S.G.J. 701 : (1956) S.C.R. 639.  
2. (1958) S.G.J. 349 : (1958) M.L.J. (Cr.) 311 (1958) : S.C.R. 749.

3. L.R. 28 I.A. 11 : 11 M.L.J. 149.  
4. L.R. 48 I.A. 31 : I.L.R. 44 Mad. 293 : 40 M.L.J. 229.



of fact and law. It is not open to a High Court to give certificates of fitness under this clause merely because in its opinion the judgment of the Court delivered by another Bench suffers from an error in regard to certain facts. In our view the certificate granted by the Calcutta High Court was not a proper certificate and must be cancelled.

It was then urged that Special Leave should be granted under Article 136 and the appeal be heard as the record had been printed and on that material if leave were to be granted the appeal could be properly argued. We have heard counsel for the appellant and we see no reason to grant Special Leave in this case. The appeal is therefore dismissed.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—P. B. GAJENDRAGADKAR, K. SUBBA RAO, K. N. WANCHOO, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Birla Cotton Spinning & Weaving Mills, Ltd.

.. Appellant\*

v.

The Workmen and others

.. Respondents.

*Industrial Dispute—Standardisation of wages—Principles—Individual workmen receiving higher wages—Position of.*

When a standardisation scheme comes into force it is an integrated whole and may sometime result in some categories of workmen getting less than what they were getting before. The whole purpose of the standardisation scheme is to standardise wages and where they are low to raise them to the standardised level. Similarly where the wages are high they have to be reduced in order to fit them in the standardised scheme. The Tribunal cannot therefore order that the wages should be increased according to the standardised scheme where they were low but should not be decreased where they were high.

It will be for the Tribunal to decide whether it will protect or not those individual workmen receiving higher wages. If it gives no direction for protection to individual workmen they will not be protected and their wages will have to be lowered in case they are higher than those fixed in the standardisation scheme. But if the Tribunal considers that it will be more in consonance with justice to protect the wages of individual workmen it may give a direction to that effect, even though they may be more than the wages fixed in the standardisation scheme. In such a case three conditions will have always to be borne in mind: (1) There can be no further raising of the wages of the protected workmen by the management after the standardisation scheme comes into force, for any such further rise will be against the principle of standardisation. (2) If the standardisation scheme fixes incremental scale of wages and if the protected workman is getting a wage which is between the minimum and the maximum and he is not entitled in accordance with the length of his service to that wage but something less in the grade, the extra amount that he may be getting will have to be absorbed in future increments till he is properly fitted in the incremental scale according to the length of service. (3) When any workman's service comes to an end for any reason whatsoever, no other employee whether new or old would be entitled to claim the pay which the outgoing employee was getting on the ground that a vacancy with that higher pay has arisen.

A direction that "wherever the said existing wages are higher than those fixed under the standardisation scheme, they shall remain, and shall not be lowered" is unsustainable.

Appeal by Special Leave from the Award dated the 29th December, 1958, of the Industrial Tribunal, Delhi in I. D. No. 36 of 1957 published in the Delhi Gazette dated 5th March, 1959.

G. B. Pai and I. N. Shroff, Advocates, for Appellant.

M. K. Ramamurthi, R. K. Garg, S. C. Agarwala and D. P. Singh, Advocates of M/s. Ramamurthy & Co., for Respondent No. 1.

The Judgment of the Court was delivered by

Wanchoo, J.—This appeal by Special Leave arises out of an industrial dispute between the Birla Cotton Spinning and Weaving Mills Limited (hereinafter called the Appellant) and its workmen. A large number of matters were referred for

adjudication to the industrial tribunal but in the present appeal we are concerned with two, namely, (i) whether the wages require to be increased and standardised, and what directions are necessary in this respect, and (ii) whether any of the workmen doing the work of fancy jobbers should be designated and paid accordingly. The first point has however been confined to mistries and line jobbers only as the other operatives were covered by another award in another Reference (No. ID 52 of 1957) between the same parties, which was decided earlier by this tribunal. That award came in appeal to this Court and the decision of this Court is reported in *The Management of Birla Cotton Spinning and Weaving Mills Ltd. v. Its workmen*<sup>1</sup>. This Court had set aside the earlier award and sent the case back to the tribunal to proceed in the manner indicated in that judgment. We are told that that matter has ended in a compromise between the parties. The claim of the workmen concerned in the present reference (namely mistries and line-jobbers) was that their wages were low and not standardised and in spite of representations made to the appellant, nothing had been done in the matter. The workmen therefore claimed that the wages should be increased and standardised and incremental pay scales should be introduced so far as mistries and line jobbers were concerned. As to fancy jobbers, the workmen's claim was that they had been wrongly designated recently as assistant fancy jobbers, though they were doing the job of fancy jobbers. It was therefore contended that they should be designated as fancy jobbers and their pay also increased and standardised accordingly.

The appellant resisted the claim on a number of grounds. It was contended firstly that there was an earlier award in 1951 made by Shri Dulat, which was still in force and therefore the Reference was incompetent. Next it was contended that there was no comparison between the Swatantra Bharat Mills and the Delhi Cloth Mills on the one hand and the appellant-mills on the other and therefore the wages prevalent in those mills could not be taken as a standard for fixing wages for the appellant's workmen. Thirdly, it was urged that incremental scales were provided nowhere in the textile industry and therefore this claim should be rejected. Fourthly, the workmen designated as assistant fancy jobbers had been so designated rightly and could not claim to be fancy jobbers. And lastly, it was urged that there was no case for applying the Bombay Standardisation Scheme to the appellant's workmen for conditions in Bombay and Delhi were in many respects different.

The tribunal rejected the contention that the Dulat award of 1951 had not been terminated and therefore the present Reference was incompetent. The tribunal further held that though there were differences between the Swatantra Bharat Mills and the Delhi Cloth Mills on the one hand and the appellant on the other, both in the matter of the working of the mills and in the matter of their financial position, they were not of importance as there were bound to be differences between unit and unit of the same industry and thus the wages paid in those two mills were comparable. As to the claim for incremental scale of wages, the tribunal held that no incremental scale had been provided in any standardisation scheme relating to textile industry and rejected this claim. It further held that the workmen now designated as assistant fancy jobbers were really fancy jobbers and had been previously designated as such. Recently, however, they started to be called assistant fancy jobbers and therefore it was ordered that they should be designated as fancy jobbers. And lastly, the tribunal following its earlier award referred to above held that the Bombay Standardisation Scheme should be adopted for mistries and line jobbers as well as fancy jobbers. It also directed that :

"wherever the said existing wages are higher than those fixed under the Bombay Standardisation Scheme, they shall remain and shall not be lowered."

It also directed that where operatives were designated by any other name, either not included in the Bombay list or materially different from the one appearing in the list, they should be paid the same wages as those doing identical work according to the Bombay list and a joint committee consisting of the representatives of the

management and the union might be formed to investigate the anomalies, arising out of the application of the Bombay Standardisation Scheme, and in case of disagreement the matter might be referred to the industrial tribunal either through a regular Reference made with mutual consent or as an arbitrator mutually agreed upon.

The appellant challenges the award and its main contentions are—

(i) that the Reference was incompetent as the Dulat award of 1951 had not been terminated ;

(ii) that the tribunal was wrong in holding that the assistant fancy jobbers should be designated as fancy jobbers ;

(iii) that the tribunal was wrong in applying the Bombay Standardisation Scheme to the appellant's workmen without allowing the appellant even a chance of producing evidence with respect to that scheme and showing the differences between the conditions in Bombay and the conditions in Delhi, which would require modification of that scheme in its application to the appellant's workmen ;

(iv) that the tribunal by directing the appointment of a joint committee to investigate the anomalies had not solved the dispute referred to it with the result that there would be further disputes arising out of this direction of the tribunal ; and

(v) that the tribunal's direction that " wherever the said existing wages are higher than those fixed under the Bombay Standardisation Scheme, they shall remain, and shall not be lowered " is against the principle on which the standardisation schemes are based.

*Re. (i).*—The question whether the Dulat award of 1951 stood in the way of the present Reference being competent was considered by this Court in the earlier case (referred to above) and was rejected. It was then pointed out that the Dulat award had held that there was no justification for delaying standardisation and had ordered the parties to work out a scheme taking the Bombay award No. 1 as the working model. In pursuance of that direction, a scheme was worked out and the parties agreed to it on September 29, 1951. It was urged for the appellant that the agreed scheme of September, 1951 thus became in a sense a part of the Dulat award and as it was terminated only in November, 1956, while the present Reference was made on March 3, 1956, that award stood in the way of the present Reference being competent. This contention was negatived by this Court in its earlier judgment on two grounds. In the first place, it was pointed out that this agreement could not be a part of the Dulat award in any sense and therefore the Dulat award could not stand in the way of the competence of the Reference even if it was not terminated before the Reference. In the second place, it was pointed that the agreement of 1951 did not amount to a settlement within the meaning of section 2 (p) of the Industrial Disputes Act, 1947, as it stood in 1951, and therefore section 19 (2) would not apply to that agreement. We are of opinion that on the same reasoning the present argument that the Reference when it was made was incompetent because of the Dulat award being still in force, must fail and the contention on this head is rejected.

*Re. (ii).*—We are of opinion that the tribunal was right in holding that it was only shortly before the Reference that those workmen who used to be called fancy jobbers began to be designated as assistant fancy jobbers. The tribunal has considered the entire evidence on this point and we are in agreement with the view expressed by it, namely, that the assistant fancy jobbers should be designated as fancy jobbers as before and the recent innovation calling them assistant fancy jobbers was only a device to depress the status of this class of workmen. The contention therefore on this head must also fail.

*Re. (iii).*—It appears that the tribunal merely followed its earlier award in ID. 52 of 1957 when it proceeded to apply the Bombay Standardisation Scheme to mistries and line jobbers as well as fancy jobbers. That award, as we have pointed out, was set aside by this Court in the earlier judgment on various grounds.

It is not necessary for us to repeat the reasons which impelled this Court in the earlier appeal to set aside the award in ID 52 of 1957. Those reasons in our opinion apply with full force to the present award also in so far as it introduces the Bombay Standardisation Scheme for the workmen concerned in the present dispute. In addition we may point out that the appellant wanted to produce evidence with respect to the Bombay Standardisation Scheme and to summon two witnesses from Bombay and Kanpur with respect to the working of that scheme ; but the tribunal by its order dated January 6, 1958, held that it was not necessary to examine those witnesses in view of the conditions obtaining in Delhi, the region with which it was concerned. But even though the tribunal thus refused to examine evidence with respect to the working of the Bombay Standardisation Scheme it went on to adopt that scheme in its entirety without any modification when it came to make its award, in view of its earlier award. We are of opinion that it was not fair for the tribunal to shut out evidence with respect to the working of the Bombay Standardisation Scheme which the appellant wanted to produce and then apply that scheme without any modification to the appellant-mill.

Another reason which impelled the tribunal to apply the Bombay Standardisation Scheme in this case was stated by it to be that the scheme was applicable to this class of workmen in the Delhi Cloth Mills and Swatantra Bharat Mills. This statement in our opinion is not borne out by the evidence of the two witnesses produced by the workmen from those two mills. Manoharlal (W.W. 19), a labour officer of the Swatantra Bharat Mills, was examined in this connection. He stated that for workers the Swatantra Bharat Mills had followed the Bombay Standardisation Scheme in the matter of payment of wages on voluntary basis but not for mistries and jobbers. This statement was apparently treated by the tribunal as meaning that the Bombay Standardisation Scheme was applicable to mistries and jobbers though Manohar Lal stated exactly the opposite. It is true that Manoharlal stated that for certain categories of mistries and jobbers the Swatantra Bharat Mills paid more than what the Bombay Standardisation Scheme gave to such categories ; but that does not mean that the Bombay Standardisation Scheme as such was applicable to all mistries and jobbers in the Swatantra Bharat Mills. The second witness was B. L. Saxena, the labour officer in the Delhi Cloth Mills. He stated that the wages of line jobbers and mistries were more in certain cases and in some cases at par with the wages in the Bombay Standardisation Scheme. But he also stated that the line jobbers and mistries in the Delhi Cloth Mills had not been brought under the Bombay Standardisation Scheme. It appears from the evidence of both these witnesses that there is no fixed grade for mistries and jobbers and each one gets what may be called his own pay. Therefore in some cases the pay which a jobber or a mistry gets may be higher or may be equal to the wages in the Standardisation Scheme. But this does not mean that the Bombay Standardisation scheme as such has been applied to mistries and jobbers in the other two mills in Delhi. The tribunal was therefore wrong even on a comparison of the other two mills in Delhi to hold that the Bombay Standardisation Scheme should be applied to the appellant-mills also.

The tribunal's award with respect to fancy jobbers would also show how the manner in which the tribunal dealt with the application of the Bombay Standardisation Scheme to the appellant-mills has resulted in unfairness. After having rightly held that the assistant fancy jobbers should be designated as fancy jobbers, the tribunal went on to award that the fancy jobbers so designated should be paid according to the Bombay Standardisation Scheme without apparently examining that scheme. A copy of that scheme has been produced before us and it shows that the Bombay Scheme envisages three categories of workers in what is called fancy work, namely, head fancy jobber, fancy jobber and assistant fancy jobbers. Therefore before the tribunal decided to apply the Bombay Standardisation Scheme it was necessary to compare the work done by the fancy jobbers in the appellant-mills with the work done by either the fancy jobber or assistant fancy jobber in the Bombay Standardisation Scheme and then decide whether they would

the designation of fancy jobbers or assistant fancy jobbers under the Bombay Standardisation Scheme or some under one and some under the other. We are therefore of opinion that the manner in which the case has been dealt with by the tribunal shows, as was pointed out in the earlier case also, that it was dealt with in a perfunctory way, though in this case the tribunal had the excuse to follow its own award in the earlier case. We are however of opinion that if the Bombay Standardisation Scheme is to be applied to the appellant-mills with respect to the workmen concerned in the present appeal, the tribunal should go into the matter carefully again on the lines indicated by this Court in its earlier judgment and then decide whether the Bombay Standardisation Scheme as a whole should be applied to the appellant-mills with respect to the workmen concerned in the present dispute or whether there should be any modification of that scheme in view of differences between the conditions in Bombay and the conditions in Delhi. This applies to all the workmen concerned in this appeal, *i.e.*, the line-jobbers, mistries and fancy jobbers. We are therefore of opinion that this appeal must be allowed and the case sent back to the tribunal for re-consideration on the lines indicated above and in accordance with the earlier judgment of this Court.

*Re. (iv).*—As to the direction by the tribunal that a joint committee should be appointed to go into what is called anomalies, it is enough to refer to what was said by this Court in the earlier judgment (*supra*) where a similar direction had been made. It was pointed out there that by making the direction the tribunal had left a part of the dispute to be resolved by the parties themselves, so that the tribunal had not done what it was expected to do itself under the terms of Reference. We set aside this direction and order that the tribunal should go into this matter itself with the assistance of assessors, if it considers that necessary, before it applies the Bombay Standardisation Scheme either in its entirety or with modification to the workmen concerned in the appellant-mills.

*Re. (v).*—This brings us to the last point. The direction in the present award by the tribunal is that

“wherever the said existing wages are higher than those fixed under the Bombay Standardisation Scheme, they shall remain, and shall not be lowered.”

Objection is taken to this direction by the appellant. There was a similar direction in the earlier award also and in that connection this Court observed as follows at page 1182 :—

“It cannot be disputed that when a standardisation scheme comes into force it is an integrated whole and may sometime result in some categories of workmen getting less than what they were getting before. The whole purpose of a standardisation scheme is to standardise wages and where they are low to raise them to the standardised level. Similarly where the wages are high they have to be reduced in order to fit them in the standardised scheme. The tribunal therefore was clearly wrong in acting against the basic principle of a standardised scheme when it ordered that the wages should be increased according to the standardised scheme where they were low but should not be decreased where they were high. This principle of standardisation is clear and even the learned counsel for the workmen had to admit it.”

It is urged on behalf of the respondents that these observations are liable to be misunderstood and may give rise to the impression that it is not open to a tribunal to protect the wages of individual workmen who may be getting more than the wages fixed under the Standardisation Scheme, at the time when such a Scheme comes into force. The respondents do not dispute that the basic principle behind the Standardisation Scheme is what has been stated by this Court; but they contend that though after a Standardisation Scheme has been brought into force it may not be open even to the management to give more wages than those provided in the Standardisation Scheme, that principle does not require necessarily that the wages of individuals who might be drawing more at the date the Standardisation Scheme comes into force should also be reduced and should not be protected for those individuals only. It is urged that it is open to the tribunal to protect the wages of such workmen who might be drawing more than the wages fixed in the Standardisation Scheme, though it may not be open to the management after the Standardisation

Scheme comes into force to pay more wages than fixed in the standardisation scheme to any one employed thereafter. On the other hand, it is contended for the appellant that when a standardisation scheme comes into force even the wages of individuals who are getting more than what is provided in the standardisation scheme must be reduced and the tribunal cannot protect the wages even of such individuals. Reliance in this connection has been placed on behalf of the appellant on *Daru v. Ahmedabad Spinning and Manufacturing Company Limited*<sup>1</sup>.

In that case the principles governing a standardisation scheme were considered by the Bombay High Court after considering thereport of the Textile Labour Inquiry Committee and also the book of Dr. D. R. Gadgil on "Regulation of Wages and other Problems of Industrial Labour in India". It was pointed out that when in an industry divergent wages were being paid and there was considerable difference between the top wage and the lowest wage, it was very difficult to standardise these wages and therefore the first thing to be done was to fix a minimum wage which is generally somewhere between the top and bottom ; but where wages in a particular occupation are not very divergent and are more or less uniform, that is the time and the stage when a labour tribunal may well standardise those wages because in standardising them although it may result in some workers being paid less than what they are being paid, the loss to them would not be considerable and if it is in the interest of labour that all workers should be paid the same wages who are doing the same work then the standardisation would result in benefit to the cause of labour.

There can be no dispute as to the validity of these principles and their soundness will be clear from the facts of that case. In that case a standardisation scheme had been brought into force in 1948. In 1951, one of the mills governed by the standardisation scheme introduced a new section the wages in which were covered by the standardisation scheme. However, the wages in the new section fixed by the said mill were higher than those fixed by the standardisation scheme. Later in 1953, the mills gave notice to the workmen reducing the wages fixed in 1951 so as to conform to the wages laid down in the standardisation scheme. This was objected to by the workmen whose wages were reduced and that is how the dispute arose. The High Court held in those circumstances that in view of the fact that the standardisation scheme was in force from 1948, it was not open to the employer to give higher wages than those fixed in the standardisation scheme in 1951 because it was of the essence of the standardisation scheme that the wages for the same work should be equal and that where higher wages had been paid than those fixed in the standardisation scheme they should be reduced to that level. That case however was not concerned with protection of the wages of individuals who might be getting more than what is provided in the standardisation scheme at the time when it is brought into force. It is in this context that the observations made by the High Court have to be understood and in that context the observations laying down the principles behind a standardisation scheme are, if we may say so with respect, sound.

It is however urged on behalf of the respondents that the protection given by the tribunal in this case is no more than protection for individual workmen who may be getting more wages than those fixed in the standardisation scheme when it comes into force and this direction is correct, and that there is nothing in law which prevents the tribunal from giving such a direction for the protection of individuals who might be getting more wages at the time the standardisation scheme is brought into force. It seems to us that it would not be against the basic principle of standardisation, to which this Court referred in the earlier case (*supra*) to protect the wages of individual workmen who might be getting more than the wages fixed in the standardisation scheme at the time when such a scheme is brought into force. It will be for the tribunal to decide whether it will protect these individual workmen or not. If it gives no direction for protection to individual workmen, they will not be protected and their wages will have to be lowered in case they are higher

than those fixed in the standardisation scheme. But if the tribunal considers that it will be more in consonance with justice to protect the wages of individual workmen, it may give a direction to that effect, even though they may be more than the wages fixed in the standardisation scheme. In such a case three conditions will always have to be borne in mind. In the first place, there can be no further raising of the wages of these protected workmen by the management after the standardisation scheme comes into force, for any such further rise will be against the principle of standardisation. In the second place, if the standardisation scheme fixes incremental scale of wages and if the protected workman is getting a wage which is between the minimum and the maximum and he is not entitled in accordance with the length of his service to that wage but something less in the grade, the extra amount that he may be getting will have to be absorbed in future increments till he is properly fitted in in the incremental scale according to the length of service. Thirdly, when any workman's service comes to an end for any reason whatsoever, no other employee whether new or old would be entitled to claim the pay which the outgoing employee was getting on the ground that a vacancy with that higher pay has arisen. Subject to these three conditions it may be open to a tribunal to protect the wages of individual workmen even though he may be getting higher wages than those fixed in a standardisation scheme at the time when the scheme is introduced.

Now let us see what the tribunal has done in this matter. It directs that

"wherever the said existing wages are higher than those fixed under the Bombay Standardisation Scheme, they shall remain, and shall not be lowered."

This in our opinion is not protection of individual workmen but protection of wages, which may be higher than those fixed in the standardisation scheme. This in our opinion cannot be done as it is against the basic principles of a standardisation scheme as observed in the earlier case. The result of this direction by the tribunal would be that a particular post carrying with it higher wages will remain protected so that when the individual who may be getting that pay at the time the standardisation scheme comes into force is no more employed, the other workmen may be able to claim those wages on the ground that the wages have been protected. The proper way of giving protection, if the tribunal thinks that justice demands that individuals who are getting higher wages than those fixed under a standardisation scheme should be protected, is to direct that the wages of such individuals should be fixed according to the standardisation scheme, and the difference, if any, between their wages and the standardised wages should be paid to them as personal pay so long as they are in service. As soon as such an individual goes out of service, another coming in his place will not be entitled to the personal pay the outgoing workman was getting, and will be fixed in the standardisation scheme. The direction however of the tribunal in this case is capable of being read not for the protection of individuals but for the protection of wages, and this in our opinion cannot be done in view of the basic principles governing a standardisation scheme. We are therefore of opinion that the direction for the protection of existing wages given in the form in which it has been given by the tribunal must be set aside. At the same time we leave it to the tribunal to decide if it considers it just when the matter goes back to it for reconsideration whether individual workmen should be protected, even in case a standardisation scheme is introduced, in the manner we have indicated above.

We therefore allow the appeal and set aside partly the order of the tribunal with respect to certain matters with which we have dealt in the course of this judgment and direct that the tribunal should re-hear the Reference and reconsider in the light of this judgment and the earlier judgment what should be its award with respect to mistries, line-jobbers and fancy jobbers in connection with the following term of Reference :

"Whether the wages require to be increased and standardised, and what directions are necessary in this respect."

Parties will be at liberty to lead such further evidence on all matters sent back for reconsideration as they think fit.

In the circumstances we order parties to bear their own costs.

*Appeal allowed.*

# THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, N. RAJAGOPALA AYYANGAR AND T. L. VENKATARAMA AYYAR, JJ.

Mohanlal Chunilal Kothari deceased and after his death his legal representatives

.. *Appellants\**

*v.*

Tribhovan Haribhai Tamboli and others

.. *Respondents.*

(in C. A. No. 282/59)

and

Tamboli Boghalal Chhotalal and others (in C. A. No. 283/59)

*Bombay Tenancy Agricultural Lands Act (LXVII of 1948), section 88 (1) (d)—Scope—How far retrospective.*

Unlike the provisions of clauses (a), (b) and (c) of section 88 (1) of the Bombay Tenancy Agricultural Lands Act 1948 which are clearly prospective the provisions of clause (d) would in the context have retrospective operation in the sense that it would apply to land which could be covered by the notification to be issued by the Government from time to time so as to take those lands out of the operation of the Act of 1948, granting the protection.

In the instant case the notification dated 24th April, 1951 specifying the area in which the suit lands were situate as "reserved for urban non-agricultural or industrial development" was cancelled by another notification dated 12th January, 1953, when the case was still pending before the lower appellate Court and the Court was bound to apply the law as it found on the date of its judgment and the landlord's suit for possession against the tenants must be dismissed. Also such suit would lie in the Revenue Courts and not in the Civil Courts.

Appeals by Special Leave from the Judgment and Decrees dated the 18th day of December, 1956, of the Bombay High Court at Bombay in Second Appeals Nos. 233 and 185 of 1955, respectively.

G. S. Pathak, Senior Advocate (O. C. Mathur, J. B. Dadachanji and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him) for Appellants.

S. G. Patwardhan, Senior Advocate (K. R. Chaudhury, Advocate, with him) for Respondents.

The Judgment of the Court was delivered by

*Sinha, C. J.*—These two appeals, by Special Leave, directed against the judgment and decree of a Single Judge of the Bombay High Court, raise a common question of law, and have, therefore, been heard together. This judgment will govern both the cases. The appellants were plaintiff-landlords, and the respondents were tenants-in-possession of certain lands which were situate in the erstwhile State of Baroda before it became part of the State of Bombay, by merger. The Bombay Tenancy and Agricultural Lands Act (Bombay Act LXVII of 1948)—which hereinafter will be referred to as the Act—was extended to Baroda on August 1, 1949. The suits out of which these appeals arise had been instituted by the appellants on the basis that the tenants-respondents had become trespassers on the service of notice in March, 1950, with effect from the beginning of the new agricultural season in May, 1951. As the defendants did not comply with the terms of the notice and continued in possession of the lands, to which they had been inducted, the landlords instituted suits for possession in the Civil Court. The Trial Courts and the Court of Appeal decreed the suits for possession. But on Second Appeal by the tenants, the learned Single Judge, who heard the Second Appeals, allowed the appeals and dismissed the suits with costs throughout.

It is not disputed that if the provisions of the Act were applicable to the tenancies in question, the plaintiffs' suits for possession must fail, because these were instituted



in the Civil Courts, which would have jurisdiction to try the suits only if the defendants were trespassers. It is equally clear that if the tenants could take advantage of the provisions of the Act, any suit for possession against a tenant would lie in the Revenue Courts and not in the Civil Courts. But reliance was placed upon the notification issued by the Bombay Government on April 24, 1951, to the following effect :

"In exercise of the powers conferred by clause (d) of sub-section (1) of section 88 of the Bombay Tenancy and Agricultural Lands Act, 1948 (Bombay LXVII of 1948) the Government of Bombay is pleased to specify the area within the limits of the Municipal Borough of Baroda City and within the distance of two miles of the limits of the said Borough, as being reserved for urban, non-agricultural or industrial development."

The learned Judge of the High Court, in disagreement with the Courts below held that under the provisions of section 3-A (1) of the Bombay Tenancy Act, 1939, as amended, a tenant would be deemed to be a protected tenant from August 1, 1950, and that that vested right could not be affected by the notification aforesaid, issued by the Government under section 88 (1) (d), which had the effect of putting the lands in question out of the operation of the Act. In other words, the learned Judge held that the notification had no retrospective effect so as to take away the protection afforded to the tenants by section 3-A, aforesaid.

The learned Counsel for the appellants contended, in the first instance, that the notification, set out above, under section 88 (1) (d) operated with effect from December 28, 1948, when the Act came into force. In this connection, reliance was placed upon the decision of this Court, pronounced by me sitting in a Division Court, in the case of *Sakharam v. Manikchand Motichand Shah*<sup>1</sup>, in these words :

"The provisions of section 88 are entirely prospective. They apply to lands of the description contained in clauses (a) to (d) of section 88 (1) from the date on which the Act came into operation, that is to say, from December 28, 1948. They are not intended in any sense to be of a confiscatory character. They do not show an intention to take away what had already accrued to tenants acquiring the status of 'protected tenants'."

It is necessary, therefore, to make some observations explaining the real position. In that case, the question then in controversy had particular reference to section 88 (1) (c), which is the only provision quoted at page 2 of the blue print of the judgment. That case had nothing to do with clause (d) of section 88(1). In that case, the lands in dispute lay within two miles of the limits of Poona Municipality. It is clear, therefore, that the inclusion of clause (d) of section 88 (1) was a slip and certainly was not relevant for consideration in that case. The provisions of section 88 (1) are as follows :—

"Nothing in the foregoing provisions of this Act shall apply :—

- (a) to lands held on lease from the Government a local authority or a co-operative society ;
- (b) to lands held on lease for the benefit of an industrial or commercial undertaking ;
- (c) to any area within the limits of Greater Bombay and within the limits of the Municipal Boroughs of Poona City and Suburban, Ahmedabad, Sholapur, Surat and Hubli and within a distance of two miles of the limits of such Boroughs ; or
- (d) to any area which the State Government may, from time to time, by notification in the Official Gazette, specify as being reserved for urban non-agricultural or industrial development."

It will be noticed that clauses (a), (b) and (c) of section 88 (1) apply to things as they were at the date of the enactment, whereas clause (d) only authorised the State Government to specify certain areas as being reserved for urban non-agricultural or industrial development, by notification in the Official Gazette, *from time to time*. Under clauses (a) to (c) of section 88 (1) it is specifically provided that the Act, from its inception, did not apply to certain areas then identified ; whereas clause (d) has reference to the future. Hence, the State Government could take out of the operation of the Act such areas as it would deem should come within the description of urban non-agricultural or for industrial development. Clause (d), therefore, would come into operation only upon such a notification being issued by the State Government. The portion of the judgment, quoted above, itself makes it clear that the provisions of section 88 were never intended to divest vested interests.

1. In Civil Appeal No. 185 of 1956, judgment delivered on April 19, 1961.

To that extent the decision of this Court is really against the appellants. It is clear that the appellants cannot take advantage of what was a mere slip in so far as clause (d) was added to the other clauses of section 88 (1), when that clause really did not fall to be considered with reference to the controversy in that case. In other words, this Court never intended in its judgment in *Sakharam's case*<sup>1</sup> to lay down that the provisions of clause (d) of section 88 (1) aforesaid were only prospective and had no retrospective operation. Unlike clauses (a), (b) and (c) of section 88 (1), which this Court held to be clearly prospective, those of clause (d) would in the context have retrospective operation in the sense that it would apply to land which could be covered by the notification to be issued by the Government from time to time so as to take those lands out of the operation of the Act of 1948, granting the protection. So far as clauses (a), (b) and (c) are concerned, the Act of 1948 would not apply at all to lands covered by them. But that would not take away the rights conferred by the earlier Act of 1939 which was being repealed by the Act of 1948. This is made clear by the provision in section 89 (2) which preserves existing rights under the repealed Act. *Sakharam's case*<sup>1</sup>, was about the effect of clause (c) on the existing rights under the Act of 1939 and it was in that connection that this Court observed that section 88 was prospective. But clause (d) is about the future and unless it has the limited retrospective effect indicated earlier it will be rendered completely nugatory. The intention of the Legislature obviously was to take away all the benefits arising out of the Act of 1948 (but not those arising from the Act of 1939) as soon as the notification was made under clause (d). This is the only way to harmonise the other provisions of the 1948 Act, conferring certain benefits on tenants with the provisions in clause (d) which is meant to foster urban and industrial development. The observations of the High Court to the contrary are, therefore, not correct.

But the matter does not rest there. The notification of 24th April, 1951, was cancelled by the State Government by the following notification dated 12th January, 1953 :

"Revenue Department, Bombay Castle, 12th January, 1953. Bombay Tenancy and Agricultural Lands Act, 1948.

No. 9361/1949 : In exercise of the powers conferred by clause (d) of sub-section (1) of section 88 of the Bombay Tenancy and Agricultural Lands Act, 1948 (Bombay LXVII of 1948). The Government of Bombay is pleased to cancel Government Notification in the Revenue Department No. 9361 of 1949 dated the 24th/25th April, 1951."

It would thus appear that when the matter was still pending in the Court of Appeal, the judgment of the Lower Appellate Court being dated 27th September, 1954, the notification cancelling the previous notification was issued. The suit had, therefore, to be decided on the basis that there was no notification in existence under section 88 (1) (d), which could take the disputed lands out of the operation of the Act. This matter was brought to the notice of the learned Assistant Judge, who took the view that though, on the merger of Baroda with Bombay in 1949, the defendants had the protection of the Act, that protection had been taken away by the first notification, which was cancelled by the second. That Court was of the opinion that though the Appellate Court was entitled to take notice of the subsequent events, the suit had to be determined as on the state of facts in existence on the date of the suit, and not as they existed during the pendency of the appeal. In that view of the matter, the learned Appellate Court held that the tenants-defendants could not take advantage of the provisions of the Act, and could not resist the suit for possession. In our opinion, that was a mistaken view of the legal position. When the judgment of the lower Appellate Court was rendered, the position in fact and law was that there was no notification under clause (d) of section 88 (1) in operation so as to make the land in question immune from the benefits conferred by the Tenancy Law. In other words, the tenants could claim the protection afforded by the law against eviction on the ground that the term of the lease had expired. But it was argued on behalf of the appellants that the subsequent notification, cancelling the first one, could not take away the rights which had accrued to them as.

1. In Civil Appeal No. 185 of 1956, judgment delivered on April 19, 1961.

a result of the first notification. In our opinion, this argument is without any force. If the landlords had obtained an effective decree and had succeeded in ejecting the tenants as a result of that decree, which may have become final between the parties, that decree may not have been re-opened and the execution taken thereunder may not have been recalled. But it was during the pendency of the suit at the appellate stage that the second notification was issued cancelling the first. Hence, the Court was bound to apply the law as it found on the date of its judgment. Hence, there is no question of taking away any vested rights in the landlords. It does not appear that the second notification, cancelling the first notification, had been brought to the notice of the learned Single Judge, who heard and decided the Second Appeal in the High Court. At any rate, there is no reference to the second notification. Be that as it may, in our opinion, the learned Judge came to the right conclusion in holding that the tenants could not be ejected, though for wrong reasons. The appeals are accordingly dismissed, but there would be no order as to costs in this Court, in view of the fact that the respondents had not brought the second notification cancelling the first to the pointed attention of the High Court.

*Appeals dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, N. RAJAGOPALA AYYANGAR AND T. L. VENKATARAMA AYYAR, JJ.

The State of Mysore and others

.. *Appellants\**

v.

Shivabasappa Shivappa, Makapur

.. *Respondent.*

*Bombay Police Manual, section 455, clause (8)—Procedure prescribed to be followed in inquiries against Sub-Inspector of Police—Validity.*

Tribunals exercising quasi-judicial functions (in the instant case Inspector-General of Police holding inquiry against a Sub-Inspector of Police) are not Courts and therefore they are not bound to follow the procedure prescribed for the trial of actions in Courts nor are they bound by strict rules of evidence. They can, unlike Courts, obtain all information material for the points under enquiry from all sources and through all channels, without being fettered by rules and procedure, which govern proceedings in Court. The only obligation which the law casts on them is that they should not act on the information which they may receive unless they put it to the party against whom it is to be used and give him a fair opportunity to explain it. What is a fair opportunity must depend on the facts and circumstances of each case but where such opportunity had been given, the proceedings are not open to attack on the ground that the enquiry was not conducted in accordance with the procedure followed in Courts.

Rules of natural justice are matters, not of form, but of substance. They are sufficiently complied with when previous statements given by witnesses are read over to them, marked on their admission, copies thereof given to the person charged and he is given an opportunity to cross-examine them.

Clause (8) of section 545 of the Bombay Police Manual prescribing such a procedure cannot be held to be bad as contravening the rules of natural justice.

Appeal by Special Leave from the Judgment and Order dated the 26th March, 1959, of the Mysore High Court in Writ Petition No. 41 of 1958.

*H. N. Sanyal*, Additional Solicitor-General, (*R. Gopalakrishnan* and *P. D. Menon*, Advocates, with him), for Appellants.

*K. R. Chaudhuri*, Advocate, for Respondent.

The Judgment of the Court was delivered by

*Venkatarama Aiyar, J.*—This is an appeal by Special Leave against the judgment of the High Court of Mysore in a Writ Petition filed by respondent challenging the validity of an order of dismissal dated 5th July, 1956 made by the Deputy Inspector-General of Police, Belgaum. The respondent entered service in the Police Department as a Constable in the District of Dharwar in 1940 and was at the material dates a Sub-Inspector of Police. On a complaint preferred by one Machwe of Kurdiwadi

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## ‘CRUELTY’ AS A MATRIMONIAL OFFENCE.

By

G. M. SEN, B.Sc., M.L.,

*Faculty of Law, University of Delhi.*

‘Cruelty’ as a matrimonial offence has, of late, assumed greater importance especially because of the enactment of the Hindu Marriage Act, 1955.<sup>1</sup> It is not, of course, treated as a direct ground for divorce under that Act, but it serves as an effective cause for the severance of the marriage tie; first as a ground for judicial separation which may then work itself ultimately into dissolution by lapse of time.

It is provided by the Act that:—

“Either party to a marriage whether solemnized before or after the commencement of this Act, may present a petition on the ground that the other party—

\* \* \* \* \*

(b) had treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party.”<sup>2</sup>  
and further that—

“Any marriage solemnized, whether before or after the commencement of this Act, may, in a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party,—

\* \* \* \* \*

(viii) has not resumed cohabitation for a space of *two years or upwards* after the passing of a decree for judicial separation against that party.”<sup>3</sup>

Thus cruelty, as a grave matrimonial offence, is recognised by the Act and the concept is of great importance in the change brought about by it in the position of ‘Hindu Marriage’.

It is true that the idea of cruelty in matrimonial relations had already been imported into the Indian law by the provisions of the Indian Divorce Act, 1869,<sup>4</sup> and the Special Marriage Act, 1954.<sup>5</sup> But ‘matrimonial cruelty’ is nowhere defined either under these Acts or now under the Hindu Marriage Act. As will be clear from what follows, it also eludes any clear precise definition. The problem which faces us at present therefore is as to what would amount to such cruelty and whether the tests, if any, are the same in cases arising under these different statutes.

In an inquiry of this sort it is of paramount importance to remember that divorce is quite alien to the systems of law generally prevalent in India and that it has been introduced expressly by these statutes. It was practically unknown to the Hindu law proper. So also was divorce not recognised by the ‘Canon Law’. The provision therefor is purely statutory and is definitely an inroad

1. Act XXV of 1955.

2. Section 10 of the Act.

3. Section 17 : *Shri Narayan Singh v. Pritpal Singh* (A.I.R. 1961 Punj. 320.)

4. Act IV of 1869.

5. Act XLIII of 1954 replacing Act III of 1872.

into the 'Common law in India'. Hence 'cruelty' for the purposes of matrimonial law has to be construed within the ambit of the relevant provisions in the statutes. The general rules relating to interpretation of statutes and the wording of the relevant sections are all important in this context. In the words of Lord Campbell, the Chief Justice of England at the time of the enactment of the Matrimonial Causes Act, 1857—

"The Court for Divorce and Matrimonial Causes certainly has no jurisdiction beyond that which is derived from statute 20 and 21 Vict. c. 85, by which ~~it was~~ constituted. But in construing this statute we can only look to its enactments as they appear in the Statute Book....."

This principle is equally applicable to the Indian law and, therefore, it is essential to note the distinctions, if any, between the provisions of the different statutes while defining 'cruelty'. Probably one comprehensive definition may not hold good for all the different statutes now in force.

The general trend in India has, hitherto, been to follow the principles and practices of the English law and to adopt them as nearly as possible while deciding cases arising under the corresponding Indian statutes. For one thing, in India the cases arising under the matrimonial jurisdiction were till now few and far between and it could not also be expected that new principles would be laid down too soon under the new enactments. It is not that too many cases are now to be expected, but it is desired to point out that there is paucity of Indian case law in the matter. But will this justify the adoption of the principles laid down in England, especially in a field like matrimonial relations, under a different statute and under entirely different social conditions?

The Indian Divorce Act, 1869, had been, in the main, the sole statute relating to divorce in India till recently and it applied only to 'Christian marriages' which more or less conform to 'English marriages'. It is also expressly laid down in that Act that the Court shall follow such principles of English law subject to the provisions of the Act.<sup>6</sup> The provisions of the Indian Divorce Act, 1869, were made applicable in relation to divorce under the earlier Special Marriage Act.<sup>7</sup> But there is no such direction to follow the English practices either in the Special Marriage Act of 1954 or in the Hindu Marriage Act, 1955. The question is therefore whether the English decisions and the English ideas are to be followed under these new enactments and if so to what extent.

It is relevant in this connection to make a general review of the English law of 'matrimonial cruelty' and examine how far the English statutes are '*in pari materia*' with our enactments.

As a matter of fact in modern times three important theories are propounded as the basis of the remedies available as a consequence of 'matrimonial cruelty'. They are generally known as the theories of 'the danger to body and health', 'impossibility of performance of matrimonial duties' and 'protection of the aggrieved spouse' respectively. So far as English law is concerned, it has specifically accepted the first of these divergent theories discarding the other two.

The earliest leading English case, and which is still followed in this respect, is *Russel v. Russel*<sup>8</sup> where the whole basis of matrimonial cruelty was the subject of remarkable differences of judicial opinion. And by a majority the 'doctrine of danger' rather than the opposing theory of 'absolute impossibility'

6. Section 7 of Act IV of 1869.

7. Act III of 1872, section 17.

8. L.R. (1897) A.C. 395.

of discharging marital duties' was laid down as the test of cruelty in matrimonial relations. The view was summed up by Lord Herschell (representing the majority) in the following words:<sup>9</sup>

"Upon a review of the authorities prior to the time when the Divorce Act came into operation I think it may confidently be asserted that in not a single case was a divorce on the ground of cruelty granted unless there has been bodily hurt or injury to health, or a reasonable apprehension of one or the other of these. And it may with equal confidence be asserted that no other test was ever applied when it had to be determined whether a sentence of divorce on the ground of cruelty should be pronounced. I can find no case in which the impossibility that the duties of married life could be discharged was treated as a criterion."

It is significant that even in English law no statute has ever defined 'cruelty' and the ruling in *Russel v. Russel*<sup>9-a</sup> and the dictum laid down therein have consistently been followed and it still continues to be the leading case for the test and definition of 'matrimonial cruelty'. Cruelty between spouses is behaviour which must be shown to be detrimental to body or mind, or both, either in fact or in justifiable anticipation of the particular injured spouse actually complaining.

It also means therefore that in gauging the effects of acts of cruelty in any particular case it should be on the basis of a 'subjective standard' rather than on an 'objective standard'. That is to say test is subjective — the effect of cruel conduct upon the person actually complaining of the same, regarded as an individual with his or her own temperament and characteristics; not upon an artificial "reasonable human being of the law" or a "human being of reasonable firmness or courage". Even undue sulking by the husband which injured the health of an exceptionally sensitive and nervous wife was held to constitute cruelty though such conduct would not have had any effect on a woman of reasonable strength of mind.<sup>10</sup> The adoption of the subjective standard is of course detrimental to the more admirable type of an injured spouse, for it sets a greater premium on her (or him) who endures her (or his) suffering with fortitude and calmness, in the hope of salving the marriage than on the one who breaks down under the strain easily and abandons abruptly all hopes of salving the marriage. This cannot be helped. Obviously marriage is a 'personal' relationship and its success or failure depends on those very particular 'persons' which perhaps justifies this subjective standard in testing the effect of acts of cruelty between them considered as those very individuals. No mythical 'reasonable person of the law' is allowed to intervene.

Distinct and standing apart from these two theories, the 'doctrine of protection' postulates that the whole and the sole object of the remedy provided by the law of cruelty is to safeguard the injured (and therefore complaining) spouse from possible further injury. If therefore there is no future danger of repetition of the acts of cruelty there appears to be no ground for a remedy for that which lies entirely in the past. If there is no risk of further danger no 'protection' is required and the remedy asked for has to be refused. But so far as the English Matrimonial Causes Act is concerned it has been held that such a theory is quite untenable and has been explicitly discarded. In *Swan v. Swan*.<sup>11</sup> Hodson, L. J. stated:

9. At page 456, *Ibid.*

9-a. L.R. (1897) A.C. 395.

10. *Lauder v. Lauder* (1949) 1 All E.R. 76.

11. (1953) 2 All E.R. 854.



"I can find nothing in the old authorities to justify the proposition that a decree based on cruelty is a remedy given not for a wrong inflicted but solely as a protection for the victim."

The relevant provision in the statute is "has since the celebration of the marriage treated the petitioner with cruelty."<sup>12</sup>

This in brief is the position obtaining in English law and now we have to refer to the relevant sections of our statutes under consideration for a comparative study.

Section 10 of the Indian Divorce Act, 1869, provides that any wife may present a petition praying that her marriage may be dissolved on the ground that since the solemnization thereof her husband has been guilty of—

"Adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et toro*."

This statute, therefore, fails to give any indication as to the nature of 'matrimonial cruelty' contemplated. But as has already been pointed out before, the English law is directed to be followed in such matters so far as this Act is concerned.<sup>13</sup>

Section 27 of the Special Marriage Act, 1954, *inter alia* provides that a petition for divorce may be presented either by the husband or the wife on the ground that the respondent—

"has since solemnisation of the marriage treated the petitioner with cruelty."

It will be seen that this is exactly as in the English Matrimonial Causes Act, 1950, word by word. But at the same time it is significant that there is no direction to follow the English rules and practices as in the case of the Divorce Act.

When we come to the Hindu Marriage Act, 1955, a great difference will be found. The cruelty required is—

"such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party."

From the above it appears that the 'doctrine of protection' disapproved by the English law while interpreting the provision in the Matrimonial Causes Act<sup>14</sup> has been accepted under our Act. It ought to follow, therefore, that if no danger is anticipated in future, reliefs may not be available, for that is the basis of the 'protection theory'.

Consistently with this view the Punjab High Court seems to have held recently in *P. L. Sayal v. Sarla Rani*,<sup>15</sup> that the apprehension of the husband that 'things might be repeated' amounts to legal cruelty within the meaning of section 10 of the Act. In that case the wife had administered some 'love potion' to the husband in the belief that it would conduce to happy married life. The husband actually suffered in health as a consequence. The possibility that things might be repeated was held sufficient to constitute legal cruelty which accords with the 'protection theory'. Subsequent cohabitation was held to be no condonation in such circumstances.

12. Section 1, Matrimonial Causes Act, 1950 (14 Geo. 6 C. 25).

13. Vide section 7 of the Act.

14. Vide *Swan v. Swan*, (1953) 2 All E.R. 854.

15. A.I.R. 1961 Punj. 125.

Again the Madras High Court, while interpreting the meaning of the relevant section relating to cruelty, has held that making unfounded allegations of adultery against a chaste wife would amount to cruelty under the law enabling the petitioner to get relief.<sup>16</sup> Here it is obvious that the wife would suffer mentally and physically thereby causing risk to her life, if she was asked to continue to live with such a husband, for an Indian woman there can be no greater torture than that of imputation of unchastity which once made continues to be a lasting wound with no healing whatsoever.

This, therefore, appears to be the position under the Hindu Marriage Act, 1955, which is different from that under the Indian Divorce Act, 1869, and that under the Special Marriages Act, 1954. As has been pointed out above it is probable that a remedy may not be available to a spouse for something definitely of the past if there is no reasonable fear of repetition of the acts of cruelty or of any insecurity of home at the moment of complaining. This is obviously against the English view as we have already seen.

It is when we come to the kinds and quality of the acts that may constitute 'matrimonial cruelty' a greater divergence with the English law will be noticed. This is because of the fact that social conditions and the concepts of matrimonial life in the two countries are entirely different. And in the adjudication of matrimonial offences like cruelty the whole conjugal picture must be looked at, and not merely a single aspect of it.<sup>17</sup> The Royal Commission in England, in their Report on Marriage and Divorce, 1956, had stated.<sup>18</sup>

"We consider that it is preferable not to have a detailed definition but to allow the concept of cruelty to remain open to such adjustment as it is desirable to make through the medium of judicial decision so as to accord with the changing social conditions."

So also the concept may be different under different social conditions and social habits.

It is noticed, therefore, that all the different kinds of cruelty defy a comprehensive description. And considering the fact that acts of cruelty may bring about either mental or physical suffering, and since in a sense mysterious are the ways of human beings especially with regard to their individual reactions, it is difficult to conceive of all the kinds of conduct that may bring about such suffering. The effect of a particular depictable act would vary with the differences in the character of the individuals and to a greater extent with differences in the social environment. Mere 'unhappiness' or 'incompatibility of temperament', or that 'wear and tear' of married life or 'getting on each others nerves' do not, as decisions stand, constitute cruelty even under the Indian law. However drawing the line between 'unhappy' and 'unsafe' marriages is one of the most difficult tasks, and the judges have to perform this task with due consideration to the build up of the individuals before them and their social background.

It is not however at present proposed to take out such examples of conduct which, in the view of the English law, would amount to matrimonial cruelty and examine them in relation to the general Indian conditions and evaluate them for the purpose of Indian law. But it is only desired to point out that the social environment in which an Indian spouse lives, the concepts of matrimonial relationship and duties, the sensitiveness and reaction to conjugal conduct and

16. *Kuppuswamy Gounder v. Alagammal*, A.I.R. 1961 Mad. 391.

17. *King v. King*, L.R. (1953) A.C. 124.

18. At page 42.

delinquencies are all different. It would not, therefore, be advisable to blindly copy the English conventions in this respect and it would be necessary to evolve a set of principles by authoritative dicta laid down by Jurists and Judges. Evidently they may, in many respects, be divergent from the English law.

Courts and Judges exercising matrimonial jurisdiction have also a greater responsibility than ordinary civil Courts. Marriage is an institution with which the State is vitally concerned, and any breaking up of the marriage cannot be left to the choice of individuals. The Court always has the discretion in such matter and can of its own motion make as full and complete an investigation as it can.<sup>19</sup>

## "LAW, LAWYERS AND JUDGES"\*

By The Hon'ble Mr. Justice P. B. Gajendragadkar.

### INTRODUCTORY.

I deem it a proud privilege to have been given an opportunity to join you this evening to participate in the Centenary Celebrations of your Association. The occasion is solemn and of historical importance in the life of the Association, and as I stand before you to inaugurate the principal function associated with the Centenary Celebrations, I must confess I feel a sense of real fulfilment. I joined the Appellate Side Bar in August, 1926 and I venture to think nobody ever joined the Bar less prepared for the task ahead of him and less familiar with the practice and procedure in Courts. The tradition of the family and my own academic equipment indicated the line of teaching, but somehow impelled by an inner urge which was not based on any practical considerations without a friend to consult, and without any senior to help, I entered the room of the Appellate Side Bar nearly 37 years ago without knowing anything about the men and matters connected with the Bar. My first appearance before a Division Bench of the Appellate Side brought home to me my complete inadequacy to the task which I had undertaken. It was a petty matter concerning a stay petition filed by the appellants and I was briefed for the respondents. In those days, even stay petitions went before a Division Bench. The appellants had appealed against a decree passed in a first class suit which had directed them to pay a fairly large amount to the respondents by way of past mesne profits and had granted them a share in the immovable properties in dispute. By the stay application on which the appellants had obtained a rule, they claimed stay of all proceedings in execution of the said decree. When I got my brief for the respondents, I had absolutely no idea as to what was required to be done to meet the appellants' case in the stay proceedings. In my innocence I thought my only responsibility would be to make a speech before the Court indicating to the Court the inequity which would result to my clients if stay was granted, and so, I moved into the Court and watched for the case to be called out. In due course, the case was called out and the appellants appeared by Mr. G. N. Thakore instructed by Mr. S. Y. Abhyankar. Mr. Thakore told the Court that I had filed my appearance for the respondents more than a fortnight ago, and yet, had filed no counter-affidavit; and so, he urged that the rule granted on the stay application should be made absolute. What Mr. Thakore stated to the Court passed over my head completely; frankly, I did not know what a counter-affidavit meant and did not realise that the consequence of my failure to file a counter-affidavit was going to be that the stay would be confirm-

19. *Ganeshprasad v. Damayanti*, I.L.R. (1946) Nag. 1 at pp. 6-8 (F.B.).

\* Inaugural Address delivered on the occasion of the centenary celebrations of the Advocates Association of Western India, Bombay, 12th October, 1963.

ed. I did not grasp the full significance of the prayer that the rule should be made absolute. This mystic phrase just meant nothing to me on that day. Sir Lallubhai Shah who presided over the Bench, immediately saw my predicament, and in a tone full of sympathy and kindness he enquired how much time I would need to file a counter-affidavit? The Court-room was crowded and I felt extremely embarrassed by the whole situation; in my impatience to rush out of the Court-room, I just managed to whisper somewhat inaudibly that a week's time would be enough; the kindly Judge knew what was passing in my mind, and so, he said take three weeks' time and make a proper counter-affidavit. Later, an elaborate counter-affidavit was filed and when the stay petition came on for hearing before the same Bench, the rule was made absolute in respect of the immovable property and was discharged in regard to the rest. I will never forget the benevolence of that kindly Judge who adorned the Bench on the Appellate Side for many years and who by his unfailing courtesy to the Bar and by his scholarly, conscientious and objective approach to the problems brought before him in Court set a pattern of judicial decorum and diligence which all of us Judges who came after him tried to emulate. My first experience in the Court of Sir Lallubhai Shah taught me that Judge's stature and greatness should be measured by the confidence he creates in the minds of the junior members of the Bar.

In course of time, I formed many friendships at the Bar, and made some progress in my professional career. The Bar-room, as you know, is a club of equals where freedom of expression rules supreme and no person is above criticism. In those days when I was struggling at the Bar and even after I was heavily engaged in my professional work, all leisure moments were occupied in a free, frank and vigorous expression of views exchanged with friends, and Judges, public-men and politicians, as well as all current events were vehemently and mercilessly discussed thread-bare. Time passed on, and in 1945, I was asked to join the Bench. My elevation to the Bench caused a deep wrench in my heart because ties of warm and close friendships were partially cut asunder. I realised that a degree of isolation is inevitable in Judicial life and intimate contact with friends was no longer possible. Even so, ever since I became a Judge, I have often cast a longing lingering look behind at the Bar-room where I spent nearly 19 years of my happy active life; and it has always given me pleasure to renew my contact with the Bar whenever a suitable opportunity presented itself. My association with the Bar and the warm friendships I formed during my period at the Bar have become a part of my being and I venture to hope that my association with the Bar has, to a limited extent, formed part of the texture of the life of the Association itself. That is why when the President of your Association invited me to inaugurate the Centenary Celebrations, I promptly accepted the invitation because that invitation offered me a splendid opportunity to meet you all on this solemn and historical occasion. It is because of my deep attachment to the Bar to which I once belonged and of my emotional affiliation to the Association of which I was a member, and under whose auspices I grew as a lawyer that I feel a real sense of fulfilment in participating in the function this evening.

### THE ADVOCATES' ASSOCIATION OF WESTERN INDIA— TRIBUTE

When we are holding the Centenary Celebrations of our Association, we justly claim that our Association is perhaps the oldest Bar Association in this country. The High Court of Judicature at Bombay commenced its career on August 14, 1962, and soon thereafter the Vakil Bar practising on the Appellate Side of the High Court organised an Association on January 24, 1864. This

was the result of the resolution passed by the six Founding Fathers who met on that day. These Founding Fathers were: Messrs. Dhirajlal Mathuradas Raosaheb Vishwanath Narayan Mandlik, Nanabhai Haridas, Shantaram Narayan, Pandurang Balibhadra and Ganpatrao Bharkar. Within a week after the organisation was started, the Rules of the Association were adopted at the next meeting held on the 31st January, 1864, and the Association was named the 'Vakils' Association of Western India. In 1881, the name of the Association was changed and it was called the Pleaders' Association of Western India. It appears that on August 16, 1906, a resolution was moved that the President of the Association be elected by ballot every year, but it was lost by a majority, and the convention that the Government Pleader should be ex-officio President of the Association continued. On September 9, 1926, the Indian Bar Councils Act came into force, and in consequence on November 25, 1929, the name of the Association had to be changed; it now came to be known as the Advocates' Association of Western India. In 1931, the Association felt that the presence of the Government Pleader as ex-officio President embarrassed both the President and the Association in discussing matters of public importance which fell within the purview of the aims and objects of the Association, and so, in that year the constitution of the Association was radically changed and a provision was made that the President of the Association should be elected every year. Accordingly the first President of the Association was elected and Mr. Nilkant Atmarani Shiveshwarkar was the proud recipient of that honour.

On an occasion like the present, we naturally look back on the history of the Association with just pride and look forward with the prayerful hope that the present generation will add to the glory of the past and sustain the noble traditions which have always been nursed by the Association in the past. Let us, therefore, pay our respectful homage to all the stalwarts who built this Association and by their sustained effort assisted its progress from time to time. The six Founding Fathers and all those who followed them are entitled to a deep debt of gratitude from all of us who have inherited the great traditions of the Bar from them.

May I in this connection refer to a few of the luminaries on the Appellate Side Bar whom it was my privilege to see in action during my time? It was a pleasure to hear Ganpat Sadashiv Rao, who was a leader of the Bar in his time, addressing the Courts. He was gifted with a sonorous voice and his chaste and chiselled style of speech always reminded you of the perfect diction found in the best judgments of the Privy Council. In fact, it used to be Rao's boast that he rarely cited any decisions other than those of the Privy Council; Kelkar gave the impression of being a cynic in a philosophic sense; his suave manners and pleasant demeanour many times captured the Court's imagination by the artful brevity of his advocacy; A. G. Desai was the unofficial leader of the Bar for many years; tall and imposing in stature, simple in dress, unconventional in manners, subtle in arguments, persuasive of tongue and adept in changing his advocacy from Court to Court to suit the tendencies and the temperaments of different Judges; I have never understood why the Bombay High Court denied itself the privilege of elevating Desai to the Bench; Shingne, the Government Pleader who dominated the Bar by his official position, was always master of the record however heavy and complicated; he marshalled his facts in a rugged forceful and terse manner; one small half sheet of paper contained all his notes and his points came out in his advocacy in well-ordered succession from his remarkable memory; G. N. Thakore, the gaint of our times, austere in appearance, stern in his behaviour, firm and persistent in his advocacy, unbending and assertive, possessed the remarkable and almost uncanny gift of effectively distinguishing inconvenient cases cited by his opponent; H. C. Coyajee, dignified and plea-

sant in his presence, looked like a sage of old; in his behaviour he was courtesy personified and invariably considerate and helpful to the juniors; soft spoken, persuasive in his style, dangerously selective in his points, Coyajee was a perfect artist at the Bar; Mr. M. R. Jayakar was distinguished for his deep learning, polished eloquence, innate culture and charming manners; it was a treat to hear his speeches in Court; Shiveshwarkar, the first elected President of the Association, who wore his distinctive turban, did not believe in collecting a large volume of professional work, and selected his briefs meticulously charged heavy fees from his rich clients and gave them in return invaluable help for every rupee that he had charged; he knew every bit of his case and always pressed his points earnestly in a low and subdued voice, and in short pithy sentences, with the firm conviction that his client had a good cause, while his adversary had none; Dharap who had the unusual advantage of a wide and rich experience both in Original and Appellate Courts, in civil as well as criminal matters, possessed powerful advocacy and would certainly have gone to the top of the Bar, but premature death cut short his brilliant career. Utsavlat Shah, mild in appearance, sweet and soft in temper, brief in his advocacy, was endowed with a very logical and subtle mind; the penetrating power of analysis which Shah possessed and the devastating logic which he introduced in his soft-spoken address to the Court often proved more deadly than assertive or dogmatic advocacy, ever could; in my experience at the Bar, I did not come across a more astute lawyer; unfortunately this well-meaning and obliging lawyer who was never gifted with robust health, overworked against medical advice and notwithstanding the remonstrance of his friends, and a brilliant and very promising career came to a sad premature end; last, but not the least, stands Dr. Kane who is fortunately with us. The scholar lawyer who gave up his teaching career somewhat late in life in protest because his self-respect was injured, joined the Bar fully determined to keep his scholarship alive; law, it is said, is a very jealous mistress, but Kane had resolved at the outset to be master in his relation with the mistress of law. He deliberately selected a small number of briefs and thus left himself sufficient freedom to pursue his scholarship. His subsequent career shows that the vow which he had taken when he joined the Bar to be true to his scholarship has been more than fulfilled. Kane's advocacy showed a depth of legal knowledge and a firm grasp of the ultimate principles of law. I have always felt that the Bombay High Court has, in a sense, contributed to the enrichment of oriental scholarship literally beyond all measure. When the names of our eminent lawyers and Judges have, after passage of time, become a part of forgotten history, Kane's name will be respectfully remembered so long as oriental scholarship thrives and history of Hindu culture attracts the attention of the intellectual world.

I have referred to some of the luminaries on the Appellate Side Bar who made their mark during my time. As you will easily realise, my list is merely illustrative and does not purport or claim to be exhaustive. Let us, therefore, pay our homage to all our predecessors who laboured in their time to build up the rich traditions of the Appellate Side Bar.

### THE TWO BARS—THE APPELLATE AND ORIGINAL

In the Bombay High Court, there have always been two Bars, the Appellate Side Bar and the Original Side Bar. The Appellate Side Bar in my time used to be conservative and traditional in dress as well as general outlook. It contributed largely to the development of those branches of law which mattered to the large majority of the litigating public in the State. For success on the Appellate Side, you wanted a firm grounding in law in general, and special knowledge of those departments of law with which the litigation in the moffusil is generally concerned. On the other hand, the Original Side has occasion to deal more frequently with heavy commercial causes arising from the transactions of

the commercial community in the city of Bombay. Practice on the Original Side calls for different qualities; it requires ready wit, suppleness of intellect, elasticity of approach, a knowledge of the working of human mind, and keen sense of relevance. On the Appellate Side, the human conflicts which give rise to litigation are reduced to cold print and advocacy centers more around facts found and points of law raised and decided by the trial Court. In the trial of original causes, however, the lawyer is dealing with human material and has to be alert in marshalling his evidence and moulding his case.

It is true that the dual system which is a special feature of the Original Side was first introduced in Bombay and Calcutta mainly for the convenience of the English Barristers-at-law who had virtual monopoly of practice on the Original Side of the two High Courts for many years. In Bombay, this monopoly was gradually broken by a band of brilliant Indian Advocates (Original Side) who made history on the Original Side; but, though in course of time the Barrister element of the Original Side has become weaker in numbers, Indian Advocates who constitute the bulk of practitioners on the Original Side seem to desire the continuance of the dual system, because it is felt that the system contributes to make the pleadings more efficient and advocacy more effective and detached.

When I joined the Appellate Side Bar, a wall of exclusiveness separated the two Bars and they seemed to live in two different worlds; on occasions, there used to be bouts of controversy between them as to the necessity, the wisdom and the desirability of the continuance of the dual system. These disputes which centered round the merits and demerits of the dual system often raised passions and led to heated debates and misunderstandings; but gradually though somewhat imperceptibly, the two Bars started coming together and the rigidity of rules which kept them apart slowly began to be relaxed. Unlike in Calcutta where it is reported that the relations between the two Bars are far from cordial, in Bombay the position fortunately has been very different; here the relations between the two Bars have been very cordial, there is complete co-operation between them and members belonging to the two respective Bars are able to see strong and good points in each other. The merits of the dual system must, therefore, be examined in due course dispassionately before a final decision is reached in that behalf. Any changes concerning this system should be worked out in harmony by mutual understanding and with perfect co-operation.

In that connection, the interest of the litigating public is obviously a consideration of primary importance. You may have to bear in mind the efficiency which the specialised training of the Solicitors introduces in the drafting and presentation of pleadings, and the preparation of the cases and the assistance which this system tends to give in making advocacy more effective and objective. You may also have to balance these considerations against the additional cost involved in its continuance; the levy of court-fees on suits on the Original Side has introduced factor which has to be borne in mind. The interests of the junior section of the Bar practising on the Original Side may also have to be taken into account. No one can deny the importance of taking all legitimate steps to cultivate the growth of a strong Junior Bar both on the Original and the Appellate Sides, because it is the Junior Bar of to-day which will give us the leaders of the Bar to-morrow.

There is one important aspect of this question to which I may incidentally refer. During recent years and particularly since the Constitution was adopted, categories of litigation which hold a prominent place in the High Court have changed; Tax matters, industrial disputes and innumerable petitions filed under Article 226 which occupy the attention of lawyers and Judges so much now, are

radically different in character from the categories of work which were traditionally associated with the Original and Appellate Side Bars respectively; and quite obviously, the proper presentation of these newer types of causes requires a different kind of equipment in a lawyer; there is nothing which is intrinsically original or appellate about them in the accepted sense of those terms; competent young men on both sides can and may legitimately hope to tackle this class of litigation efficiently even without the additional assistance of the dual system.

Whilst we are considering the pros and cons of this problem, we ought also to remember that existing conventions operating in all spheres of socio-economic activities, including the practice of liberal professions, would be out of tune with the felt necessities of to-day if they are shown to tend to create monopolies or foster feelings of exclusiveness reminiscent of the rigid caste system of the conservative Hindu community.

Let me, however, hasten to add that I am expressing no opinion on this controversy, without the assistance of expert opinion because it has been one of my regrets that I have never conducted any original suit as a lawyer and have not tried any original cause as a Judge. In fact, it is not my intention to express any opinion on this issue. In the Supreme Court, a similar problem may perhaps fall to be considered in the near future. As you know in the Supreme Court we have the system of Advocates-on-record. Whether or not that system works satisfactorily is a matter on which there is likely to be a difference of opinion. Would it be possible, for instance, to make the dual system compulsory in some specified categories of litigation and leave it to the option of the litigants to adopt it in other categories of litigation? Would it be possible and advisable to make the dual system entirely optional and provide for appropriate rules for taxation wherever clients take recourse to it and secure the assistance of Solicitors? Would the system of junior and senior Advocates serve the purpose? These and other similar matters connected with the question of the dual system need to be carefully considered before any decision is reached in that behalf.

However, I am free to confess that as I look at the future, I sometimes wonder if in course of time we may not see the fusion of the two Bars into one homogeneous comprehensive Bar of the High Court; lawyers practising before the Appellate Benches of the High Court would, in that case, naturally constitute one branch and those practising in the Courts dealing with original matters would constitute the other. This dream may sound heretical to some friends; but I would remind them that history abounds in instances where the heresy of to-day becomes the platitude of to-morrow. With the change of times, all our perspectives are likely to change and the compulsive pressure of events may ultimately lead to the healthy fusion and unification of the two Bars. It seems to me that when we have one comprehensive Bar, it would be possible for the junior member to move from one branch to another according to his aptitude, equipment and opportunities. We are all proud that the name of the Bombay High Court and the Bombay Bar, considered as a whole, occupies a unique place of honour in the legal world of our country. I trust and hope that the High Court and both the Original and Appellate Side Bars practising before it will always continue to maintain that high position.

### CYNICAL CRITICISM OF THE PROFESSION OF LAW

The profession of law can claim an ancient pedigree, but so can its uncharitable critics make a similar claim. In discussing the role of lawyers in a modern democratic State, it is necessary that we should be aware of what the critics have to say about the profession. Manu said that "the people who suffer for the sake of others are witnesses, sureties and the judges, but those who are



benefited by litigation, are the King (who gets Court-fees), the creditor (who gets his decree), the merchant (the speculator who supplies money for defence to the defendant and acquires his property in return), and the Brahmin (lawyer who advises each party on law)."<sup>1</sup> Lord Macmillan in his address on 'The Ethics of Advocacy' has quoted a Latin couplet which he has rendered thus:

An advocate but not a thief,

A thing well nigh beyond belief.

In pictorial art, too, says Lord Macmillan, the Saint is commonly represented with a cat beside him as his symbol, for the reason, as Mr. Baring-Gould tells us in his 'Lives of the Saints', that the cat is regarded "as in some sort symbolising a lawyer who watches for his prey, darts on it at the proper moment with alacrity, and when he has got his victim delights to play with him, but never lets him escape from his clutches."<sup>2</sup> Swift described the Bar as "a society of men bred up from their youth in the art of proving by words multiplied for the purpose that white is black and black is white, according as they are paid".<sup>3</sup> Sir Walter Scott said that the clergy live by our sins, the medical faculty by our diseases and the law gentry by our misfortunes. It is also said that the Banker handles other people's moneys, parson and priest other people's spiritual aspirations and a lawyer other peoples troubles. Criticism of this kind is based on ignorance and misunderstanding of the true functions of law and the role that lawyers play in the administration of law. In all civilised societies where disputes between citizens are no longer decided by ordeals or by vigorous arguments of clubs and fists, administration of law and of justice is always treated as the primary concern of the State, and it is in regard to this function of the State that the Courts render assistance and the lawyers play their part. As against the carping and cynical criticism made from time to time against the profession of law, it is heartening to turn to the inspiring words of Justice Holmes. "The law", said Justice Holmes, "is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men."<sup>4</sup>

### LAW AND ITS FUNCTION

When Holmes spoke about the noble function of law, he was not referring so much to the provisions of the law contained in the statute book or to judicial decisions; he had in mind the jurisprudential aspect of law—law in relation to its ultimate philosophy and its ethics.

In that sense, law is something much greater and nobler than the contents of any statute book, of any code, of any volume of judicial decisions. As Lord Macmillan observed, "It is the guardian and vindicator of the two most precious things in the world—justice and liberty. Its ideal remains constant and unchanging. By the standards of justice and liberty which it sets up all governments, all political theories, must ultimately stand or fall."<sup>5</sup> In other words, the law we think of in this context is what Justice Brandeis so significantly described "as the living law".

The most significant change in the concept of this philosophic aspect of law has been caused by the change from the analytical to the functional attitude adopted by jurists. 'Jurisprudence', according to Ulpian, 'is the knowledge of

1. Manu VIII, 169.

2. Macmillan on 'Law and other Things' page 172.

3. do. P. 181.

4. "The Path of the Law"—talk by Oliver Wendell Holmes—Voices in Court page 497.

5. Macmillan on "Law and Other Things" pages 11-12.

things human and divine, the science of the just and the unjust."<sup>6</sup> Sociological jurisprudence which is more appropriately described as functional jurisprudence introduces pragmatism as a philosophy of law. Dean Roscoe Pound who has been the great exponent of this school of jurisprudence for many years past, has stated that "the sociological method consists in study of a legal system functionally, as a social instrument, as a part social control, and study of its institutions, doctrines and precepts with respect to the social ends to be served. It pre-supposes that law is a specialized agency of social control."<sup>7</sup> According to this view, law has to meet the challenge of the times from epoch to epoch. As Pound so eloquently observes: "While jurists have been at these tasks, a new social order has been building which makes new demands and presses upon the legal order within a multitude of unsatisfied desires. Once more we must build rather than merely improve; we must create rather than merely order and systematise and logically reconcile details."<sup>8-9</sup> According to the vision of Pound "legal history is the record of a continually wider recognising and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding friction in human enjoyment of the goods of existence—in short, a continually more efficacious social engineering."<sup>8-9</sup> It is in the light of this philosophy that the function of law has to be determined today.

Thus considered, law ceases to be, in the words of Justice Holmes, "a brooding omnipotence in the sky" and becomes a flexible instrument of social order. Its contents would naturally depend upon the political values of the society which it purports to regulate. That is how justice and freedom take a place of pride in the scheme of law today and to them must be added the basic values of a democratic society which require the realisation of social justice.<sup>10</sup>

It is in this context that Lord Macmillan described law as the guardian and vindicator of the two most precious things in the world—justice and liberty. Justice and liberty properly understood inevitably lead to the corollary of social justice and equal opportunities to all. It is of course true that law is not an exact science, as Lord Halsbury used to say. It is essentially a very human affair. It has to deal not with scientific axioms or scientific formulae, but with the everyday concerns of ordinary citizens.<sup>11</sup> To be able to meet the challenge posed by current problems, law of today has to study the day before yesterday, in order that yesterday may not paralyze today, and today may not paralyze tomorrow.<sup>12</sup> In substance, then, law is a mighty weapon in the armoury of democracy with which democracy seeks to attain its ideal of a Welfare State. Huxley found in Locke "the noblest, and at the same time briefest, statement of the purpose of Government known to him when Locke observed that 'the end of Government is the good of mankind.'"<sup>13</sup> The end of democratic Governments today is undoubtedly the good of its citizens, and in order to achieve its ideal, democracy tends to lean more and more on law and seeks to establish socioeconomic equality with the assistance of law. That, broadly stated, is the func-

6. 'Selected writings of Benjamin Nathan Cardozo' edited by Margaret E. Hall, page 248.

7. 'Jurisprudence' by Roscoe Pound, Vol. I, Pt. I, page 17.

8-9. "An Introduction to the Philosophy of Law" by Roscoe Pound, page 57.

10. 'Law and Social change in contemporary Britain' by Friedmann, page 284.

11. Macmillan on Law and Other Things', page 128.

12. Selected Writings of Benjamin Nathan Cardozo,' page 128.

13. 'Aspects of Justice' by C. K. Allen, page 139.

tion of law today and it is while law seeks to discharge that function that lawyers have to play their role.

In discussing the dynamic function of law in a democratic State, one important principle has to be borne in mind. Democracy is undoubtedly entitled to lean on the power of law to bring about socio-economic changes with the object of attaining the ideal of a Welfare State; but in making laws with that object, care must be taken to see that the lag between the letter of the law and enlightend public opinion is not unduly wide. The social structure which law purports to construct must be steady though not stationary, stable though not statis. The principle of challenge and response which according to Professor Toynbee has marked the growth of human civilisation comes into play even in the matter of the operation of dynamic law in a democratic State. The challenge posed by the socio-economic problems from time to time has to be met by law, but the response which democracy makes to the said challenge with the help of its dynamic laws should try to keep continuity with the best element of the past and effect appropriate and adequate changes in order to prepare for the future. In this delicate process of bringing about a socio-economic revolution peacefully by the force of laws, lawyers can undoubtedly play a very important role in educating public opinion.

### THE LAWYERS—THE GREAT BROTHERHOOD AT LAW.

When we consider the role of lawyers in the administration of law, we ought to remember that the profession of law is not a mere trade or business. It is a vocation and those who belong to it pursue their profession as the guardians of ideals and traditions to which it is right that they should from time to time dedicate themselves.<sup>14</sup> "If I were to seek for the explanation of the bond which binds in brotherhood the servants of the law throughout the world", observed Lord Macmillan, "I venture to think that I should find it in our common devotion to a great ideal, the promotion of the orderly progress of civilisation."<sup>15</sup> It is around this ideal that all the noble traditions of the Bar are built and it is the pursuit of this ideal that makes the calling of law noble and a worthy instrument of social service. Mr. Justice Cardozo has described the tradition of the Bar as "a myth which has grown about the profession of law, a fable, a tradition, not always the truth as seen and realised in conduct, but nonetheless the chief thing that makes it worthwhile, the thing that ennobles it, the thing that it really is in its best and truest moments, the thing without which, we may be sure, it would wither and die. The tradition, the ennobling tradition, though it be myth as well as verity, that surrounds as with an aura the profession of law, is the bond between its members and one of the great concerns of man, the cause of justice upon earth."<sup>16</sup> In the context of the challenge which democracy has to meet today, the role of lawyers has naturally assumed a somewhat different complexion. The concept of the rule of law has itself become dynamic in accordance with the dynamic role of law in a democracy and that makes it necessary for the lawyer to meet the challenge of his times. As Friedmann has observed: "It would be tragic if the law were so petrified as to be unable to respond to the unending challenge of evolutionary or revolutionary changes in society. To the lawyer, this challenge means that he cannot be content to be a craftsman. His technical knowledge will supply the tools but it is his sense of

14. Macmillan 'Law and Other things', page 127.

15. do do p. 135.

16. 'Selected Writings of Benjamin Nathan Cardozo', page 105.

responsibility for the society in which he lives that must inspire him to be jurist as well as lawyer."<sup>17</sup>

In all democratic countries which are committed to the pursuit of the ideal of a Welfare State, no lawyer can ignore the fact that a minimum of planning, which is essential for the success of democracy makes it necessary that relevant legal principles should be reconsidered. The conflict between individual freedom and planning can be legitimately resolved by making suitable adjustments and harmonising individual liberty with the claims of social change. The theory that planning is wholly incompatible with the rule of law is a myth, it is the result of prejudice and ignorance. Once the paramount need of a peaceful socio-economic evolution is realised, the lawyer can easily make important contribution to the problem of harmonising planning with freedom. Let us realise that without a proper solution of this problem, democratic way of life cannot survive.

Before I part with this topic, however, I would like to recall the words of admonition addressed by Justice Frankfurter when he gave evidence before the Royal Commission in England, that examined the question about the abolition of death sentence. Said Justice Frankfurter, "Nothing is more true of my profession than that the most eminent amongst them for 100 years have testified with complete confidence that something is impossible which once it is introduced is found to be easy of administration. The history of legal procedure is the history of rejection of reasonable and civilised standards in the administration of law by most eminent Judges and legal practitioners. That is true of your country and mine. That is true of civil law and criminal law. Every effort to effect improving changes is resisted on the assumption that man's ultimate wisdom is to be found in the legal system as at the time on which you tried to make a change."<sup>18</sup> It is my earnest hope that we Judges and lawyers in this country will not deserve this reproach.

### JUDICIAL APPROACH

Whilst we are considering the role which lawyers have to play in the administration of law, I would like to discuss briefly the importance of a proper judicial approach in the administration of law. As Justice Jackson used to observe, a trial of an action in our Courts is in the nature of an adversary proceeding. Sometimes it resembles a trial by battle in the Norman period where the combatants used all the weapons in their armoury to vanquish their opponent. This adversary method has no doubt its merits, but to achieve the object of finding the truth in a trial conducted on the adversary method, a Judge has to play an important part. He cannot be merely a passive witness of the combat; he should, of course, never enter the arena, but, nevertheless, he must always regulate the contest by the well-known and well-established rules and see that both parties play the game in a proper way. It is customary for Judges to take their seats on a raised platform in Courts, but Judges must never forget that they and the lawyers who address them are partners in the best sense of the term, the object of both being to find the truth in every case. In order to help the administration of justice, a Judge must approach his task with humility and with the full knowledge of his fallibility; he must always remember that a Judge who makes no mistake is yet to be born. As Justice Cardozo observed: "Something of Pascal's spirit of self-research and self-reproach must come at moments to the man who finds himself summoned to the duty of shaping the:

17. W. Friedmann 'Law in a Changing Society', page 503.

18. 'Capital Punishment as a Deterrent' by Jeral Gardiner Q.C., Page 55.

progress of law. The very breadth and scope of the opportunity to give expression to his finer self, seem to point the accusing finger of disparagement and scorn."<sup>19</sup> It is in this connection that Judges should bear in mind the wise words of Judge Learned Hand. Said Judge Learned Hand, "he would like to see written over the portals of every Church, every Court-house and at every crossroad the words which Oliver Cromwell spoke just before the battle of Dunbar—"I beseech ye in the bowels of Christ, think that ye may be mistaken."<sup>20</sup> Often enough in the discharge of his duties a Judge is required to draw sufficient conclusions from insufficient data; but his problem always is to apply the never changing principles to ever-changing conditions and facts. That is where patience and a genuine desire to know would help the Judge to do his duty, while sympathetic consideration and courtesy to the members of the Bar would enable him to get the best out of them. Experience of work in Courts shows that a strong Bar and a strong Bench act and react on each other. A strong Bench corrects the vagaries of the Bar, whereas a strong Bar checks the idiosyncrasies of the Bench. Wise Judges realise that the quality of their judgments is almost always determined by the quality of the arguments urged before them, and that the credit for contributing to the development of law must always be shared by the Bar and the Bench alike. That is why perfect co-operation between the Bar and the Bench is essential for the proper administration of justice in our Courts.

It is true that all of us have their inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense, in James's phrase, of "the total push and pressure of the cosmos", which, when reasons are nicely balanced, must determine where choice will fall.<sup>21</sup> Nevertheless, Judges ought never to forget that they must never become slaves to the tyranny of dogmas and tags, and must never allow their minds to be influenced, even sub-consciously, by the pulls and pressures of their faith or their beliefs. Every-day before the proceedings commence when Judges and lawyers bow before the seat of justice, it is necessary that each one of us should remember that the task that we discharge in the Court-room is the solemn task of the search of truth. Ethical considerations of the highest order cannot be eliminated from our work in Courts, for, in a sense, that work is the work of worship in the temple of justice. If we realise the solemnity of the work that we do in Courts of law, it will create in our minds that humility and that passionate desire for the search of truth which alone will make the administration of law a proper instrument of serving the needs of social justice. That is how it seems to me that the lawyers and Judges by co-operating with each other assist the progress of law in all its majesty.

### THE RULE OF LAW—ITS SIGNIFICANCE TODAY

It is hardly necessary to emphasise that in the context of today, the rule of law has to play a vital role. After we gave ourselves the Constitution, we have chosen the democratic way of life and the Nation is committed to the task of achieving socio-economic equality and the attainment of a Welfare State. In our march towards the ideal thus set up before us by the Constitution, law has inevitably to play a major part; the administration of law and the enforcement of the rule of law are entrusted to the Courts in this country. Let us

19. 'Selected Writings of Benjamin Nathan Cardozo, Page 180.

20. "The Spirit of Liberty" by Learned Hand, page XXIV.

21. Selected Writings of Benjamin Nathan Cardozo, page 109.

always remember that what we do in Court effects the future of the rule of law in this country. The adjustment of fundamental rights of individual citizens with the claims for socio-economic revolution which legislation attempts to make, presents a difficult and delicate problem, but that problem must be solved reasonably if the democratic way of life is to succeed. We have to establish a rational synthesis and harmony between individual liberty and freedom and social good and welfare. In that process, the validity of laws falls often to be tested and in that connection, Judges and lawyers have to play a prominent part. Let us, therefore, watch our steps carefully and see to it that the confidence of the public which is our main asset is not shaken. Administration of law must be free from fear and must likewise be free from hope of favour. We often hear public criticism these days in regard to what is described as the crisis of character. Fortunately, public confidence in the administration of justice is unshaken; but the common citizen in the country has become watchful and vigilant, and so, it is our duty to see that the administration of justice is fair, impartial and fearless. Both lawyers and judges must strictly conform to the code of conduct prescribed by healthy conventions recognised in all democratic countries and let it be our constant endeavour to deserve the confidence of the public. Liberty and justice are the most outstanding assets of democracy and it is by a rational synthesis of the concept of liberty and social justice that the goal of a Welfare State can be peacefully reached in a democratic way. The majesty of law in that connection must play its dynamic role. Let us then on this solemn occasion rededicate ourselves to the service of law in all its majesty.

### IMPORTANCE OF HEALTHY CONVENTIONS

It is universally recognised that the rule of law constitutes the most distinguishing feature of the democratic way of life. It is, however, necessary to emphasise in this connection that the rule of law postulates the observance of certain healthy and well-recognised conventions. After the passing of the Advocates Act, the Bar in India has now become completely autonomous and the Bar Councils constituted under the Act must now act as vigilant custodians of the healthy conventions and traditions of the Bar. Judges also must make an earnest endeavour to conform to the healthy and proper conventions in regard to judicial conduct. Judges are not monks or ascetics living in monasteries or maths; they do not live in ivory towers; they are and continue to be a part of the community and within the limitations prescribed by their office, they participate in the general current of national life. But Judges never take part in public discussions of any problems which are controversial or which are likely to come before the Court for judicial decision. Convention voluntarily adopted by them requires that Judges should observe a certain degree of isolation in their life and should be restrained and balanced in giving public expression to their views. Judges, however, do not cease to be citizens after they put on judicial robes and they can and may take part in educational, cultural and social activities which do not impinge even remotely on their judicial duties. In regard to their work in Court, Judges realise that they function in open Courts and hold their proceedings in public. As Lord Atkin so eloquently observed in *Andre Paul v. Attorney-General of Trinidad*,<sup>22</sup> "Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men." In fact, wise Judges are so fully conscious of their fallibility that outspoken comments made

by enlightened members of the public against their judgments are always appreciated and never misunderstood by them.

It is well-known that some of the Judges are doing their best to encourage the development of proper academic legal opinion in this country. The Indian Law Institute with which some of us are actively associated has undertaken the work of legal research and one of its activities is to encourage academic lawyers and Professors to scrutinise the judgments that we deliver from time to time on important questions of law and freely and fearlessly express their opinion on the propriety or correctness of judicial conclusions. In this connection, I would appeal to the members of the Bar in Bombay to take more interest in the academic aspect of law and give the public at large the benefit of their opinions on important legal points which are decided from day to day in our Courts.

There is, however, one aspect of this problem which incidentally deserves to be carefully considered by the legal world in India. Sometimes, the State Government or the Central Government requests a sitting Judge to hold an enquiry under the provisions of the Commissions of Enquiry Act No. LX of 1952, and, ordinarily, when such a request is received, Judges deem it a part of their duty to accept the invitation and proceed to hold the enquiry assigned to them. When enquiries of this character are held by Judges they are, as they ought to be, held as open enquiries with decorum and restraint, and in conducting them, rules of natural justice are invariably observed. At the end of the enquiry, the Judge carefully considers the evidence adduced before him and makes his report; a question often arises as to whether the Government which entrusted the enquiry to the Judge is bound to accept his report. I may in this connection be permitted to refer to my experience. When I undertook the work of the Bank Award Commission after the unfortunate death of Mr. Justice Rajadhyaksha in 1955, there was an implied understanding that my recommendations would be accepted. Since the dispute referred to the Commission had a long, chequered and tortuous past history, I prescribed for myself a period within which the report should be made, and did make my report within that period. Soon thereafter, Government accepted my recommendations and Act was passed to give effect to them. It seems to me that when a Judge is invited to hold an enquiry, that should be the normal procedure. I am not suggesting that the findings recorded at such an enquiry or the recommendations made by the Judges are legally binding on the Government which orders the enquiry. It is not so much the legal aspect of the matter to which I am adverting. I am dealing with the question of healthy conventions; and so I would suggest that a convention should be established in this country whereby reports made by Judges at the end of the enquiry conducted by them under the Commissions of Enquiry Act should normally be accepted; otherwise we come across instances in which the report elaborately made by a Judge is sent to an Executive Officer for his scrutiny, and the note made by the said Officer becomes the basis for the Government's decision in the matter. Usually the Government announces its decision in a laconic manner and indicates broadly what conclusions of the Judge it has accepted wholly or partially and what conclusions it has rejected. If it is felt that certain questions are required to be determined in a judicial or quasi-judicial manner, and they are, therefore, entrusted to the enquiry of a sitting Judge, considerations of propriety require that normally the findings and recommendations made by the Judge should be accepted by the Government. What the Government does is not a matter of any significance to the Judge himself; what is relevant and material is the impact of the Government's action on the basic and essential

postulates of the rule of law. That is why it seems to me that time has come when healthy and proper conventions should be evolved in this matter.

Persons who are privileged to hold high offices either in the Judiciary, the Government or the Executive from time to time may come and go, but the rule of law on the success of which the future of democracy in this country so vitally depends must go on for ever. That is why I appeal to the legal world and to the enlightened public opinion in all humility but with all the earnestness at my command, to help in evolving healthy and proper conventions which would make the rule of law effective in this country.

### WATCHWORDS — TO KINDLE THE PATH OF THE BROTHERHOOD AT LAW:

Before I conclude, may I remind you of what Justice Cardozo said in his address to the Annual New York County Lawyers Association when he spoke on 'Faith and a Doubting World'? As you know, Justice Cardozo was a scholar Judge of great eminence who had a matchless command over English language and whose deep and varied scholarship often enough gives thrills of pleasure to the readers of his writings and speeches by apt and illuminating quotations. In the speech to which I am referring, Justice Cardozo mentioned a book written by Claud Mullins, an English Barrister, with the provocative title "In Quest of Justice", and made a quotation from it. Said Justice Cardozo, "Where shall we find a more stirring message than the great speech delivered by Lord Brougham a century ago in the English House of Commons when he spoke in support of a motion that an address be presented to the King petitioning that "a commission be established to inquire into the defects, occasioned by time and otherwise in the laws of this realm of England as administered in the Courts of common law, and the remedies which may be expedient for the same." "It was the boast of Augustus (I quote the closing words) that he found Rome of brick and left it of marble. But how much nobler will be our sovereign's boast, when he shall have it to say that he found law dear and left it cheap; found it a sealed book, left it a living letter, found it the patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword or craft and oppression, left it the staff of honesty and the shield of innocence." Having made this appropriate quotation, Justice Cardozo in his inimitable style added: "Here is a kindling oriflame or all of us, a little gaudy and extravagant perhaps, but moving all the same. Are there Knights among our number that will put it within the power of our sovereign lord, the People, to utter a like boast?"<sup>23</sup>



**THE CONSTITUTION (FIFTEENTH AMENDMENT) ACT, 1963.**

[Received the assent of the President on the 5th October, 1963.]

Published in the Gazette of India (Extraordinary) Part II, section 1, page 349,  
dated 7th October, 1963].

[5th October, 1963.]

*An Act further to amend the Constitution of India.*

Be it enacted by Parliament in the Fourteenth Year of the Republic of India as follows :—

**Short title.**

1. This Act may be called **THE CONSTITUTION (FIFTEENTH AMENDMENT) ACT, 1963.**

**Amendment of Article 124.**

2. In Article 124 of the Constitution, after clause (2), the following clause shall be inserted, namely :—

“(2-A) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide.”

3. In Article 128 of the Constitution, after the words “Federal Court”, the words “or who has held the office of a Judge of a High Court and is duly qualified for appointment as a Judge of the Supreme Court” shall be inserted.

**Amendment of Article 128.****Amendment of Article 217.**

4. In Article 217 of the Constitution,—

(a) in clause (1), for the words “sixty years”, the words “sixty-two years” shall be substituted ;

(b) after clause (2), the following clause shall be inserted and shall be deemed always to have been inserted, namely :—

“(3) If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.”

**Amendment of Article 222.**

5. In Article 222 of the Constitution, after clause (1), the following clause shall be inserted, namely :—

“(2) When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix.”

**Amendment of Article 224.**

6. In Article 224 of the Constitution, in clause (3), for the words “sixty years”, the words “sixty-two years” shall be substituted.

**Insertion of new Article 224-A.**

7. After Article 224 of the Constitution, the following article shall be inserted, namely :—

“224-A. *Appointment of retired Judges at sittings of High Courts.*—Notwithstanding anything in this Chapter, the Chief Justice of a High Court for any State may at any time, with the previous consent of the President, request any person who has held the office of a Judge of that Court or of any other High Court to sit and act as a Judge of the High Court for that State, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges, of, but shall not otherwise be deemed to be, a Judge of that High Court :

Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that High Court unless he consents so to do.”

**Amendment of Article 226.**

8. In Article 226 of the Constitution,—

(a) after clause (1), the following clause shall be inserted, namely :—

“(1-A) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat

of such Government or authority or the residence of such person is not within those territories.”;

(b) in clause (2), for the word, brackets and figure “ clause (1) ”, the words, brackets, figures and letter “ clause (1) or clause (1-A) ” shall be substituted.

**Amendment of Article 297.** 9. In Article 297 of the Constitution, after the words “ territorial waters”, the words “ or the continental shelf” shall be inserted.

**Amendment of Article 311.** 10. In Article 311 of the Constitution, for clauses (2) and (3), the following clauses shall be substituted, namely :—

“(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry.

Provided that this clause shall not apply—

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge ; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry ; or

(c) where the President or the Governor , as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.”.

**Amendment of Article 316.** 11. In Article 316 of the Constitution, after clause (1), the following clause shall be inserted, namely :—

“(1-A) If the office of the Chairman of the Commission becomes vacant or if any such Chairman is by reason of absence or for any other reason unable to perform the duties of his office, those duties shall, until some person appointed under clause (1) to the vacant office has entered on the duties thereof or, as the case may be, until the Chairman has resumed his duties, be performed by such one of the other members of the Commission as the President, in the case of the Union Commission or a Joint Commission, and the Governor of the State in the case of a State Commission, may appoint for the purpose.”.

**Amendment of the Seventh Schedule.** 12. In the Seventh Schedule to the Constitution in List I, in Entry 78, after the word “organisation”, the brackets and words “(including vacations)” shall be inserted and shall be deemed always to have been inserted.

## THE CONSTITUTION (SIXTEENTH AMENDMENT) ACT, 1963.

[Received the assent of the President on the 5th October, 1963.]

Published in the Gazette of India (Extraordinary), Part II, section 1, page 352, dated 7th October, 1963].

[5th October, 1963.]

*An Act further to amend the Constitution of India.*

BE it enacted by Parliament in the Fourteenth Year of the Republic of India as follows :—

**Short title.**

1. This Act may be called THE CONSTITUTION (SIXTEENTH AMENDMENT) ACT, 1963.

**Amendment of Article 19.**

2. In Article 19 of the Constitution,—

(a) in clause (2), after the words “ in the interests of”, the words “ the sovereignty and integrity of India or ” shall be inserted,

(b) in clauses (3) and (4), after the words “ in the interests of”, the words “ the sovereignty and integrity of India or ” shall be inserted.

**Amendment of Article 84.** 3. In Article 84 of the Constitution, for clause (a), the following clause shall be substituted, namely :—  
“(a) is a citizen of India, and makes and subscribes before some person authorized in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule ;”.

**Amendment of Article 173.** 4. In Article 173 of the Constitution, for clause (a), the following clause shall be substituted, namely :—  
“(a) is a citizen of India, and makes and subscribes before some person authorized in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule ;”.

**Amendment of Third Schedule.** 5. In the Third Schedule to the Constitution,—  
(a) in Form I, after the words “ Constitution of India as by law established,” the words that “ I will uphold the sovereignty and integrity of India”, shall be inserted:  
(b) for Form III, the following shall be substituted, namely :—

### “ III

#### A

Form of oath or affirmation to be made by a candidate for election to Parliament :—

“ I, A.B., having been nominated as a candidate to fill a seat in the Council of States (or the House of the People) do swear in the name of God that I will bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of India.”.

#### B

Form of oath or affirmation to be made by a member of Parliament :—

“ I, A.B., having been elected (or nominated) a member of the Council of States (or the House of the People) do swear in the name of God that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter.” ;

(c) in Forms IV, V and VIII, after the words “ the Constitution of India as by law established ”, the words “ that I will uphold the sovereignty and integrity of India ”, shall be inserted :

(d) for Form VII, the following shall be substituted, namely :—

### “ VII

#### A

Form of oath or affirmation to be made by a candidate for election to the Legislature of a State :—

“ I, A.B., having been nominated as a candidate to fill a seat in the Legislative Assembly (or Legislative Council), do swear in the name of God that I will bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of India.”.

#### B

Form of oath or affirmation to be made by a member of the Legislature of a State :—

“ I, A.B., having been elected (or nominated) a member of the Legislative Assembly (or Legislative Council), do swear in the name of God that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter.”.

## [SUPREME COURT.]

*P. B. Gajendragadkar, K. N. Wanchoo,  
K. C. Das Gupta, J. C. Shah and  
N. Rajagopala Ayyangar, JJ.*  
9th April, 1963.

*Associated Industries (P.) Ltd. v.  
The Regional Provident Fund  
Commissioner, Kerala,  
C.A. No. 324 of 1962.*

*Provident Funds Act (XIX of 1952), section 1 (3)—Meaning of 'Factory'.*

It is in the light of this position that we may revert to the actual decision in the *Regional Provident Fund Commissioner, Bombay v. S. K. M. Manufacturing Co.*, A.I.R. 1962 S.C. 1536. In that case, this Court was dealing with the cases of Shree Krishna Metal Manufacturing Co., and Oudh Sugar Mills Ltd. The Metal Company carried on four different kinds of activities and it was held that its industrial activity which fell under Schedule I was neither minor, nor subsidiary, nor incidental to the other activities. In other words, the industry which the company ran and which fell under Schedule I was independent of the other industries conducted by the Company, and so, it was held that the question about one industry being subsidiary minor, or incidental did not arise. In the result, the Company's factory was found to fall under section 1 (3) (a).

Where the industrial activities are independent and the factory is running separate industries within the same premises and as part of the same establishment and under the same licence, it is difficult to accept the argument that in dealing with such a factory, enquiry would be relevant as to which of the industries is dominant and primary, and which is not. Therefore, in our opinion, the High Court was plainly right in rejecting the appellant's case that its factory did not attract the provisions of section 1 (3) (a) of the Provident Funds Act.

*G. P. Rai, Advocate and J. B. Dadachanji, O. G. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., for Appellant.*

*S. V. Gupte, Additional Solicitor-General of India (R. Ganapathy Iyer, Advocate and P. D. Menon, Advocate for R. H. Dhebar, Advocate, with him), for Respondent.*

G.R.

*Appeal dismissed.*

## [SUPREME COURT.]

*K. Subba Rao, Raghubar Dayal and  
J. R. Mudholkar, JJ.*  
9th April, 1963.

*Addagada Raghavamma v.  
Addagada Chenchamma.  
C.A. No. 165 of 1961.*

*Hindu Law—Adoption—Partition—Construction of Will—Burden of Proof—Concurrent findings of facts.*

The main question of law that arises is whether a member of a joint Hindu family becomes separated from the other members of the family by a mere declaration of his unequivocal intention to divide from the family without bringing the same to the knowledge of the other member of the family. In this context a reference to Hindu law texts would be appropriate, for they are the sources from which Courts evolved the doctrine by a pragmatic approach to the problems that arose from time to time. The evolution of the doctrine can be studied in two parts, namely (1) the declaration of the intention, and (2) the communication of it to others affected thereby. On the first part the following tests would throw considerable light. They are collated and translated by Viswanatha Sastri, J., who has a deep and abiding knowledge of the sources of Hindu Law in *Adiyalath Katheesumma v. Adiyalath Beechu*, I.L.R. 1950 Mad. 502, and we accept his translations as correct and indeed learned counsel on both sides proceeded on that basis.

The doctrine of relation back has already been recognized by Hindu Law as developed by Courts and applied in that branch of the law pertaining to adoption. There are two ingredients of a declaration of a member's intention to separate. One is the expression of the intention and the other is bringing that expression to the

knowledge of the person or persons affected. When once that knowledge is brought home (that depends upon the facts of each case) it relates back to the date when the intention is formed and expressed. But between the two dates, the person expressing the intention may lose his interest in the family property; he may withdraw his intention to divide; he may die before his intention to divide is conveyed to the other members of the family; with the result, his interest survives to the other members. A manager of a joint Hindu family may sell away the entire family property for debts binding on the family. There may be similar other instances. If the doctrine of relation back is invoked without any limitation thereon, vested rights so created will be affected and settled titles may be disturbed. Principles of equity require and common sense demands that a limitation which avoids the confusion of titles must be placed on it. What would be more equitable and reasonable than to suggest that the doctrine should not affect vested rights? By imposing such a limitation we are not curtailing the scope of any well established Hindu law doctrine, but we are invoking only a principle by analogy subject to a limitation to meet a contingency. Further, the principle of retroactivity, unless a legislative intention is clearly to the contrary, saves vested rights. As the doctrine of relation back involves retroactivity by parity of reasoning it cannot affect vested rights. It would follow that, though the date of severance is that of manifestation of the intention to separate the right accrued to others in the joint family property between the said manifestation and the knowledge of it by the other members would be saved.

*D. Narasaraaju*, Advocate-General for the State of Andhra Pradesh, (*T. V. R. Tatachari*, Advocate, with him), for Appellants.

*K. R. Choudhuri*, Advocate, for Respondent No. 2.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

*B. P. Sinha, C.J., J. C. Shah and  
N. Rajagopala Ayyangar, JJ.*  
10th April, 1963.

*P. J. Ratnam v. D. Kanikaram.*  
C.A. No. 321 of 1962.

*Bar Councils Act (XXXVIII of 1926), section 10 (2)—Legal Practitioners Act, sections 12 and 13.*

In the case now before us, the misconduct charged is intimately connected with and arises out of the duty which the Advocate owed to his client. This distinction between misconduct which is intimately connected with the duties which the practitioner owes to his clients and cases where it is not so connected as bearing upon the exercise of the Court's discretion to proceed or not to proceed straightaway with an inquiry into the Advocate's professional misconduct was emphasised by Lord Abinger in *Stephen v. Hill*, (1852) 10 M. & W. 28 : 158 E.R. 368, which dealt with a case of professional misconduct against an Attorney in England.

*M. Rajagopalan and K. R. Chaudhuri*, Advocates, for Appellant.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

*B. P. Sinha, C.J., J. C. Shah and  
N. Rajagopala Ayyangar, JJ.*  
10th April, 1963.

*The State of Andhra Pradesh v.  
Sree Rama Rao.*  
C.A. No. 626 of 1961.

*Constitution of India (1950), Article 226—Jurisdiction of the High Court—Departmental enquiry—High Court—If can sit in appeal over the decision of the departmental authority.*

Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence. The High Court may

undoubtedly interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, or on similar grounds. But the departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226 of the Constitution.

*T. V. R. Tatachari and P. D. Menon*, Advocates, for Appellants.

*K. Bhimasankaram*, Senior Advocate, (*T. Satyanarayana*, Advocate, with him), for Respondent.

G.R.

*Appeal allowed.*

[SUPREME COURT.]

*B. P. Sinha, C.J., J. C. Shah and  
N. Rajagopala Ayyangar, JJ.*  
10th April, 1963.

The State of Rajasthan *v.*  
Ram Saran.  
C.A. No. 453 of 1962.

*States Reorganisation Act (XXXVII of 1956), Article 311 and 14 of the Constitution of India (1950)—Police Act (V of 1861)—Standing Orders—Government of India Act, 1935, section 243.*

We consider, with great respect to the learned Judges of the High Court, that they were in error in treating Standing Order 46 as a condition of service which was violated by the order of reversion impugned by the respondent in his Writ Petition.

The contention that survives is merely whether the right to hold an officiating post is a legal right and whether it could be stated to be a condition of service that such an officer shall not be reverted except for proper reasons. In our opinion, the matter is concluded by the decision of this Court in *Parshotam Lal Dhingra v. Union of India*, (1958) S.C.J. 217 : 1958 S.C.R. 828. There, as here, an officer who was appointed to officiate in Class II Service as an Assistant Superintendent, Railway Telegraphs, was reverted to his substantive Class III appointment. No doubt, the question there considered was whether on the facts of that case this order of reversion was passed as a punishment so as to attract the constitutional protection guaranteed by Article 311 (2) but this Court had also to consider whether an officer appointed to an officiating post had any legal right to continue in that post.

If the issue as to discrimination and a violation of Article 14 has to be satisfactorily investigated and decided both the parties would have to file amended pleadings in order to focus attention on several details, with the result that this would virtually amount to the filing of a new petition. We consider therefore that if the respondent is so advised he should be at liberty to challenge the order now impugned on these other grounds and that for that purpose it would really be in his interest that he should be permitted to file a fresh petition making necessary allegations and setting forth the requisite facts when the State also would have an opportunity to make its answers to such a plea. It is in the light of this consideration that we have refrained from remanding the case to the High Court for the consideration of this point.

*S. K. Kapur, K. K. Jain and P. D. Menon*, Advocates, for Appellant.

*B. D. Sharma*, Advocate, for Respondent.

G.R.

*Appeal allowed.*

## [SUPREME COURT.]

B. P. Sinha, C.J., J. C. Shah and  
N. Rajagopala Ayyangar, JJ.  
15th April, 1963.

S. R. Tewari v.  
The District Board, Agra.  
C.A. No. 304 of 1962.

*Constitution of India* (1950), Article 311—*U.P. District Boards Act, 1922*—*Specific Relief Act (I of 1877)*, section 21 (b)—*Meaning of 'dismissal'*.

We therefore, hold that the Board had the power to determine the employment of the appellant and the Board purported to exercise that power. But counsel for the appellant contended that even though in form the power of determination of employment was exercised, in substance it was intended to exercise the power of dismissal and that the form of the resolution of the Board was merely to camouflage the real object of the Board. It is settled law that the form of the order under which the employment of a servant is determined is not conclusive of the true nature of the order. The form may be merely to camouflage an order of dismissal for misconduct, and it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. If the Court holds that the order though in the form merely of determination of employment is in reality a cloak for an order of dismissal as a matter of punishment, the Court would not be debarred merely because of the form of the order in giving effect to the rights conferred by statutory rules upon the employee.

S. T. Desai, Senior Advocate, (J. P. Goyal, Advocate, with him), for Appellant.

C. B. Aggarwala, Senior Advocate, (C. P. Lal, Advocate, with him), for Respondent No. 1.

K. S. Hajela, Senior Advocate, (C. P. Lal, Advocate, with him), for Respondent No. 2.

G.R.

*Appeal dismissed.*

## [SUPREME COURT.]

P. B. Gajendragadkar, K. N. Wanchoo and  
K. C. Das Gupta, JJ.  
17th April, 1963.

Munna Lal v. The State of U.P.  
Cr. As. Nos. 102-104 of 1961.

*Prevention of Corruption Act (II of 1947)*, section 5 (2)—*Illegal or irregular investigation*—*Sanction of prosecution.*

In the present cases no objection was taken at the trial when it began and it was allowed to come to an end. In these circumstances the ratio of *The State of Madhya Pradesh v. Mubarak Ali*, (1958) S.C.J. 843 : (1959) M.L.J. (Cr.) 571 : (1959) 2 M.L.J. (S.C.) 105, cannot apply and the decision in *H. N. Rishbud & Inder Singh v. The State of Delhi*, (1955) S.C.J. 283 : (1955) 1 M.L.J. (S.C.) 173 : (1955) 1 S.C.R. 1150 would apply. The appellant therefore cannot say that the trial was vitiated unless he can show that any prejudice was caused to him on account of the illegal or irregular investigation. We have already remarked that no such thing has been shown in this case; nor was it possible to show any such thing in view of the alternative defence taken by the appellant. We therefore reject this contention.

There is in our opinion no substance in this argument, for the sanction speaks of misappropriation and embezzlement and there is nothing in the words to imply that this was only with reference to conversion by the appellant to his own use. As the words of the sanction stand they would cover a case of misappropriation or conversion to his own use by the appellant himself or by allowing others to do so. We are therefore of opinion that the sanction was sufficient for the purpose of giving jurisdiction to the Special Judge to take cognizance of the cases out of which these appeals have arisen.

We therefore dismiss the appeals with the modification that the sentence in each case is reduced to the period already undergone. The appellant, if on bail, shall be discharged from his bail bonds in respect of these appeals.

Frank Anthony and P. C. Agarwala, Advocates, for Appellant.

G. C. Mathur and C. P. Lal, Advocates, for Respondent.

G.R.

*Appeals dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—A.K. SARKAR M. HIDAYATULLAH AND J.C. SHAH, JJ.

Sri Gopal Jalan &amp; Co.

.. Appellant.\*

v.

Calcutta Stock Exchange Association Ltd.

.. Respondent.

*Companies Act (I of 1956), section 75 (1)—“Allotment”—Meaning of—Re-issue of forfeited shares—If “allotment” requiring filing of return under section 75 (1) (a)—Section 75 (5)—“Allotment”—Construction and scope.*

It is beyond doubt that in Company Law “allotment” means the appropriation out of the previously unappropriated capital of a company, of a certain number of shares to a person. Till such allotment the shares do not exist. A re-issue of forfeited share is not an “allotment” within the meaning of section 75 (1) of the Companies Act, 1956. When a share is forfeited and re-issued, it is not allotment in the sense of appropriation of shares out of the authorised and unappropriated capital so as to bring the shares into existence. The issue of the forfeited shares is not an allotment of them but only a sale and no question of filing any return under section 75 (1) (a) in respect of such re-issue can arise.

The word “allotment” in section 75 (1) must be understood without reference to section 75 (5) of the Act. Section 75 (5) must be understood as having been enacted *ex abundanti cautela*.

Appeal by Special Leave from the Judgment and Order dated 18th August, 1959 of the Calcutta High Court in Appeal from Original Order No. 106 of 1957.

S. K. Kapur, S. Murthi, P. M. Mukhi and K. K. Jain, Advocates for Appellant.

H. N. Sanyal, Solicitor-General of India (B. P. Maheshwari, Advocate, with him) for Respondent.

The Judgment of the Court was delivered by

Sarkar, J.—The question in this appeal is, what is the meaning to be ascribed to the word “allotment” occurring in section 75 (1) of the Companies Act, 1956? That section requires a company to file a return of the allotment of its shares with the Registrar within a month of the making of the allotment. The appellant who has been accepted as a shareholder in the respondent Company for the purposes of the present proceedings, complained that the Company had not filed the return required by that section, and, therefore, moved the High Court at Calcutta under section 614 of the Act for an order requiring it to do so.

The shares with which this case is concerned had been forfeited by the Company under its Articles. A reference to some of these articles is necessary before we proceed further. Article 21 of the Articles of Association of the Company authorised its Committee to expel or suspend a member in certain events. The present is not a case involving an exercise of power under this article. Articles 22, 24 and 27 are in these terms :

Article 22: “Any member who has been declared a defaulter by reason of his failure to fulfil any engagement between himself and any other member or members and who fails to fulfil such engagement within six months from the date upon which he has been so declared defaulter shall at the expiration of such period of six calendar months automatically cease to be a member.”

Article 24: “Upon any member ceasing to be a member under the provisions of Article 22 hereof and upon any resolution being passed by the Committee expelling any member under the provisions of Article 21 hereof or upon any member being adjudicated insolvent the share held by such member shall *ipso facto* be forfeited.”

Article 27: “Any share so forfeited shall be deemed to be the property of the Association, and the Committee shall sell, re-allot and otherwise dispose of the same in such manner to the best advantage for the satisfaction of all debts which may then be due and owing either to the Association or any of its members arising out of transactions or dealings in stocks and shares.”

The appellant's contention is that the Company from time to time forfeited various shares under these articles and it appeared from its balance-sheet that seventy of such forfeited shares had been re-issued at a nominal face value of Rs. 1,000



but no return of such re-issue of the forfeited shares had been filed by the Company. The Company in its affidavit in answer to the petition admitted these facts. It was also said that these forfeited shares had been issued for much larger sums but nothing turns on that in this case.

Now section 75, so far as material for our purposes, is as follows :

*Section 75 1.*—(1) Whenever a company having a share capital makes any allotment of its shares, the company shall, within one month thereafter,—

(a) file with the Registrar a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and occupations of the allottees, and the amount, if any, paid or due and payable on each share ;

\* \* \* \* \*

(5) Nothing in this section shall apply to the issue and allotment by a company of share which under the provisions of its articles were forfeited for non-payment of calls.

The appellant contends that a return should have been filed of the re-issued forfeited shares under this section. The contention of the Company is that the re-issue of forfeited shares does not amount to allotment of shares and, therefore, it was not required to file any return in respect of such re-issued shares under the section. This contention was accepted by the learned Judge of the High Court before whom the appellant's petition was first moved and also by the learned Judges of the Division Bench of that Court on appeal from the decision of the learned trial Judge.

We agree with the learned Judges of the High Court that a re-issue of a forfeited share is not an allotment of share within section 75 (1). The word "allotment" has not been defined in the Companies Act either in our country or in England. But we think that the meaning of that word is well understood and no decision has been brought to our notice to indicate that any doubt has ever been entertained as to it. As Chitty, J., put it in *In re Florence Land and Public Works Company*<sup>1</sup>,

"What is termed 'allotment' is generally neither more nor less than the acceptance by the company of the offer to take shares. To take the common case, the offer is to take a certain number of shares or such a less number of shares as may be allotted. That offer is accepted by the allotment either of the total number mentioned in the offer or a less number, to be taken by the person who made the offer. This constitutes a binding contract to take that number according to the offer and acceptance. To my mind there is no magic whatever in the term 'allotment' as used in these circumstances. It is said that the allotment is an appropriation of a specific number of shares. It is an appropriation, not of specific shares but of a certain number of shares."

The process described by Chitty, J., is very familiar in Company Law. Under the Act, a company having share capital is required to state in its memorandum the amount of that capital and the division thereof into shares of a fixed amount : see section 13 (4). This is what is called the authorised capital of the company. Then the Company proceeds to issue the shares depending on the condition of the market. That only means inviting applications for these shares. When the applications are received, it accepts them and this is what is generally called allotment. No doubt there may be an allotment of shares without an application but no instance exists where that word is used to describe a transaction whereby one becomes a shareholder otherwise than by appropriation to him of a share out of the previously unappropriated share capital.

So Farwell, L.J., said in *Mosely v. Koffyfontein Mines Limited*<sup>2</sup>,

"As regards the construction of these particular articles it is plain that the words 'creation', 'issue', and 'allotment' are used with the three different meanings familiar to business people as well as to lawyers. There are three steps with regard to new capital ; first, it is created ; as indeed it was here ; the market did not allow of a favourable opportunity of placing it. When it is issued it may be issued on such terms as appear for the moment expedient. Next comes allotment. To take the words of Stirling J. in *Spitzel v. Chinese Corporation*<sup>3</sup>, he says : 'What is an allotment of shares ? Broadly speaking, it is an appropriation by the directors or the managing body of the company of shares to a particular person.' Lord Greene M. R. observed in *In re, V. G. M. Holdings Limited*<sup>4</sup> "it seems to me that the words 'purchase' cannot with propriety be

1. (1885) L.R. 29 Ch. D. 421, 426.

2. L.R. (1911) 1 Ch. 73, 84.

3. (1899) 80 L.T. 347, 351.

4. L.R. (1942) 1 Ch. D. 235.

applied to the legal transaction under which a person, by the machinery of application and allotment, becomes a shareholder in the company. He does not purchase anything when he does that. Mr. Wynn Parry endeavoured heroically to establish the proposition that a share before issue was an existing article of property, that it was an existing bundle of rights which a shareholder could properly be said to be purchasing when he acquired it by subscription in the usual way. I am unable to accept that view. A share is a chose in action. A chose in action implies the existence of some person entitled to the rights which are rights in action as distinct from rights in possession, and, until the share is issued, no such person exists. Putting it in a nutshell, the difference between the issue of a share to a subscriber and the purchase of a share from an existing shareholder is the difference between the creation and the transfer of a chose in action."

It is beyond doubt from the authorities to which we have earlier referred, and there are many more which could be cited to show the same position, that in Company law 'allotment' means the appropriation out of the previously unappropriated capital of a company, of a certain number of shares to a person. Till such allotment the shares do not exist as such. It is on allotment in this sense that the shares come into existence. Learned Counsel for the appellant has not been able to cite any case where the word 'allotment' has been used to describe a transaction with regard to an existing share, that is, a share previously brought into existence by appropriation to a person out of the authorised capital. In every case the words 'allotment of shares' have been used to indicate the creation of shares by appropriation out of the unappropriated share capital to a particular person. We find no reason why the word 'allotment' in section 75 should have a different sense. It is said that sub-section (5) of section 75 furnishes such a reason. We will deal with that argument later. Our attention has not been drawn to any other provision in our Companies Act which would support the contention that the Act includes within the word 'allotment' a transaction with a share after it has been first created by appropriation out of the authorised share capital to a particular individual. As the learned Judges of the High Court pointed out, section 75 occurs in Part III of the Act which deals with "Prospectus And Allotment, And Other Matters Relating To Issue Of Shares Or Debentures". Sections 69 to 75 are classed under the sub-heading 'Allotment' and the only kind of allotment that is dealt with in these sections is the appropriation of shares to individuals out of the unappropriated share capital of the company. In these circumstances it would be impossible to give to the word 'allotment' in section 75 (1) a different meaning.

Now it is quite clear that when a share is forfeited and re-issued it is not allotment in the sense of appropriation of shares out of the authorised and unappropriated capital so as to bring the shares into existence. In the present case both sides proceeded on the basis that the Articles of the Company dealing with forfeiture of shares which we have earlier set out are valid Articles. In other words, it has not been disputed that the Company may validly forfeit shares in terms of these Articles. We accept that basis and proceed on the assumption that it is correct. In the High Court at Calcutta there was a difference of opinion as to the validity of these Articles but the later view is that the Articles are valid. The reason for the view has thus been put in the latest case in the Calcutta High Court, namely, *The Calcutta Stock Exchange Association Limited v. S. N. Nundy and Company*<sup>1</sup>. Harries, C.J., dealing with the very Articles with which we are concerned observed at page 264 :

"In the present case the Articles relating to forfeiture do not, in my view, offend against the provisions of the Companies Act as they do not contemplate a reduction of capital or a purchase of shares or a trafficking in shares."

Now, obviously, if upon forfeiture, the shares had ceased to exist *qua* shares and become merged in the unissued capital of the Company, then there would have been a reduction of the capital and such a forfeiture would have been invalid. The reason why it was held that the forfeiture was valid was that on such forfeiture all that happened was that the right of the particular shareholder disappeared but the share considered as a unit of issued capital continued to exist and was kept in suspense until another shareholder was found for it : see *Naresh Chandra Sanyal v. Ramoni Kanta Roy*<sup>2</sup>. We have to examine the present case on this basis.

If, therefore, the shares which the Company forfeited have to be considered as shares already created and as continuing in existence as such in spite of the forfeiture, obviously they could not be allotted in the sense in which that word is understood in the Company law as we have earlier stated. In *Morrison v. Trustees etc., Insurance Corporation*<sup>1</sup>, the Articles of the Company gave power to forfeit shares for non-payment of calls and further provided that :

“any share so forfeited shall be deemed to be the property of the Company and the directors may sell, re-allot or otherwise dispose of the same in such manner as they think fit.”

It was held that the Company could re-issue the forfeited shares giving credit for the money already received in respect of them. The contention that the transaction amounted to the issue of a share at a discount was rejected. Vaughan Williams, L.J., observed.

“I do not like the use of the word ‘issue’ with reference to the transaction with regard to these shares. If they were being issued, the argument for the appellant might possibly be right; but they are not being issued. When we look at the Articles we see that what takes place on a forfeiture of shares is that the power of transferring them passes from the original shareholders to the Company and the Company can then transfer the shares subject to the same rights and liabilities as if they had not been forfeited.”

To the same effect are the observations of Bacon, V. C. in *Ramwell's case*<sup>2</sup>. Quite clearly, the view well accepted in Company Courts has been that issue of the forfeited shares was not allotment of them but only a sale. If it were not so, the forfeiture itself would be invalid as involving an illegal reduction of capital. If the re-issue of a forfeited share is only its sale, then it is not an allotment and that being so, no question of filing any return in respect of such re-issue arises.

It remains now to deal with sub-section (5) of section 75. That does create a difficulty. It provides that no return need be filed in respect of allotment of shares forfeited for non-payment of calls. It gives rise to an argument that the Act contemplates an “allotment” of shares forfeited for non-payment of calls for otherwise it would not be necessary to provide that returns in respect of such allotment need not be filed. It is said that being so, the word “allotment” in section 75 (1) should be understood as including the issue of shares forfeited for other reasons, for there is no reason to make any distinction between shares forfeited for non-payment of calls and those forfeited for other reasons in the present context. This argument is no doubt legitimate. But having given it our best consideration, we have come to the conclusion that it should be rejected. We think that sub-section (5) owes its origin to a confusion of ideas. Apart from it, all other provisions of the Act clearly contemplate by allotment the creation of shares out of the authorised and unappropriated capital of the Company and not re-issue of shares already created by allotment in the manner aforesaid but subsequently forfeited. There would be no justification for altering the meaning of that word in any other part of the Act because of the solitary provision occurring in sub-section (5) of section 75. The Companies Act in force before the Act of 1956 was the Act of 1913. Section 104 (1) of that Act corresponded to section 75 (1) of the present Act. In 1936 there were large amendments made in the 1913 Act. Prior to these amendments there was no provision in section 104 of the Act of 1913 corresponding to sub-section (5) of section 75 of the present Act. Therefore, up to 1936 there was no reason to contend that the word “allotment” in section 104 (1) could at all include the re-issue of a forfeited share. The 1936 Amendment added sub-section (4) to section 104 and that sub-section contained provision similar to sub-section (5) of section 75 of the present Act. We do not think that it could be legitimately contended that by the amendment of 1936 the meaning of the word “allotment” in section 104 (1) was altered. That being so, the word “allotment” in section 75 (1) must be understood without reference to sub-section (5) in the same way as that word in section 104 (1) had to be understood without reference to sub-section (4) of that section. It is safer to read sub-section (5) of section 75 as having been enacted *ex abundanti cautela*, that is to say, to prevent any argument being raised that a return has to be filed of the re-issued shares forfeited

1. (1899) 68 L.J. Ch. 11.

2. (1881) 50 L.J. Ch. (N.S. 827).

for non-payment of calls. We also agree with the view expressed in the High Court that the reason why only forfeiture for non-payment of calls was mentioned in section 104 (4) of the Act of 1913 and section 75 (5) of the present Act is that there has always been a great deal of doubt, as will appear from the difference of opinion in the Calcutta High Court to which we have earlier referred, as to whether there can be any forfeiture of share except for non-payment of calls which latter case had been expressly provided for by the statute. The other cases of forfeiture had apparently not been mentioned because if they had been it could have been legitimately argued that the Legislature considered such forfeiture valid and the Legislature did not want to give support to that argument.

We think for these reasons that the appeal fails and we dismiss it with costs.

P.R.N.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA, J. G. SHAH, AND N. RAJAGOPALA AYYANGAR, JJ.

Societe De Traction Et D' Electricite Societe Anonyme .. *Appellant.\**

v.

Kamani Engineering Company Ltd. .. *Respondent.*

*Companies Act (I of 1956), section 389 (1) and (3) (before repeal in 1960)—Scope and effect—Agreement between Indian Company and foreigner to refer to arbitration a future dispute according to the Rules of International Chamber of Commerce—If binding or enforceable as against the former—Power of company to refer disputes to Arbitration according to Rules of the International Chamber of Commerce—Arbitration Act (X of 1940), sections 3, 46 and 47—Arbitration (Protocol and Convention) Act (VI of 1937), section 3.*

Section 389 of the Companies Act, 1956 (before repeal by Act (LXV of 1960), like section 152 of the Companies Act, 1913, was intended to provide that all arbitrations to which a company is a party shall be conducted in accordance with the provisions of the Arbitration Act, 1940. Section 389 (1) regulated the power of Indian Companies to agree to submit differences to arbitration and by force of section 389 (3) the provisions of the Arbitration Act, 1940, applied to all such arbitrations.

Sections 46 and 47 of the Arbitration Act, however, have clearly made the provisions of the Arbitration (Protocol and Convention) Act, 1936 applicable to consensual arbitrations under the Arbitration Act, 1940, when the conditions prescribed therein are attracted, even if the scheme of arbitration recognised thereby is inconsistent with sections 3 to 38 of the Arbitration Act, 1940. The Act of 1937 was enacted for giving effect to the protocol on arbitration clauses set forth in the First Schedule and the conventions on the execution of foreign arbitral awards set forth in the Second Schedule and for enabling the conventions to become operative in India.

An Indian Company may therefore legally agree to refer differences between itself and any other company or person by written agreement in accordance with the Arbitration Act, 1940. Arbitration according to the Arbitration (Protocol and Convention) Act, 1937, being recognised by the former Act, an agreement to refer disputes in accordance with the Rules of the International Chamber of Commerce is not inconsistent with section 389 of the Companies Act, 1956. Such an agreement is neither prohibited nor ineffective, but is perfectly valid and enforceable.

A company under Companies Act is entitled to contract for all such purposes as are by its constitution within its competence. This power includes the power to refer disputes to arbitration.

The Supreme Court will not be justified for the first time in appeal in entering upon questions of fact without having the benefit of the view of the High Court on those questions and when no decision was recorded on those questions either by the Trial Court or the High Court.

History of the law traced ; authorities reviewed.

Appeal from the Judgment and Decree dated 15th and 16th November, 1962, of the Bombay High Court in Appeal No. 32 of 1962.

*M. C. Setalvad*, Senior Advocate, (*M. R. Parpia* and *J. P. Thacker*, Advocates and *O. C. Mathur*, *J. B. Dadachanji* and *Ravinder Narain* Advocates of *M's. J. B. Dadachanji & Co.*, with him) for Appellant.

*S. T. Desai*, Senior Advocate, (*Tanubhai*, *D. Desai* and *I. N. Shroff*, Advocates with him), for Respondent.

The Judgment of the Court was delivered by

*Shah, J.*—The question which falls to be determined in this appeal with certificate granted by the High Court of Bombay against an order refusing a motion for stay of a suit, is :

"Whether an agreement to refer a future dispute to arbitration according to the Rules of The International Chamber of Commerce between a Company registered under the Indian Companies Act and a foreigner is binding upon the former."

The facts which give rise to this question are these: *Societe De Traction Et. D' Electricite Societe Anonyme*—hereinafter called, for the sake of brevity, 'Traction'—is a Corporation incorporated under the laws of Belgium and carries on business as consulting and construction engineers at Brussels. The respondent *Kamani Engineering Corporation, Ltd.*—hereinafter called 'Kamani' is a company registered under the Indian Companies Act, 1913. Kamani carries on business, amongst others, as an engineering concern. On April 22, 1959 Kamani entered into a 'Collaboration agreement' with Traction whereby the latter undertook to provide to Kamani technical assistance for the construction of overhead railway electrification, tramway systems and trolley buses in India, Burma, Ceylon and/or Nepal. The agreement contained an arbitration clause in Article, X which provided :

"All disputes arising in connection with this agreement during the period of the agreement or thereafter shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the Rules of the said International Chamber of Commerce."

On September 1, 1961, Kamani instituted Suit No. 296 of 1961 in the High Court of Judicature at Bombay on its Original Side, *inter alia* for—

(1) a decree declaring that Traction had committed diverse breaches of the 'Collaboration agreement' and the agreement was on that account terminated by Traction, and Kamani stood discharged from all its obligations thereunder ;

(2) a decree for accounts of the items contained in the invoice referred to in paragraphs 24 and 25 of the plaint and for ascertainment of the amount in the light of the contentions and submissions set out ;

(3) for a decree directing Traction to pay Rs. 9,00,000 together with interest thereon at the rate of six per cent per annum from the date of the suit ; and

(4) for the aforesaid purposes for an order that all enquiries be made, directions given, orders passed and Traction be directed to hand over to Kamani all documents, files, reports, correspondence etc., removed by the representatives of the Traction.

On January 22, 1962, Traction took out a Notice of Motion for an "order staying the proceedings in the suit pursuant to section 3 of the Arbitration (Protocol and Convention) Act, 1937, and/or section 34 of the Arbitration Act, 1940 and/or section 151 of the Code of Civil Procedure, 1908 and/or the inherent powers of the High Court"; in the alternative for an order that Kamani, its servants and agents be restrained by an order and injunction from in any manner proceeding further with or from taking any further steps in the suit. *Kantawalla, J.*, refused the Motior and the order passed by him was confirmed in appeal by the High Court. The High Court held that the arbitration clause of the collaboration agreement was invalid for it obliged Kamani, contrary to section 389 of the Indian Companies Act, 1956, to go to arbitration otherwise than in accordance with the Arbitration Act X of 1940.

The relevant Rules of the International Chamber of Commerce may be summarised. Article 7 provides by clause (1) that the Court of Arbitration does not itself settle disputes except when otherwise stipulated : it appoints or confirms the nomination of arbitrators in accordance with the provisions following: If the parties have agreed to the settlement of a dispute by a sole arbitrator they may nominate him by common agreement for confirmation by the Court of Arbitration ; failing

agreement between the parties the arbitrator shall be appointed by the Court of Arbitration. If reference be to three arbitrators each party shall nominate an arbitrator for confirmation of the Court of Arbitration which shall appoint the third arbitrator. If the parties fail to agree on the number of arbitrators the Court of Arbitration shall appoint a sole arbitrator who shall choose the National Committee or Committees from which it shall request nominations. The sole arbitrators and third arbitrators must be nationals of countries other than those of the parties. If any challenge be made by one of the parties to the appointment of an arbitrator, the decision of the Court of Arbitration which is the sole Judge of the grounds of challenge, shall be final. On the death or refusal of an arbitrator to carry out his duties, or on resignation, the Court of Arbitration if it appointed him, shall nominate another arbitrator in his place. Article 8 deals with initiation of arbitration proceedings. By Article 13 it is provided that when the parties agree to submit their disputes to arbitration by the International Chamber of Commerce, they shall be deemed to submit to arbitration in accordance with the Rules and if a party raises a plea as to the existence or validity of the arbitration clause, if the Court of Arbitration is satisfied as to the *prima facie* existence of such a clause, it may without prejudice to the admissibility or the merits of such plea, order that the arbitration shall proceed. Article 16 prescribes the procedure to be followed in the arbitration proceeding. The rules by which the arbitration proceedings shall be governed shall be the Rules of the Chamber and, in the event of there being no provision in those Rules, those of the law of procedure chosen by the parties or, failing such choice, those of the law of the country in which the arbitrator holds the proceedings shall govern the proceeding. By Article 18 the proceedings before the arbitrator are to take place in the country determined by the Court of Arbitration, unless the parties have agreed in advance upon the place of arbitration. Article 19 deals with the arbitrator's terms of reference. The arbitrator is required, before hearing of the case commences, to draw up in the presence of the parties a statement defining his terms of reference including the names and addresses of the parties, brief statement of the claims of the parties, terms of reference, statements of the case, indication of the points at issue to be determined, the place of arbitration proceeding, and all other matters in order that the award when made shall be enforceable at law, or which in the opinion of the Court of Arbitration and the arbitrator, it is desirable to specify. Article 20 deals with the hearing of the case by the arbitrator and Article 21 specifies the powers of the arbitrator. The arbitrator is competent to decide the dispute on the basis of the relevant documents, unless one of the parties requests that a hearing be given. The arbitrator may *suo moto*, or on the request of the parties, summon the parties to appear before him at a specified place and time and if the parties or any of them having been duly summoned, fail to appear before the arbitrator he may, after satisfying himself that the summons was duly served upon the party or parties, proceed with the arbitration *ex parte*. Article 23 provides that the award shall be made within sixty days from the date on which the signed statements under Article 19 are submitted, but time may be extended by the Court of Arbitration. Article 25 deals with the decision regarding the costs of arbitration, arbitrator's fee and the administrative costs. By Article 26 the arbitrator has before completing the award to submit the same to the Court of Arbitration. The Court of Arbitration may lay down modifications as to its form and if need be draw the arbitrator's attention even to points connected with the merits of the case, and no award shall under any circumstances be issued until approved as to its form by the Court of Arbitration. Articles 27 and 28 deal with the pronouncement and notification of the award. By Article 28 the award is made final, it being undertaken by the parties that the award shall be carried out without delay, the parties having waived their right to any form of appeal, in so far as such waiver may be valid. By Article 30 the award is required to be deposited with the Secretariat of the Court of Arbitration. This is followed by a general rule which states that in circumstances not specifically provided for, the Court of Arbitration and the arbitrator shall act on the basis of the Rules and make their best efforts for the award to be enforceable at law.

The scheme of arbitration contemplated by these Rules is different from the scheme contemplated by sections 3 to 38 of the Arbitration Act. Some of the striking

provisions of the Rules are the power of the Court of Arbitration to appoint arbitrators or umpires, finality of the award without any provision for resort to the Civil Court to remit or to set aside the award even for misconduct of the arbitrator or an error apparent on the face of the award, and the power of the Court of Arbitration to modify the award and to give directions during the course of proceedings for arbitration, and similar provisions.

Kamani is, as already stated a company registered under the Indian Companies Act of 1913 and by section 3 (1) of the Indian Companies Act, 1956 is a 'company' for the purposes of that Act. Section 389 of the Indian Companies Act, 1956 (before it was repealed by Act LXV of 1960) read as follows :—

“(1) A company may, by written agreement refer to arbitration, in accordance with the Arbitration Act 1940 (X of 1940) an existing or future difference between itself and any other company or person.

(2) A company which is a party to an arbitration may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the company itself or by its Board of directors, managing director, managing agent, secretaries and treasurers, or manager.

(3) The provisions of the Arbitration Act, 1940 (X of 1940), shall apply to all arbitrations in pursuance of this Act to which a company is a party.”

The High Court held that an Indian Company could, because of section 389 refer an existing or future dispute between itself and any other company or person to arbitration only in accordance with the Arbitration Act, 1940 and not otherwise ; that any arbitration agreement which obliged the Company to submit itself to arbitration according to a scheme of arbitration different from the Arbitration Act, 1940 would not be binding upon the Indian Company, and therefore the Court had no power to enforce Compliance with an invalid Covenant, and to stay the suit instituted by an Indian Company in breach thereof. In recording that conclusion the High Court was guided by its earlier judgment in *Societe Italians per Lavori Maritimi v. Hind Constructions Ltd*,<sup>1</sup> that it was not permissible for a Company incorporated under the Indian Companies Act to refer disputes to arbitration otherwise than in accordance with the Arbitration Act.

In support of the appeal Mr. Setalvad contended that section 389 is an enabling provision and does not compel an Indian Company to agree to refer differences to arbitration only in accordance with the provisions of the Indian Arbitration Act, 1940, i.e. if the Company desires to refer a dispute to arbitration under the Arbitration Act, 1940, it may do so, but the power to submit to arbitration being an incident of the power to enter into contracts for the purpose of carrying on its business, is unrestricted ; and that sub-section (3) of section 389 applies not to consensual arbitrations but only to statutory arbitrations *in pursuance* of the Companies Act, e.g., arbitrations under section 494 (3) (b) of the Companies Act, 1956.

It cannot be disputed that the use of the expression 'may' is not decisive. Having regard to the context, the expression 'may' used in a statute has varying significance. In some contexts it is purely permissive, in others, it may confer a power and make it obligatory upon the person invested with the power to exercise it as laid down.

A company under the Indian Companies Act is entitled to enter into contract for all such purposes as are by its constitution within its competence. It is invested with a legal personality, and a commercial company may subject to restrictions specifically imposed upon it by its Memorandum or Articles, always enter into contracts for the purpose of its business subject in the matter of form to section 45 of the Companies Act. An arbitration agreement being a contract to submit present or future differences between the parties not to the ordinary Courts but before a tribunal chosen by the parties, if the company has the power to enter into a con-

1. Appeal No. 63 of 1959, decided on September, 22, 1960.

tract, that power would include power to submit a dispute to arbitration out of Court. By section 28 of the Indian Contract Act agreements in restraint of legal proceedings are declared void, subject however to the rule that a contract by which two or more persons agree that any dispute which has arisen or which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, is not illegal. Section 389 of the Companies Act, 1956, therefore, does not confer any new right upon Companies to agree to refer disputes which have arisen or which may arise, to arbitration; the section recognises the rights of a company to refer present disputes to arbitration, and seeks to regulate the right by placing a restriction upon the exercise of that right. It is pertinent to remember that the Arbitration Act, 1940, is in form a code relating to the law of arbitration and applies to all arbitrations; it applies to all arbitrations to which persons natural and legal are parties. The power of the Company to enter into an arbitration agreement is therefore not conferred for the first time by the Companies Act, it is merely regulated by section 389 of the Companies Act. In other words, a company within the meaning of the Indian Companies Act, 1956, has the power to refer present or future disputes to arbitration, but such reference has because of the statutory provision to be in accordance with the Arbitration Act, 1940. Sub-section (3) of section 389 makes the provisions of the Arbitration Act applicable to all arbitrations to which a company is a party, provided they are in pursuance of the Companies Act. There is no warrant for holding that sub-section (3) is independent of sub-section (1). Sub-section (1) affirms the power of a company to refer differences between it and another company or person, and also regulates it. Sub-section (3) makes the provisions of the Arbitration Act applicable to all arbitrations to which a company is a party: it is not restricted to mere statutory arbitrations to which a company is obliged to submit by virtue of the provisions of the Companies Act. To invest sub-section (3) with a restricted meaning, is to make it redundant. The only provision of the Companies Act which compels a company to go to arbitration in respect of a dispute is section 494 (b). By that clause a member of a transferor company in voluntary liquidation expressing dissent against an arrangement relating to the acceptance of shares, policies or other interest or participation in profits in the transferee company in consideration of the business of the former may require the liquidator to purchase his interest at a price to be determined by agreement or by arbitration in the manner provided by section 494 and sub-section (6) expressly makes the provisions of the Arbitration Act applicable to such arbitration. It may be observed that the words "other than those restricting the application of that Act" in sub-section (6) have no meaning. They have been merely copied from section 208-C of the Companies Act of 1913, in which they survived by some inadvertence, even after the repeal of the Arbitration Act of 1899. Our attention has not been invited to any other provisions under the Indian Companies Act under which compulsory arbitration has to be undertaken between a company and another company or person and in regard to which no provision relating to the applicability of the Arbitration Act has expressly been made. The provisions relating to arbitration in the earlier Companies Act also confirm that view. A retrospect of legislation relating to arbitration in the context of the law relating to Companies would serve also in clearing the ground in appreciating the reasons which led to conflicting decisions in the High Courts.

It may not be necessary to enter upon a detailed review of the Regulations and Acts in force prior to the year 1882. It may be sufficient to observe that in the Presidency towns of Calcutta, Madras and Bombay there were diverse Regulations in operation which provided for machinery for amicable settlement of disputes of civil nature by arbitration. For the first time by Act VIII of 1856, in the Code of Civil Procedure a provision was made for reference of disputes to arbitration by parties to the suit applying to the Court in which the suit was pending in which the matter was referred to arbitration. Then came the Indian Contract Act IX of 1872, which recognised the validity of contracts requiring parties to submit their disputes either present or future to arbitration. In 1882 the Indian Companies Act VI of 1882, was enacted which by sections 96 to 123 made provisions for arbitration out of Court, of disputes in which companies were concerned. A company could refer by writing



under its common seal any matter whatsoever in dispute between itself and any other company or person, and the procedure prescribed in those sections applied. This group of sections dealt exhaustively with arbitrations out of Court to which company was a party. Besides enacting the procedure for arbitration it provided that the award of the arbitrator was not liable to be set aside on any ground of irregularity or informality. On the application of any party interested the arbitration agreement could be filed in the High Court having jurisdiction, and an order of reference could be made thereon. Immediately in the wake of the Companies Act, 1882 the Code of Civil Procedure (Act XIV of 1882) was enacted which provided by Chapter 37 the general law relating to arbitration. Sections 506 to 522 dealt with arbitration in a pending suit. If all the parties to a suit desired that any matter in difference between them in the suit be referred to arbitration, they could, at any time before judgment was pronounced, apply to the Court for an order of reference. By section 523 provision was made enabling the parties to an arbitration agreement to file it in Court and the Court if satisfied as to the existence of the arbitration agreement could make a reference to the arbitrator appointed by the parties or nominated by the Court and the provisions relating to arbitration in the earlier sections in so far as they related to or were consistent with the agreement applied. Section 525 enabled any person interested in the award made in a matter referred to arbitration without the intervention of a Court of Justice to file the same in Court and if no ground for setting aside the award was made out, the Court could order that the same be filed. Chapter 37 therefore dealt with arbitration generally—arbitration in pending proceedings, arbitrations pursuant to orders passed by the Court referring a dispute on an agreement filed in Court, and filing of awards made by arbitrators appointed by valid agreements out of Court. The combined effect of the Indian Companies Act sections 96 to 123 and the Code of Civil Procedure sections 506 to 526 was that where a Company was a party to an arbitration out of Court, the arbitration proceedings had to take place in accordance with the Companies Act and could be enforced in the manner provided thereunder. Filing of an arbitration agreement in Court for reference was also governed by the Companies Act, but arbitration in a pending suit to which a Company was a party was governed by the Code of Civil Procedure.

In 1899 the Indian Legislature enacted the Indian Arbitration Act IX of 1899. That Act had a limited operation. By section 2 it was provided that it shall apply only in cases where if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency-town. By the proviso it was open to the Local Government, to declare the Act applicable in other local area as if it were a Presidency-town. By section 3 proviso (2) it was provided that nothing in the Act shall affect the provisions of the Indian Companies Act, 1882 relating to arbitration. The provisions of the Indian Companies Act, 1882 contained in sections 96 to 123 therefore continued to remain in operation and to apply to companies notwithstanding the enactment of the Indian Arbitration Act, 1899. The Civil Procedure Code of 1882 was repealed by Act V of 1908 and the provisions relating to arbitration substantially on the same pattern as in the Code of 1882 were incorporated in a separate schedule in a new Code. Clauses 1 to 16 dealt with references to arbitration of the differences between the parties to a suit if they applied in writing in that behalf. Clauses 17 to 19 dealt with orders of references on agreements to refer disputes to arbitration and clauses 20 and 21 dealt with the filing and enforcement of awards. Section 89 was specially enacted in the Code which provided by the first sub-section :

“(1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule.”

The effect of section 89 was to make the Second Schedule applicable to all arbitrations other than those governed by the Indian Arbitration Act, 1899 or any other law for the time being in force. Therefore since the enactment of the Code of Civil Procedure, 1908 all arbitrations out of Court where a company was a party had to

be conducted in the manner provided by the Companies Act, 1882 but arbitrations during the pendency of a suit or references to arbitrations by filing an arbitration agreement could be made under the appropriate clauses of the Code of Civil Procedure. The Indian Companies Act, 1882 was repealed by the Companies Act VII of 1913. By section 290 of that Act read with Schedule IV the Indian Companies Act of 1882 and the second proviso to section 3 of the Indian Arbitration Act, 1899 were repealed. The Indian Companies Act, 1913 incorporated a new section 152 which by the first clause authorised a company by written agreement to refer to arbitration, in accordance with the Indian Arbitration Act, 1899, an existing or future difference between itself and any other company or person, and by the third sub-section enacted that the provisions of the Indian Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations between companies and persons in pursuance of the Companies Act. The arbitrations to which a company was a party had therefore to take place irrespective of the restrictions contained in section 2 of the Arbitration Act, 1899, according to the provisions of the Arbitration Act, 1899. Section 214 of the Companies Act, 1913 (which was later re-numbered section 208 by Act XXII of 1936) provided for compulsory arbitration for purchasing the interest of a member of a company in voluntary liquidation when the business of the company was agreed to be transferred to another company in the course of liquidation and the liquidator and the member could not agree as to the price payable in respect thereof. By clause (6) of that section it was expressly provided that the provisions of the Arbitration Act, 1899, other than those restricting the application of that Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations in pursuance of section 214.

The Government of India was a party to the Protocol on Arbitration Clauses and the Convention on the Execution of Foreign Arbitral Awards. To enforce the terms of the Protocol, the Indian Legislature enacted the Arbitration (Protocol and Convention) Act VI of 1937 for enforcement of foreign awards on differences relating to matters considered as commercial under the law in force in British India in pursuance of an arbitration agreement to which the Protocol set forth in the First Schedule applied, between persons who were subject to the jurisdiction of the powers notified by the Governor-General in that behalf as parties to the Convention. By section 3 of that Act it was provided that :

“Notwithstanding anything contained in the Indian Arbitration Act, 1899, or in the Code of Civil Procedure, 1908, if any party to a *submission made in pursuance of an agreement* to which the Protocol set forth in the First Schedule as modified by the reservation subject to which it was signed by India applies, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings ; and the Court, unless satisfied that the agreement of arbitration has become inoperative or cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.”

By this enactment an obligation in the conditions set out in section 3 was imposed upon the Court, unless it was satisfied that the agreement of arbitration had become inoperative or could not proceed, to direct that the suit filed in any Court in India against any other party to the submission shall be stayed. This provision applied to all arbitration agreements whether a company was or was not a party thereto.

This Act was followed by the Arbitration Act X of 1940. The Act was enacted in the form of a complete code on the law of arbitration in India. All consensual arbitrations were governed by the Arbitration Act and by section 46 the provisions of the Act, except sub-section (1) of section 6 and sections 7, 12, 36 and 37 were made applicable to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the Act was inconsistent with that other enactment or with any rules made thereunder. By section 47 it was provided that :

"Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder.

Provided that an arbitration award otherwise obtained may with the consent of all parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending."

By section 49 read with the Fourth Schedule the figure "1899" in section 152 (1) and (3) in the Companies Act, 1913 was substituted by the figure "1940" and the words in sub-section (3) "other than those restricting the application of the Act in respect of the subject-matter of the arbitration" were deleted. So also section 89 of the Code of Civil Procedure was deleted. The effect of this amendment was to make the Arbitration Act applicable to all arbitrations in pursuance of the Companies Act, 1913 in which a company was a party. No amendment, however, was made in the Arbitration (Protocol and Convention) Act VI of 1937 and none such was necessary. By virtue of the saving clause in section 47 the provisions of the Arbitration (Protocol and Convention) Act, 1917 continued to operate.

The Indian Companies Act, VII of 1913 was repealed by the Companies Act I of 1956 and section 389 took the place of section 152 of the former Act with a slight modification. Under the Arbitration Act, 1899 read with the Companies Act, 1913, the power of a company to refer differences to arbitration fell to be determined in certain cases which arose before the High Courts of Lahore, Calcutta and Madras. In *Sita Ram Balmukand and another v. The Punjab National Bank, Ltd. Ambala City and others*<sup>1</sup>, there was a private arbitration in a dispute between the Punjab National Bank, Ltd., and a debtor of the Bank and the arbitrator made his award in favour of the Bank. This award was filed in the Court of the Senior Subordinate Judge, Ambala, under Schedule II of the Code of Civil Procedure, 1908 and a decree was obtained in accordance with the provisions of that Schedule. Execution was then taken out and property of the debtor was attached. The debtor contended that the award and the decree by the Court were invalid, because arbitration to which a company was a party had, in view of the provisions of section 152 of the Indian Companies Act, to take place in accordance with the provisions of the Arbitration Act, 1899 and the award could only be filed in the Court of the District Judge and not in the Court of the Senior Subordinate Judge and therefore the proceedings in execution "*were ultra vires*". The High Court held that section 152 of the Indian Companies Act, 1913, enacted an enabling provision and did not make it obligatory upon the parties one of which was a company, to go to arbitration in accordance with the requirements of the Indian Arbitration Act, 1899. The provisions of section 152 in the view of the Court being permissive, the Company could apply to have an award filed in Court under paragraph 21 (1) of Schedule II to the Code of Civil Procedure and the decree passed by the Senior Subordinate Judge was not a nullity as contended by the debtor. Bhide, J., who delivered the judgment of the Court observed that the general policy of the Legislature as disclosed by section 152 of the Indian Companies Act, 1913 was not to make compliance in arbitration proceedings with the provisions of the Indian Arbitration Act, 1899, obligatory outside the Presidency-towns and that section 152 being an enabling provision it merely conferred power on companies to refer disputes to arbitration under the Indian Arbitration Act, 1899, by an agreement in writing when that course was preferred. This view was not accepted by the Calcutta High Court in *Jhirighat Native Tea Company, Ltd. v. Bipul Chandra Gupta*<sup>2</sup>. In that case the jurisdiction of the District Court to entertain a petition under paragraph 20 of Schedule II of the Code of Civil Procedure for an order filing an award made out of Court where one of the parties to the dispute was a company registered under the Indian Companies Act, 1913, was challenged. It was held by the High Court of Calcutta that by virtue of the provisions of section 152, sub-sections (1) and (3) of the Indian Companies Act, 1913, all arbitrations between companies and persons had to take place in accordance with the provisions of sections 3 to 22 of the Indian Arbitration Act

1. (1936) I.L.R. 17 Lah. 722 (F.B.).

2. I.L.R. (1940) 1 Cal. 358.

1899, and for that purpose, section 2 of the Indian Arbitration Act restricting its local application was to be treated as non-existent. The Court also opined that in view of section 89 of the Code of Civil Procedure, 1908, the Second Schedule to the Code had no application to arbitration between a company and a person or to arbitrations under section 208-C of the Companies Act, 1913. It was observed that the words "in pursuance of this Act" (i.e., the Companies Act) qualified the phrase "shall apply" and therefore the meaning of section 152 was that the provisions of the Indian Arbitration Act, 1899, except section 2 thereof shall apply to all arbitrations between companies and persons by the force and effect of the Companies Act itself.

In *East Bengal Bank, Ltd. v. Jogesh Chandra Banerji*<sup>1</sup>, Mitter, J., modified the second proposition which was somewhat broadly stated. He held that even where one party or both the parties to a suit are companies registered under the Indian Companies Act, arbitration proceedings *pendente lite* between them are governed by the Second Schedule to the Code of Civil Procedure, 1908 and not the provisions of section 152 of the Companies Act, 1913. It was pointed out that the Indian Arbitration Act, 1899, only applied to arbitration by agreement without intervention of the Court and the Act had no application to arbitration relating to the subject-matter of a pending suit by the force and effect of section 152 of the Indian Companies Act. The view expressed in *Jhirighat Native Tea Companies case*<sup>2</sup> was approved by the Madras High Court in *The Catholic Bank, Ltd., Mangalore v. F.P.S. Albuquerque*<sup>3</sup>. In that case the Court held that after the enactment of the Indian Companies Act, 1913 and before the Indian Arbitration Act, 1940, came into force a company could submit differences to arbitration only under the provisions of the Indian Arbitration Act, 1899, and consequently Companies were (for the purpose of arbitration out of Court) not governed by Schedule II of the Code of Civil Procedure. All these cases arose under the Indian Arbitration Act, 1899 read with the Indian Companies Act, 1913, and the question mooted was whether the Subordinate Judge, who was approached on the assumption that Schedule II of the Code of Civil Procedure applied, was competent to pass a decree on an award made out of Court, or to entertain a petition for filing such an award.

In 1960 the Bombay High Court had occasion to consider the effect of section 152 of the Indian Companies Act VII of 1913, in its relation to the Arbitration Act of 1940. The Court in that case after referring to the Lahore, the Calcutta and the Madras decisions observed in *Societe Italians per Lavori Marittimi v. Hind Constructions Ltd.*,<sup>4</sup> decided by Mudholkar, Acting C.J. and S.M. Shah, J., after referring to the marginal note of section 152 :

"Undoubtedly a corporation has powers which are incidental to the performance of the objects for which that corporation was established. It can, therefore, be said and properly be said that a power to carry on business implies also an incidental power to refer a dispute arising from that business to arbitration. It was, therefore, not at all necessary to make specific provisions in the Indian Companies Act of the kind which we find in section 152 of the Act of 1913 for enabling a corporation to enter into an agreement for arbitration. The fact that the Legislature has enacted this provision would show that the Legislature by enacting it had no object in view other than to limit the exercise of that power."

The Court therefore held that an arbitration agreement whereby an Indian Company had agreed to refer future dispute under a collaboration agreement with an Italian Corporation, was unenforceable by virtue of section 152 of the Indian Companies Act, and the suit filed by the Indian company for a declaration that the "dredging agreement" had been validly terminated, and for damages for breach of contract, and accounts of profits and losses could not be ordered to be stayed either under section 34 of Arbitration Act or section 3 of the Arbitration (Protocol and Convention) Act, 1937, or under section 151 of the Code of Civil Procedure.

On a review of the statutory provisions and the authorities we are of the view that section 152 of the Indian Companies Act, 1913, and section 389 of the Indian

<sup>1</sup> I.L.R. (1940) 2 Cal. 237.

<sup>2</sup> I.L.R. (1940) 1 Cal 358.

<sup>3</sup> I.L.R. (1944) 1 M.L.J. 290 : I.L.R. (1944) Mad. 22nd September, 1960. (Bombay High

385 (F.B.)

4. Appeal No. 63 of 1959, decided

Companies Act I of 1956, were intended to provide that all arbitrations to which a company is a party shall be conducted in accordance with the provisions of the Indian Arbitration Act X of 1940. For reasons which we have already stated section 389 (1) of the Companies Act, 1956, regulated the power of Indian Companies to agree to submit differences to arbitration and by sub-section (3) the provisions of the Arbitration Act, 1940, applied to all arbitrations to which an Indian Company was a party.

That however is not decisive of the question which falls to be determined before us. Section 47 of the Arbitration Act, 1940, is as much a part of the Indian Arbitration Act as any other provision and that section makes the provisions of the Arbitration Act applicable to all arbitrations and to all proceedings thereunder but subject to the provisions of section 46 and save in so far as is otherwise provided by *any law for the time being in force*. We are not concerned in the present case with a statutory arbitration. But by the use of the words "save in so far as is otherwise provided by any law for the time being in force", the Legislature has clearly made the provisions of the Arbitration (Protocol and Convention) Act, 1937, applicable to consensual arbitrations under the Arbitration Act of 1940 when the conditions prescribed for the application of that Act are attracted, even if the scheme of arbitration recognised thereby is inconsistent with sections 3 to 38 of the Arbitration Act, 1940. The Arbitration (Protocol and Convention) Act VI of 1937 was enacted for giving effect to the protocol on arbitration clauses set forth in the First Schedule and of the conventions on the execution of foreign arbitral awards set forth in the Second Schedule and for enabling the conventions to become operative in India.

It is not disputed that the proposed arbitration between Traction and Kamani under the Rules of the International Chamber of Commerce is governed by the Protocol on Arbitration Clauses agreed to at Geneva on September 24, 1923, and protocol in the First Schedule applies. The Arbitration (Protocol and Convention) Act VI of 1937, being a law otherwise providing for arbitration the provisions thereof would by virtue of section 47 be applicable to arbitrations under section 389 of the Indian Companies Act, 1956, if the conditions regarding their applicability are fulfilled. That Act applies to arbitrations whether parties to the submission are individuals or companies. By virtue of section 389, sub-sections (1) and (3) of the Indian Companies Act I of 1956, (before that section was repealed in 1960) an Indian Company may agree to refer differences between itself and any other company or person by written agreement in accordance with the Arbitration Act, 1940 and the provisions of the Arbitration Act, 1940 apply to all arbitrations in pursuance of the Companies Act to which a company is a party. Arbitration according to the provisions of the Arbitration (Protocol and Convention) Act VI of 1937 being recognised by the Arbitration Act an agreement to refer disputes in accordance with the Rules of the International Chamber of Commerce is not inconsistent with section 389 of the Companies Act, 1956. In *Societe Italians per Lavori Marittimi's case*<sup>1</sup>, the attention of the Court was, it appears, not invited to the provisions of section 47 of the Arbitration Act, 1940, in its relation to the Arbitration (Protocol and Convention) Act VI of 1937 and the Court refused to stay the action commenced in contravention of the arbitration agreement on the footing that an arbitration agreement which contemplated reference otherwise than in the manner provided by the Arbitration Act, 1940, sections 1 to 38 was ineffective not being permissible under the provisions of section 152 of the Companies Act, 1913 and "therefore impossible and completely prohibited." This view in our judgment, cannot be sustained. In the present case, Kantawalla, J., and the High Court proceeded upon the view (as they were bound to do) that the decision in *Societe Italian per Marittimi's case*<sup>1</sup>, was sufficient to justify the contention of Kamani that the suit could not be stayed, the arbitration agreement being ineffective and invalid. For reasons already set out by us, that assumption cannot be supported. Whether having regard to the terms of section 3 of the Arbitration (Protocol and

1. Appeal No. 63 of 1959, decided on 22nd September, 1960 (Bombay High Court).

Convention) Act VI of 1937 stay may be granted of the suit commenced by Kamani is a question on which no decision has been recorded by the Trial Judge nor the High Court, and we will not be justified in this appeal in entering upon questions of fact for the first time without having the benefit of the view of the High Court on those questions.

The appeal will therefore be allowed, and the proceeding remanded to the Court of First Instance to be heard and disposed of according to law. Costs in this Court and before the Division Bench of the High Court will abide the result of the proceeding taken pursuant to this order in the Trial Court.

P.R.N.

*Appeal allowed and proceeding remanded.*

## THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice* A. K. SARKAR, K. C. DAS GUPTA, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Sardar Syedna Taher Saifuddin Saheb

.. *Petitioner\**

*v.*

The State of Bombay

.. *Respondent.*

Hussein Kurbanhusein Sanchawala

.. *Intervener.*

*Bombay Prevention of Excommunication Act (XLII of 1949)—Provisions invalidating excommunications—Constitutionality of—Constitution of India (1950), Articles 25 and 26—Infringement of.*

*By majority :—(B. P. Sinha, C.J., dissenting).—*The power of excommunication is vested in the *Dai-ul-Mullaq* for the purpose of enforcing discipline and keep the denomination together as an entity and to ensure the preservation of the community and has therefore a prime significance in the religious life of every member of the group : As the Bombay Prevention of Excommunication Act (XLII of 1949), invalidates excommunication on any ground whatsoever, including religious grounds, it must be held to be in clear violation of the right of the Dawoodi Bohra community under Article 26 (b) of the Constitution of India (1950).

*Per B.P. Sinha, C.J.—*Article 26 (b) must be read subject to Article 25 (2) (b) of the Constitution. The right of excommunication on the pleadings and the evidence is not a purely religious matter. On the social aspect of excommunication the impugned Act declaring such practices to be void has only carried out the strict injunction of Article 17 of the Constitution by which untouchability has been abolished and its practice in any form forbidden. It has not been established that the impugned Act has been passed by a Legislature which was not competent to legislate on the subject or that it infringes any of the provisions of the Constitution.

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

*K. M. Munshi*, Senior Advocate (*R. J. Joshi, G. K. Munshi, T. S. N. Diwanji* and *J. B. Dadachanji*, Advocates and *S. N. Andley, Rameshwar Nath* and *P. L. Vohra*, Advocates of *M/s. Rajinder Narain & Co.*, with him), for Petitioner.

*M.C. Setalvad*, Attorney-General for India, *C.K. Daphtary*, Solicitor-General of India, *H.N. Sanyal*, Additional Solicitor-General of India and *B. Sen*, Senior Advocate (*R.H. Dhebar*, Advocate with them), for Respondent.

*I.N. Shroff*, Advocate, for Intervener.

The Court delivered the following judgments:—

*Sinha, C.J.—*By this petition under Article 32 of the Constitution, the petitioner, who is the 51st *Dai-ul-Mullaq* and head of the Dawoodi Bohra Community, challenges the constitutionality of the Bombay Prevention of Excommunication Act, 1949 (Bombay Act XLII of 1949) (hereinafter referred to as the Act) on the ground that the provisions of the Act infringe Articles 25 and 26 of the Constitution. The sole respondent in this case is the State of Bombay.

The petition is founded on the following allegations. The Dawoodi Bohra Community consists of Muslims of the *Shia* sect, holding in common with all mem-

bers of that sect the belief that there is one God, that Mohammad is His Prophet to whom He revealed the *Holy Koran*; that Ali, the son-in-law of Mohammad, was the *Wasi* (executor) of the Prophet, and that the said Ali succeeded the Prophet by *Nas-e-Jali*. The Dawoodi Bohras believe that the said Ali was succeeded by a line of Imams, each of whom in turn was appointed by *Nas-e-Jali*, by his immediate predecessor. The *Shia* sect itself became divided into two sub-sects, known respectively as *Ismailis* and *Isna Asharia*. The Dawoodi Bohras belong to the former sect, and believe that owing to persecution *Imam Tyeb* (the 21st *Imam*) went into seclusion and that an *Imam* from his line will appear, it being their belief that an *Imam* always exists although at times he may be invisible to his believers, while in seclusion; that owing to the impending seclusion of the 21st *Imam* (*Imam Tyeb*) his predecessor, the 20th *Imam*, directed his *Hujjat* (a dignitary ranking next to an *Imam*), one *Hurra-tul-Malaka*, to appoint a *Dai* a *Mazoon* (a dignitary next to a *Dai*) and a *Mukasir* (a dignitary ranking next to a *Mazoon*) to carry on the *Dawat* (mission) of the *Imam* so long as the *Imam* should remain in seclusion, and to take and receive from the faithful an oath of allegiance. The *Dais* are known as *Dai-ul-Mutlaq*. The petitioner, as the Head Priest of the community of Dawoodi Bohras, is the viceregent of *Imam* on Earth in seclusion. The petitioner is a citizen of India. As *Dai-ul-Mutlaq* and the viceregent of *Imam* on Earth in seclusion, the *Dai* has not only civil powers as head of the sect and as trustee of the property, but also ecclesiastical powers as religious leader of the community. It is the right and privilege of the petitioner, as *Dai-ul-Mutlaq*, to regulate the exercise of religious rights in places where such rights and ceremonies are carried out and in which religious exercises are performed. In his capacity as the *Dai-ul-Mutlaq*, that is to say, as religious leader as well as trustee of the property of the community, one of his duties is to manage the properties which are all under his directions and control. He has also the power of excommunication. This power of excommunication is not an absolute, arbitrary and untrammelled power, but has to be exercised according to the usage and tenets of the community. Save in exceptional circumstances, expulsion from the community can be effected only at a meeting of the *Jamat*, after the person concerned has been given due warning of the fault complained of and an opportunity of mending, and after a public statement of the grounds of expulsion. The result of excommunication properly and legally effected involves exclusion from the exercise of religious rights in places under the trusteeship of the *Dai-ul-Mutlaq*. The petitioner claims that as the head of the Dawoodi Bohra community and as *Dai-ul-Mutlaq* he has the right and power, in a proper case and subject to the conditions of legal exercise of that power, to excommunicate a member of the Dawoodi Bohra community, and this power of excommunication is an integral part of the religious faith and belief of the Dawoodi Bohra community. The petitioner further affirms that the exercise of the right of excommunication is a matter of religion, and that, in any event, the right is an incident of the management of the affairs of the Dawoodi Bohra community in matters of religion. He also asserts that the Dawoodi Bohra community constitutes a religious denomination within the meaning of Article 26 of the Constitution; the said right of the petitioner to excommunicate a member of the community, for reasons of which the petitioner is the sole Judge in the exercise of his position as the religious head, is a guaranteed right under Articles 25 and 26 of the Constitution.

The Bombay Legislature enacted the Act, which came into force on 1st November, 1949. The petitioner asserts that the Act violates his right and power, as *Dai-ul-Mutlaq* and religious leader of the Dawoodi Bohra community, to excommunicate such members of the community as he may think fit and proper to do; the said right of excommunication and the exercise of that right by the petitioner in the manner aforesaid are matters of religion within the meaning of Article 26 (b) of the Constitution. It is submitted by the petitioner that the said Act violates or infringes both the Articles 25 and 26 of the Constitution, and to that extent, after the coming into force of the Constitution, has become void under Article 13 of the Constitution. The petitioner claims that notwithstanding the provisions of the Act, he, as the religious leader and *Dai-ul-Mutlaq* of the community, is entitled

to excommunicate any member of the Dawoodi Bohra community for an offence, which according to his religious sense justifies expulsion ; and in so far as the Act interferes with the said right of the petitioner, it is *ultra vires* the Legislature. The Act is also challenged on the ground of legislative incompetence of the then Legislature of Bombay, inasmuch as it is contended that such a power is not contained in any of the entries in the Seventh Schedule of the Government of India Act, 1935.

One Tayebhai Moosagi Koicha (Mandivala) instituted a suit, being Suit No. 1262 of 1949, in the High Court of Judicature at Bombay, praying *inter alia*, for a declaration that certain orders of excommunication passed by the petitioner against him prior to the enactment of the Act were void and illegal and of no effect, and that the plaintiff continued to remain a member of the Dawoodi Bohra community. The said suit was heard by J. C. Shah, J., who, by his judgment, dated 21st February, 1952 held that the Act was not inconsistent with Article 26 of the Constitution, and was not *ultra vires* the Legislature of the Province of Bombay. The petitioner, being dissatisfied with the judgment of the learned Judge, preferred an appeal that came up for hearing before the Court of Appeal, composed of Chagla, C.J., and Bhagwati, J. By its judgment, dated 26th August, 1952, the Court of Appeal upheld the judgment of the learned single Judge, though on different grounds. The petitioner obtained leave from the High Court to appeal to this Court, and ultimately filed the appeal, being Civil Appeal No. 99 of 1954. During the pendency of the appeal, the plaintiff-respondent aforesaid died and an application made on behalf of his heirs for being brought on the record was not granted by the High Court of Bombay. This Court dismissed the said appeal on the ground that the plaintiff having died, the cause of action did not survive.

The petitioner further alleges that parties inimical to him and to the Dawoodi community have written scurrilous articles challenging and defying the position, power or authority of the petitioner as the religious head of the community ; the challenge to the petitioner's position and his power to excommunicate as the head of the Dawoodi Bohra community is violative of the petitioner's guaranteed rights under Articles 25 and 26 of the Constitution. It is, therefore, claimed that it is incumbent upon the respondent, in its public character, to forbear from enforcing the provisions of the Act against the petitioner. By the petitioner's Attorney's letter, Annexure B to the petition, dated 18th July, 1958, the petitioner pointed out to the respondent the unconstitutionality of the Act and requested the latter to desist from enforcing the provisions of the Act against the petitioner or against the Dawoodi Bohra community. In the premises, a writ of *mandamus* or a writ in the nature of *mandamus* or other appropriate writ, direction or order under Article 32 of the Constitution was prayed for against the respondent restraining it, its officers, servants and agents from enforcing the provisions of the Act.

The answer of the State of Bombay, the sole respondent, is contained in the affidavit sworn to by Shri V. N. Kalghatgi, Assistant Secretary to the Government of Bombay, Home Department, to the effect that the petitioner not having taken any proceedings to excommunicate any member of the community had no cause of action or right to institute the proceedings under Article 32 of the Constitution ; that it was not admitted that the *Dai-ul-Mutlaq*, as the head of the community, has civil powers, including the power to excommunicate any member of the community ; that, alternatively, such power is not in conformity with the policy of the State, as defined in the Constitution ; that the petitioner, as the head of the community, may have the right to regulate religious rights at appropriate places and occasions, but those rights do not include the right to excommunicate any person and to deprive him of his civil rights and privileges ; and that, in any event, after the coming into effect of the impugned Act, the petitioner has no such rights of excommunication ; that it was denied that the right to excommunicate springs from or has its foundation in religion and religious doctrines, tenets and faith of the Dawoodi Bohra community ; that, at any rate, it was denied that the right to excommunicate was an essential part of the religion of the community ; that, alternatively, assuming that it was part of a religious practice, it runs counter to



public order, morality and health. It was also asserted that the impugned Act was a valid piece of legislation enacted by a competent Legislature and within the limits of Articles 25 and 26 of the Constitution ; and that the right to manage its own affairs vested in a religious community is not an absolute or untrammelled right but subject to a regulation in the interest of public order, morality and health. It was denied that the alleged right of the petitioner to excommunicate a member of the community is guaranteed by Articles 25 and 26 of the Constitution. In the premises, it was denied that the petitioner had any right to the declaration sought or the relief claimed that the provisions of the Act should not be enforced.

At a very late stage of the pendency of the proceedings in this Court, in April, 1961, one Kurbanhusein Sanchawaly of Bombay, made an application either for being added as a party to the Writ Petition or, alternatively, for being granted leave to intervene in the proceedings. In his petition for intervention, he stated that he was a citizen of India and was by birth a member of the Dawoodi Bohra community and as such had been taking an active part in social activities for bettering the conditions of the members of the community. He asserted that members of the community accepted that up to the 46th *Dai-ul-Mullaq* there was no controversy, that each one of them had been properly nominated and appointed, but that a controversy arose as regards the propriety and validity of the appointment of the 47th *Dai-ul-Mullaq*, which controversy continued all along until the present time so that opinion is divided amongst the members of the Dawoodi Bohra community as to the validity of appointments and existence of *Dai-ul-Mullaqs* from the 47th to the 51st *Dai-ul-Mullaq*, including the present petitioner. The intervener also alleged that but for the impugned Act, the petitioner would have lost no time in excommunicating him. In the premises, he claims that he is not only a proper but necessary party to the Writ Petition. He, therefore, prayed to be added as a party-respondent, or, at any rate, granted leave to intervene at the hearing of the Writ Petition. We have to dispose of this petition because no orders have been passed until the hearing of the main case before us. In answer to the petitioner's claim, the intervener has raised the following grounds, namely, that the *Holy Koran* does not permit excommunication, which is against the spirit of Islam ; that, in any event, the *Dai-ul-Mullaq* had no right or power to excommunicate any member of the community, and alternatively, that such a right, assuming that it was there, was wholly " out of date in modern times and deserves to be abrogated and was rightly abrogated by the said Act ". It was further asserted that the alleged right of excommunication was opposed to the universally accepted fundamentals of human rights as embodied in the " Universal Declaration of Human Rights ". It was also asserted that the Act was passed by a competent Legislature and was in consonance with the provisions of Articles 25 and 26 of the Constitution. The intervener further claims that the rights to belief, faith and worship and the right to a decent burial were basic human rights and were wholly inconsistent with the right of excommunication claimed by the petitioner, and that the practice of excommunication is opposed to public order and morality ; that the practice of excommunication was a secular activity associated with religious practice and that the abolition of the said practice is within the saving clause (2) (a) of Article 25 of the Constitution. It was also asserted that, under the Mohamadan Law, properties attached to institutions for religious and charitable purposes vested in the Almighty God and not in the petitioner, and that all the members of the Dawoodi Bohra community had the right to establish and maintain such institutions, in consonance with Article 26 of the Constitution ; that is to say that Article 26 guarantees the right of the denomination as a whole and not an individual like the petitioner. It was also asserted that the provisions of the Act prohibiting excommunication was in furtherance of public order and morality and was just and reasonable restriction on a secular aspect of a religious practice. The petitioner challenged the right of the intervener either to intervene or to be added as the party-respondent. In his rejoinder to the petition for intervention, the petitioner further alleged that the practice of excommunication was essential to the purity of religious denominations because it could be secured only by removal of persons who were unsuitable for membership of the community. It was, therefore, asserted that those who did not

accept the headship of the *Dai-ul-Mullaq*, including the petitioner, must go out of the community and anyone openly defying the authority of the *Dai-ul-Mullaq* was liable to be excommunicated from the membership of the community, entailing loss of rights and privileges belonging to such members. It was, therefore, claimed that the practice of excommunication was, and is, an essential and integral part of the religion and religious belief, faith and tenets of Dawoodi Bohra community, which have been guaranteed by Article 26 of the Constitution.

It has been argued on behalf of the petitioner, in support of the petition, that the Dawoodi Bohra community, of which the petitioner is the religious head, as also a trustee in respect of the property belonging to the community, is a religious denomination within the meaning of Article 26 of the Constitution ; that as such a religious denomination it is entitled to ensure its continuity by maintaining the bond of religious unity and discipline, which would secure the continued acceptance by its adherents of certain essential tenets, doctrines and practices ; the right to such continuity involves the right to enforce discipline, if necessary by taking the extreme step of excommunication ; that the petitioner as the religious head of the denomination is invested with certain powers, including the right to excommunicate dissidents, which power is a matter of religion within the meaning of Article 26 (b) of the Constitution ; that the impugned Act, in so far as it takes away the power to enforce religious discipline and thus compels the denomination to accept dissidents as having full rights as a member of the community, including the right to use the properties and funds of the community dedicated to religious use, violates the fundamental rights of the petitioner guaranteed under Article 26. In this connection, reliance was placed on the decision of this Court in *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*<sup>1</sup>, which, it is contended, has laid down that the guarantee under the Constitution not only protects the freedom of opinion, but also acts done in pursuance of such religious opinion, and that it is the denomination itself which has a right to determine what are essential parts of its religion, as protected by the provisions of Articles 25 and 26 of the Constitution. It was further contended that the right to worship in the mosque belonging to the community and of burial in the grave yard dedicated to the community were religious rights which could not be enjoyed by a person who had been rightly excommunicated. In so far as the Act took away the right of the petitioner as the head of the community to excommunicate a particular member of the community and thus to deprive him of the use of the funds and property belonging to the community for religious purposes, had the effect of depriving the petitioner of his right as the religious head to regulate the right to the use of funds and property dedicated to religious uses of the community. It has also been contended that religious reform, if that is the intention of the impugned Act, is outside the ambit of Article 25 (2) (b) of the Constitution.

The learned Attorney-General for the respondent contended on the other hand, that the right to excommunicate, which has been rendered invalid by the impugned Act, was not a matter of religion within the meaning of Article 26 (b) of the Constitution ; that what the Act really intended was to put a stop to the practice indulged in by a caste or a denomination to deprive its members of their civil rights as such members, as distinguished from matters of religion, which were within the protection of Articles 25 and 26. Alternatively, it was also argued that even assuming that excommunication was concerned with matters of religion, the Act would not be void because it was a matter of reform in the interest of public welfare. It was also argued that there was no evidence on the record to show that excommunication was an essential matter of religion. The right to worship at a particular place or the right of burial in a particular burial ground were questions of civil nature, a dispute in respect of which was within the cognizance of the Civil Courts. The legislation in question, in its real aspects, was a matter of social welfare and social reform and not within the prohibitions of Article 25 (1) or Article 26. Excommunication involving

deprivation of rights of worship or burial and the like were not matters of religion within the meaning of Article 26 (b) ; and finally, Article 26 (b) was controlled by Article 25 (2) (b) of the Constitution, and, therefore, even if excommunication touched certain religious matters, the Act, in so far as it had abolished it, was in consonance with modern notions of human dignity and individual liberty of action even in matters of religious opinion and faith and practice.

Shri Shroff, appearing for the intervener, attempted to reopen the question whether the petitioner as *Dai-ul-Mutlaq*, assuming that he had been properly elected as such, had the power to excommunicate, in spite of the decision of their Lordships of the Judicial Committee of the Privy Council in *Hasan Ali v. Mansoor Ali*<sup>1</sup>. He also supported the provisions of the impugned Act on the ground that they were in furtherance of public order. As we are not here directly concerned with the question whether or not the petitioner as the head of the religious community had the power to excommunicate, we did not hear Mr. Shroff at any length with reference to that question. We shall proceed to determine the controversy in this case on the assumption that the petitioner had that power. We are only directly concerned with the questions whether the provisions of the Act, in so far as they have rendered invalid the practice of excommunication, are unconstitutional as infringing Article 26 (b), and enacted by a Legislature which was not competent to do so, as contended on behalf of the petitioner. We will, therefore, confine our attention to those questions. Keeping in view the limited scope of the controversy, we have first to determine the ambit and effect of the impugned Act. The Bombay Prevention of Excommunication Act (Bombay Act XLII of 1949) is an Act to prohibit excommunication in the Province of Bombay. Its Preamble, which shortly states the background of the legislation, is in these terms :

"Whereas it has come to the notice of Government that the practice prevailing in certain communities of excommunicating its members is often followed in a manner which results in the deprivation of legitimate rights and privileges of its members ;

And whereas in keeping with the spirit of changing times and in the public interest it is expedient to stop the practice ; it is hereby enacted as follows :—

The definition of "community" as given in section 2 (a) would include the Dawoodi Bohra community, because admittedly its members are knit together by reason of certain common religious doctrines, and admittedly its members belong to the same religion or religious creed of a section of the Shia community of Muslims. The term "community" includes a caste or a sub-caste also. "Excommunication" has been defined by section 2 (b) as meaning "the expulsion of a person from any community of which he is a member depriving him of rights and privileges which are legally enforceable by a suit of civil nature. . . . .", and the explanation to the definition makes it clear that the rights and privileges within the meaning of the definition include the right to office or property or to worship in any religious place or a right of burial or cremation, notwithstanding the fact that the determination of such right depends entirely on the decision of the question as to any religious rites or ceremonies or rule or usage of a community. By section 3, excommunication of a member of a community has been declared to be invalid and of no effect, notwithstanding any law, custom or usage to the contrary. Any act of excommunication, or any act in furtherance of excommunication, of any member of a community has been made a penal offence liable to a punishment, on conviction, of fine which may extend to one thousand rupees. The *Explanation* has made it clear that any person who has voted in favour of a decision of excommunication at a meeting of a body or an association of a particular denomination is deemed to have committed the offence made punishable by section 4, as aforesaid. Sections 5 and 6 lay down the procedure for the trial of an offence under the Act, the limit of time within which the prosecution must be launched and the necessity of previous sanction of the authority indicated therein.

These, in short, are the provisions of the impugned Act. It will be noticed that the Act is a culmination of the history of social reform which began more than a

century ago with the enactment of section 9 of Regulation VII of 1832 of the Bengal Code, which provided, *inter alia*, that the laws of Hindus and Muslims shall not be permitted to operate to deprive the parties of any property to which, but for the operation of such laws, they would have been entitled. Those provisions were subsequently incorporated in the India Act (XXI of 1850)—known as the Caste Disabilities Removal Act—which provided that a person shall not be deprived of his rights or property by reason of his or her renouncing or exclusion from the communion of any religion or being deprived of caste, and that any such forfeiture shall not be enforced as the law in the Courts. The impugned Act, thus, has given full effect to modern notions of individual freedom to choose one's way of life and to do away with all those undue and outmoded interferences with liberty of conscience, faith and belief. It is also aimed at ensuring human dignity and removing all those restrictions which prevent a person from living his own life so long as he did not interfere with similar rights of others. The Legislature had to take the logical final step of creating a new offence by laying down that nobody had the right to deprive others of their civil rights simply because the latter did not conform to a particular pattern of conduct. The Act, in substance, has added a new offence to the penal law of the country by penalising any action which has the effect of depriving a person of his human dignity and rights appurtenant thereto. It also adds to the provisions of the Criminal Procedure Code and has insisted upon the previous sanction of the prescribed authority as a condition precedent to launching a prosecution for an alleged offence against the provisions of the Act. In my opinion, therefore, the enactment, in pith and substance, would come within Entries 1 and 2 of List III of the Concurrent Legislative List of the Constitution Act of 1935. It is true that "excommunication" does not, in terms, figure as one of the entries in any one of the three lists. The legislative competence of the Bombay Legislature to enact the Act has not been seriously challenged before us, and, therefore, no particular argument was addressed to us to show that the legislation in question could not be within the purview of Entries 1 and 2 of List III aforesaid. What was seriously challenged before us was the constitutionality of the Act, in the light of the Constitution with particular reference to Articles 25 and 26, and I shall presently deal with that aspect of the controversy. But before I do that, it is convenient to set out the background of the litigation culminating in the present proceedings.

The first reported case in relation to some aspects of *Shia Imami Ismailis* is that of the *Advocate-General ex relatione Dave Muhammad v. Muhammad Husen Huseni*<sup>1</sup>. That was a suit commenced before the coming into existence of the Bombay High Court, on the Equity Side of the late Supreme Court, instituted by an information and bill, filed by the relators and plaintiffs, representing a minority of the *Khoja* community, against the defendants representing the majority of that community. The prayer in the action was that an account be taken of all property belonging to or held in trust for the *Khoja* community of Bombay in the hands of the treasurer and the accountant, respectively called *Mukhi* and *Kamaria*, and other cognate reliefs not relevant to the present controversy. In that case, which was heard on the Original side by Arnould, J., judgment was delivered in November, 1866, after a prolonged hearing. In that case, the learned Judge went into a detailed history of the several sects amongst Muslims, including the *Shia Imami Ismailis*, with particular reference to the Aga Khan and his relation with the Jamat of the *Khojas* of Bombay. In that case it was laid down that there was no public property impressed with a trust, either express or implied, for the benefit of the whole *Khoja* community and that Aga Khan, as the spiritual head of the *Khojas* was entitled to determine on religious grounds who shall or shall not remain members of the *Khoja* community. In that case, the learned Judge, with reference to authoritative texts, went into the detailed history of the two sects of the *Sunnis* and *Shias*. He discussed the origin of the *Ismailis* as an offshoot of the *Shias* and traced the hereditary succession of the unrevealed *Imams* in unbroken line down to Aga Khan. Except for its historical aspect, the case does not deal with any matter relevant to the present controversy.

The next reported case which was brought to our notice is the case of the *Advocate-General of Bombay v. Yusufalli Ebrahim*<sup>1</sup>. That was a case directly in relation to the Dawoodi Bohra community, with which we are concerned in this case. In that case, there was a dispute as regards a mosque and a tomb, and was heard by Marten, J., on the Original side in 1921. We are not concerned with the details of the controversy in that case. But the learned Judge has noticed the history of this community, with particular reference to the position of the *Dai-ul-Mullaq*, and how the differences between the majority of the community and the minority arose on the question of the regularity of the succession of the 47th *Dai* in 1840. The learned Judge has pointed out that the powers of the *Dai* are at least thrice delegated, namely, by God to Prophet Mohammad, by the latter to the *Imam*, and by the *Imam* to the *Dai-ul-Mullaq*.

The more directly in point is the litigation which was concluded by the judgment of their Lordships of the Judicial Committee of the Privy Council in the case of *Hasanali v. Mansoorali*<sup>2</sup>. In that case, the powers of the *Dai-ul-Mullaq* to excommunicate were directly in controversy. The petitioner was the first defendant in that action, which had been commenced in October, 1925, and was decided by the judgment of the Subordinate Judge of Burhanpur, dated 2nd January, 1931. That decision was reversed by the Judicial Commissioner of Central Provinces and Berar (later the High Court at Nagpur) by his judgment, dated 25th October, 1934. That judgment was taken on appeal to the Privy Council and the judgment of the Privy Council very succinctly traces the history of the Dawoodi Bohra community until we come to the 51st *Dai*, who was the first defendant in that action, and is the petitioner before us. In that case, certain orders of excommunication were under challenge. As a result of those orders of excommunication, the plaintiffs had been obstructed in, and prevented from, entering the property in suit for the purposes of worship, burial and resting in the rest house. In that case, their Lordships did not uphold the claim of the *Dai-ul-Mullaq* that he had unrestricted power of excommunication, though they found that he could be regarded as *Dai-ul-Mullaq*. As regards the power to excommunicate, it was held that though the power was there, it was not absolute, arbitrary and untrammelled; and then their Lordships laid down the conditions for the valid exercise of that power. The effect of a valid excommunication, in their Lordships' view, was exclusion from the exercise of religious rights in places under the trusteeship of the head of the community, because the *Dai* was not only a religious leader but also a trustee of the property of the community. After examining the evidence in that case, their Lordships held that the persons alleged to have been excommunicated had not been validly expelled from the community.

The judgment of the Privy Council was given on 1st December, 1947. Within two years of that judgment the impugned Act was passed, and soon after a suit on the Original side of the Bombay High Court was commenced (being Suit No. 1262 of 1949). That was a suit by a member of the Dawoodi Bohra community, who had been excommunicated by the petitioner, functioning as the *Dai-ul-Mullaq*, by two orders of excommunication, one passed in 1934 and the other in 1948, soon after the judgment of the Privy Council. The suit was, *inter alia*, for a declaration that the orders of excommunication were void in view of the Act. A number of issues were raised at the trial, which was heard by Shah, J. Two questions, by way of preliminary issues, with which we are immediately concerned in the present proceedings, were raised before the learned Judge of the Bombay High Court, namely:

- (1) Was the Act within the legislative competence of the Legislature of the Province of Bombay?
- (2) Whether after the coming into force of the Constitution, the Act was invalid in view of Articles 25 and 26 of the Constitution?

The learned Judge, after an elaborate examination of the Constitution Act of 1935 came to the conclusion that the Bombay Legislature was competent to enact the Act, and that it was not unconstitutional even after the coming into effect of the Constitution because it was not inconsistent with the provisions of Articles 25 and 26.

1. (1922) 24 Bom.L.R. 1060.

2. L.R. 75 I.A. 1 : A.I.R. 1948 P.C. 66.

An appeal was taken to the Court of Appeal, which was heard by Chagla, C.J. and Bhagwati, J. The Court of Appeal upheld the decision of Shah, J. The matter was brought up on appeal to this Court in Civil Appeal No. 99 of 1954. During the pendency of the appeal in this Court the plaintiff died and it was held, without deciding the merits of the controversy, that the suit giving rise to the appeal in this Court had abated by reason of the fact that the plaintiff had died and the cause of action being personal to him was also dead. The Order of this Court dismissing the appeal as not maintainable is dated 27th November, 1957.

This Writ Petition was filed on 18th August, 1958 by the petitioner as the 51st *Dai-ul-Mutlaq* and head of the Dawoodi Bohra community, for a declaration that the Act was void so far as the petitioner and the Dawoodi Bohra community were concerned, and that a writ of *mandamus* or a writ in the nature of *mandamus* or other appropriate writ, direction or order under Article 32 of the Constitution be issued restraining the respondent, its officers, servants and agents from enforcing the provisions of the Act, against the petitioner or the Dawoodi Bohra community, or in any manner interfering with the right of the petitioner, as the religious leader and *Dai-ul-Mutlaq* of the Dawoodi Bohra community, to excommunicate any member of the community for an offence which the petitioner, in the exercise of his religious sense as the religious head of the community may determine as justifying such an expulsion.

It is not disputed that the petitioner is the head of the Dawoodi Bohra community or that the Dawoodi Bohra community is a religious denomination within the meaning of Article 26 of the Constitution. It is not even disputed by the State, the only respondent in the case, that the petitioner as the head of the community had the right, as found by the Privy Council in the case of *Hasanali v. Mansoorali*<sup>1</sup> to excommunicate a particular member of the community for reasons and in the manner indicated in the judgment of their Lordships of the Privy Council. But what is contended is that, as a result of the enactment in question, excommunication has been completely banned by the Legislature, which was competent to do so, and that the ban in no way infringes Articles 25 and 26 of the Constitution. I have already indicated my considered opinion that the Bombay Legislature was competent to enact the Act. It now remains to consider the main point in controversy, which was, as a matter of fact, the only point urged in support of the petition, namely, that the Act is void in so far as it is repugnant to the guaranteed rights under Articles 25 and 26 of the Constitution. Article 25 guarantees the right to every person, whether citizen or non-citizen, the freedom of conscience and the right freely to profess, practise and propagate religion. But this guaranteed right is not an absolute one. It is subject to (1) public order, morality and health, (2) the other provisions of Part III of the Constitution, (3) any existing law regulating or restricting an economic, financial, political or other secular activity which may be associated with religious practice, (4) a law providing for social welfare and reform, and (5) any law that may be made by the State regulating or restricting the activities aforesaid or providing for social welfare and reform. I have omitted reference to the provisions of *Explanation I* and *II* and other parts of Article 25 which are not material to our present purpose. It is noteworthy that the right guaranteed by Article 25 is an individual right, as distinguished from the right of an organised body like a religious denomination or any section thereof, dealt with by Article 26. Hence, every member of the community has the right, so long as he does not in any way interfere with the corresponding rights of others, to profess, practise and propagate his religion, and everyone is guaranteed his freedom of conscience. The question naturally arises : Can an individual be compelled to have a particular belief on pain of a penalty, like excommunication? One is entitled to believe or not to believe a particular tenet or to follow or not to follow a particular practice in matters of religion. No one can, therefore, be compelled, against his own judgment and belief, to hold any particular creed or follow a set of religious practices. The Constitution has left every person free in the matter of his relation to his Creator,

if he believes in one. It is, thus, clear that a person is left completely free to worship God according to the dictates of his conscience, and that his right to worship as he pleased is unfettered so long as it does not come into conflict with any restraints, as aforesaid, imposed by the State in the interest of public order, etc. A person is not liable to answer for the verity of his religious views, and he cannot be questioned as to his religious beliefs, by the State or by any other person. Thus, though his religious beliefs are entirely his own and his freedom to hold those beliefs is absolute, he has not the absolute right to act in any way he pleased in exercise of his religious beliefs. He has been guaranteed the right to practise and propagate his religion, subject to the limitations aforesaid. His right to practise his religion must also be subject to the criminal laws of the country, validly passed with reference to actions which the Legislature has declared to be of a penal character. Laws made by a competent Legislature in the interest of public order and the like, restricting religious practices, would come within the regulating power of the State. For example, there may be religious practices of sacrifice of human beings, or sacrifice of animals in a way deleterious to the well-being of the community at large. It is open to the State to intervene, by legislation, to restrict or to regulate to the extent of completely stopping such deleterious practices. It must, therefore, be held that though the freedom of conscience is guaranteed to every individual so that he may hold any beliefs he likes, his actions in pursuance of those beliefs may be liable to restrictions in the interest of the community at large, as may be determined by common consent, that is to say, by a competent Legislature. It was on such humanitarian grounds, and for the purpose of social reform, that so-called religious practices like immolating a widow at the pyre of her deceased husband, or of dedicating a virgin girl of tender years to a god to function as a *devadasi*, or of ostracising a person from all social contacts and religious communion on account of his having eaten forbidden food or taboo, were stopped by legislation.

But it has been contended on behalf of the petitioner that the right guaranteed, under Article 25, to freedom of conscience and the freedom to profess, practise and propagate religion is available not only to an individual but to the community at large, acting through its religious head; the petitioner, as such a religious head has, therefore, the right to excommunicate, according to the tenets of his religion, any person who goes against the beliefs and practices connected with those beliefs. The right of the petitioner to excommunicate is, therefore a fundamental right, which cannot be affected by the impugned Act. In this connection, reference was made to the following observations in the leading judgment of this Court, bearing upon the interpretations of Articles 25 and 26 (vide *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*)<sup>1</sup> :

"A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.

The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression 'practice of religion' in Article 25."

On the strength of those observations it is contended on behalf of the petitioner that this practice of excommunication is a part of the religion of the community with which we are concerned in the present controversy ; Article 26, in no uncertain terms, has guaranteed the right to every religious denomination or a section thereof "to manage its own affairs in matters of religion" (Article 26 (b)). Now what are matters of religion and what are not is not an easy question to decide. It must vary in each individual case according to the tenets of the religious denomination concerned. The expression "matters of religion" in Article 26 (b) and "activities associated with religious practice" do not cover exactly the same ground. What are exactly matters of religion are completely outside State interference, subject of course to public order, morality and health. But activities associated with religious practices may have many ramifications and varieties—economic, financial, political and other—as recognised by Article 25 (2) (a). Such activities, as are contemplated by the clause aforesaid cover a field much wider than that covered

by either Article 25 (1) or Article 26 (b). Those provisions have, therefore, to be so construed as to create no conflict between them. We have, therefore, to classify practices into such as are essentially and purely of a religious character, and those which are not essentially such. But it has been contended on behalf of the petitioner that it is for the religious denomination itself to determine what are essentially religious practices and what are not. In this connection, reliance is placed on the following observations of this Court in the leading case, aforesaid, of *The Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*.<sup>1</sup>

"As we have already indicated, freedom of religion in our Constitution is not confined to religious beliefs only; it extends to religious practices as well subject to the restrictions which the Constitution itself has laid down. Under Article 26 (b), therefore, a religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters."

It should be noted that the complete autonomy which a religious denomination enjoys under Article 26 (b) is in 'matters of religion,' which has been interpreted as including rites and ceremonies which are essential according to the tenets of the religion. Now, Article 26 (b) itself would seem to indicate that a religious denomination has to deal not only with matters of religion, but other matters connected with religion, like laying down rules and regulations for the conduct of its members and the penalties attached to infringement of those rules, managing property owned and possessed by the religious community etc., etc. We have, therefore, to draw a line of demarcation between practices consisting of rites and ceremonies connected with the particular kind of worship, which is the tenet of the religious community, and practices in other matters which may touch the religious institutions at several points, but which are not intimately concerned with rites and ceremonies the performance of which is an essential part of the religion. In this connection, the following observations of this Court in *The Durgah Committee, Ajmer v. Syed Hussain Ali*<sup>2</sup>, which were made with reference to the earlier decisions of this Court in *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt*<sup>1</sup>, and in *Sri Venkataramana Devaru v. The State of Mysore*<sup>3</sup>, that "matters of religion" in Article 26 (b) include even practices which are regarded by the community as part of its religion, may be noted:

"Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Article 26. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Article 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other."

But then it is contended that a religious denomination is a quasi-personality, which has to ensure its continuity and has, therefore, to lay down rules for observance by members of its community, and, in order to maintain proper and strict discipline, has to lay down sanctions; the right to excommunicate a recalcitrant member is an illustration of that sanction. In this connection, it was contended that the Privy Council had laid down in the case of *Hasanali v. Mansoorali*<sup>4</sup>, that the power of excommunication was a religious power exercisable by the *Dai*. In my opinion, those passages in the judgment of the Privy Council do not establish the proposition that the right which the Privy Council found inhered in the *Dai* was a purely religious right. That it was not a purely religious right becomes clear from the judgment of the Judicial Committee of the Privy Council, which laid down the appropriate

1. (1954) S.C.R. 1005 at pp. 1028-29 : (1954) S.C.J. 335 : (1954) 1 M.L.J. (S.C.) 596.  
2. (1962) 1 S.C.R. 383 : A.I.R. 1961 S.C. 1402.

3. (1958) S.C.J. 382 : (1958) 1 An.W.R.

(S.C.) 109 : (1958) 1 M.L.J. (S.C.) 109 : (1958) S.C.R. 895.

4. L.R. 75 I.A. 1, at pp. 14-15 : A.I.R. 1948 P.C. 66.



procedure and the manner of expulsion, which had to be according to justice, equity and good conscience, and that it was justiciable. A matter which is purely religious could not come within the purview of the Courts. That conclusion is further strengthened by the consideration that the effect of the excommunication or expulsion from the community is that the expelled person is excluded from the exercise of rights in connection not only with places of worship but also from burying the dead in the community burial ground and other rights to property belonging to the community, which are all disputes of a civil nature and are not purely religious matters. In the case before their Lordships of the Privy Council, their Lordships enquired into the regularity of the proceedings resulting in the excommunication challenged in that case, and they held that the plaintiff had not been validly expelled. It cannot, therefore, be asserted that the Privy Council held the matter of excommunication as a purely religious one. If it were so, the Courts could be out of the controversy.

The same argument was advanced in another form by contending that excommunication is not a social question and that, therefore, Article 25 (2) (b) could not be invoked in aid of holding the Act to be constitutional. In this connection, it has to be borne in mind that the *Dai-ul-Mutlaq* is not only the head of the religious community but also the trustee of the property of the community in which the community as a whole is interested. Even a theological head has got to perform acts which are not wholly religious but may be said to be quasi-religious or matters which are connected with religious practices, though not purely religious. Actions of the *Dai-ul-Mutlaq* in the purely religious aspect are not a concern of the Courts, but his actions touching the civil rights of the members of the community are justiciable and not outside the pale of interference by the Legislature or the Judiciary. I am not called upon to decide, nor am I competent to do so, as to what are the religious matters in which the *Dai-ul-Mutlaq* functions according to his religious sense. I am only concerned with the civil aspect of the controversy relating to the constitutionality of the Act, and I have to determine only that controversy.

It has further been argued on behalf of the petitioner that an excommunicated person has not the right to say his prayers in the mosque or to bury the dead in the community burial ground or to the use of other communal property. Those may be the result of excommunication, but I am concerned with the question whether the Legislature was competent and constitutionally justified in enacting the law declaring excommunication to be void. As already indicated, I am not concerned in this case with the purely religious aspect of excommunication. I am only concerned with the civil rights of the members of the community, which rights they will continue to enjoy as such members if excommunication was held to be invalid in accordance with the provision of the Act. Hence, though the Act may have its repercussions on the religious aspect of excommunication, in so far as it protects the civil rights of the members of the community it has not gone beyond the provisions of Article 25 (2) (b) of the Constitution.

Then it is argued that the guaranteed right of a religious denomination to manage its own affairs in matters of religion (Article 26 (b)) is subject only to public order, morality and health and is not subject to legislation contemplated by Article 25 (2) (b). This very argument was advanced in the case of *Shri Venkataramana Devaru v. The State of Mysore*<sup>1</sup>. At page 916 this argument has been specifically dealt with and negatived. This Court observed as follows:

"The answer to this contention is that it is impossible to read any such limitation into the language of Article 25 (2) (b). It applies in terms to all religious institutions of a public character without qualification or reserve. As already stated, public institutions would mean not merely temples dedicated to the public as a whole but also those founded for the benefit of sections thereof, and denominational temples would be comprised therein. The language of the Article being plain and unambiguous, it is not open to us to read into it limitations which are not there, based on a *priori* reasoning as to the probable intention of the Legislature. Such intention can be gathered only from the words actually used in the

1. (1958) S.C.J. 382; (1951) 1 An. W.R. (S.C.) 109; (1958) M.L.J. (S.C.) 109; (1958) S.C.R. 895.

statute ; and in a Court of law, what is unexpressed has the same value as what is unintended. We must therefore hold that denominational institutions are within Article 25 (2) (b)."

In that case, also, as in the present case, reference was made to the earlier decision of this Court in *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*<sup>1</sup>, but the latter decision has explained the legal position with reference to the earlier decision, and after examining the arguments for and against the proposition at pages 916-918, it has been distinctly laid down that Article 26 (b) must be read subject to Article 25 (2) (b) of the Constitution.

It has further been contended that a person who has been excommunicated as a result of his non-conformity to religious practices is not entitled to use the communal mosque or the communal burial ground or other communal property, thus showing that for all practical purposes he was no more to be treated as a member of the community, and is thus an outcast. Another result of excommunication is that no other member of the community can have any contacts, social or religious, with the person who has been excommunicated. All that is true. But the Act is intended to do away with all that mischief of treating a human being as a *pariah*, and of depriving him of his human dignity and of his right to follow the dictates of his own conscience. The Act is, thus, aimed at fulfilment of the individual liberty of conscience guaranteed by Article 25 (1) of the Constitution, and not in derogation of it. In so far as the Act has any repercussions on the right of the petitioner, as trustee of communal property, to deal with such property, the Act could come under the protection of Article 26 (d), in the sense that his right to administer the property is not questioned, but he has to administer the property in accordance with law. The law, in the present instance, tells the petitioner not to withhold the civil rights of a member of the community to a communal property. But as against this it is argued on behalf of the petitioner that his right to excommunicate is so bound up with religion that it is protected by clause (b) of Article 26, and is thus completely out of the regulation of law, in accordance with the provisions of clause (d) of that Article. But, I am not satisfied on the pleadings and on the evidence placed before us that the right of excommunication is a purely religious matter. As already pointed out, the indications are all to the contrary, particularly the judgment of the Privy Council in the case of *Hasanali v. Mansoorali*<sup>2</sup>, on which great reliance was placed on behalf of the petitioner.

On the social aspect of excommunication, one is inclined to think that the position of an excommunicated person becomes that of an untouchable in his community, and if that is so, the Act in declaring such practices to be void has only carried out the strict injunction of Article 17 of the Constitution, by which untouchability has been abolished and its practice in any form forbidden. The Article further provides that the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law. The Act, in this sense, is its logical corollary and must, therefore, be upheld.

In my opinion, it has not been established that the Act has been passed by a Legislature which was not competent to legislate on the subject, or that it infringes any of the provisions of the Constitution. This petition must, therefore, fail.

*Das Gupta, J.* (for *A.K. Sarkar, J.* himself and *J.R. Mudholkar, J.*).—In our opinion this petition should succeed.

The petitioner is the head of the Dawoodi Bohras who form one of the several sub-sectes of the Shia sect of Musalmans. Dawoodi Bohras believe that since the 21st Imam went into seclusion rights, power and authority of the Imam have been rightfully exercised by the *Dai-ul-Mutlaq*, as the vice-regent of the Imam in seclusion. One of such rights is the exercise of disciplinary powers including the right to excommunicate any member of the Dawoodi Bohra community. The existence of such a right in the *Dai-ul-Mutlaq* who is for the sake of convenience often mentioned as the *Dai* was questioned before the Courts in a case which went up to the Privy Council. But since the decision of the Privy Council

1. (1954) S.C.R. 1005 at pp. 1023-29 : (1954) S.C.J. 335 : (1954) 1 M.L.J. (S.G.) 596.

2. L.R. 75 I. A. 1, at pp. 14-15 : A.I.R. 1948 P.C. 66.

in that case, viz., *Hasanali v. Mansoorali*<sup>1</sup>, that question may be taken to have been finally settled, and it is no longer open to dispute that the *Dai*, as the head of the Dawoodi Bohra community has the right to excommunicate any member of the community. The claim of the present petitioner to be the 51st *Dai-ul-Mutlaq* of the community was also upheld in that case and is no longer in dispute. The Privy Council had also to consider in that case the question whether this power to excommunicate could be exercised by the *Dai* in any manner he liked and held after consideration of the previous cases of excommunication and also a document composed about 1200 A.D. that normally members of the community can be expelled.

"Only at a meeting of the Jamat after being given due warning of the fault complained of and an opportunity of amendment, and after a public statement of the grounds of expulsion."

Speaking about the effects of excommunication their Lordships said :—

"Excommunication.....necessarily involve exclusion from the exercise of religious rights in places under the trusteeship of the head of the community in which religious exercises are performed."

The present petitioner, it may be mentioned, was a party to that litigation.

This decision was given on 1st December, 1947 ; shortly after that, the Bombay Legislature—it may be mentioned that there is a large concentration of Dawoodi Bohras in the State of Bombay—stepped in to prevent, as mentioned in the Preamble, the practice of excommunication "which results in the deprivation of legitimate rights and privileges of" members of certain religious communities and enacted the Bombay Act No. XLII of 1949.

It is a short Act of six sections. Section 3—the main operative section—invalidates all excommunication of members of any religious community. Excommunication is defined in section 2 to mean "the expulsion of a person from any community of which he is a member depriving him of rights and privileges which are legally enforceable by a suit of a civil nature by him or on his behalf as such member." The *Explanation* to the definition to this section makes it clear that a right to office or property or to worship in any religious place or a right to burial or cremation is included as a right legally enforceable by suit even though the determination of such right may depend entirely on the decision of the question as to any religious rites or ceremonies or rule or usage of a community. Section 4 makes a person who does any act which amounts to excommunication or is in furtherance of the excommunication liable to punishment which may extend to one thousand rupees.

Faced with the position that the legislation wholly destroys his right of excommunicating any member of the Dawoodi Bohra community, the *Dai* has presented this petition under Article 32 of the Constitution. He contends that the Act violates the fundamental right of the Dawoodi Bohras, including himself, freely to practice religion according to their own faith and practice—a right guaranteed by Article 25 of the Constitution, and further that it violates the right of the Dawoodi Bohra community to manage its own affairs in matters of religion guaranteed by Article 26. Therefore, says he, the Act is void and prays for a declaration that the Act is void and the issue of an appropriate writ restraining the respondent, the State of Bombay, its officers, servants and agents from enforcing the provisions of the Act against the petitioner and/or any other member of the Dawoodi Bohra community.

It may be mentioned that in the petition the legislative competence of the Bombay Legislature to enact the Bombay Prevention of Excommunication Act, 1949, was also challenged. This, however, was not pressed at the time of the hearing.

The respondent contends that neither the right guaranteed under Article 25 nor that under Article 26 (b) is contravened by the impugned Act. Briefly stated, the respondent's case is that the right and privilege of the petitioner as *Dai-ul-Mutlaq* to regulate the exercise of religious rights do not include the right to excommunicate any person so as to deprive him of his civil rights and privileges. It was denied that the petitioner's power to excommunicate was an essential part of the 'religion of the Dawoodi Bohra community and that the right has its foundation in religion and religious doctrines, tenets and faith of the Dawoodi Bohra community. It was also denied that the right to excommunicate is the religious practice and it was further

1, L.R. 75 I.A. 1 at pp. 14-15 ; A.I.R. 1948 P.C. 66.

pleaded that assuming that it was a religious practice, it was certainly not a part of religion of the Dawoodi Bohra community.

The same points were urged on behalf of the intervener, except that the learned counsel for the intervener wanted to reopen the question whether the petitioner as the head of the Dawoodi Bohra community had the power to excommunicate. As already stated, however, this question is hardly open to dispute in the face of the decision of the Privy Council in *Hasanali v. Mansoorali*<sup>1</sup> and the point was not pressed.

The content of Articles 25 and 26 of the Constitution came up for consideration before this Court in the *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*<sup>2</sup>; *Mahant Jagannath Ramanuj Das and another v. The State of Orissa and another*<sup>3</sup>; *Sri Venkatramana Devaru and others v. The State of Mysore and others*<sup>4</sup>; *Durgah Committee, Ajmer v. Syed Hussain Ali*<sup>5</sup> and several other cases and the main principles underlying these provisions have by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief, they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religion or religious practice has to be decided by the Courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.

Before however we can give a proper answer to the two questions raised, viz., (i) Has the impugned Act interfered with a right freely to practice religion? and (ii) Has it interfered with the right of the Dawoodi Bohra community to manage its own affairs in matters of religion? it is necessary to examine first the place of excommunication in the life of a religious community. Much valuable information about this is furnished by an article in the Encyclopaedia of the Social Sciences from the pen of Prof. Hazeltine. "Excommunication", says Prof. Hazeltine, "in one or another of the several different meanings of the term has always and in all civilizations been one of the principal means of maintaining discipline within religious organizations and hence of preserving and strengthening their solidarity." Druids in old Britain are said to have claimed the power to exclude offenders from sacrifice. The early Christian Church exercised this power very largely and expelled and excluded from the Christian association, those members who proved to be unworthy of its aims or infringed its rules of governance. During the middle ages the Pope used this power frequently to secure the observance of what was considered the proper religious rights and practices of Christianity, by excommunicating even the kings of some European countries when they introduced or tried to introduce different forms of divine worship. The power was often used, not perhaps always fairly and justly, as a weapon in the struggle for the principle that the Church was above the State. Impartial historians have recognised, however, that many of the instances of excommunication were for the purpose of securing the adherence to the orthodox creed and doctrine of Christianity as pronounced by the Catholic Church. (*Vide The Catholic Encyclopaedia, Vol. V, Articles on England and Excommunication*).

Turning to the Canon law we find that excommunication may be inflicted as a punishment for a number of crimes, the most serious of these being, heresy, apostasy or schism. Canon 1325, section 2 defines a heretic to be a man who while remaining nominally a Christian, pertinaciously denies or doubts any one of the truths which must be believed *de fide divina et catholica*; if he falls away entirely from the Christian faith, he is an apostate; finally if he rejects the authority of the Supreme Pontiff or refuses communion with the members of the Church who are subject to him, he is a schismatic. (*Vide Canon Law by Bouscaren and Ellis*).

1. L.R. 75 I.A. at pp. 14-15 : A.I.R. 1948 (1954) S.C.R. 1046.  
 P.C. 66.  
 2. (1954) S.C.J. 335 : (1954) 1 M.L.J. (S.C.) 4. (1958) S.C.J. 382 : (1958) 1 An.W.R. (S.C.) 109 : (1958) 1 M.L.J. (S.C.) 109 : (1958) S.C.R. 895.  
 3. (1954) S.C.J. 329 : (1954) 1 M.L.J. 591 : 5. (1962) 1 S.C.R. 383 : A.I.R. 1961 1402.  
 596 : (1954) S.C.R. 1005.

Among the Mulsims also the right of excommunication appears to have been practised from the earliest times. The Prophet and the Imam, had this right ; and it is not disputed that the *Dais* have also in the past exercised it on a number of occasions. There can be little doubt that heresy or apostasy was a crime for which excommunication was in force among the Dawoodi Bohras also. It may be pointed out in this connection that excommunication in the case of *Hasanali v. Mansoorali*<sup>1</sup> (which was upheld by the Privy Council) was based on the failure to comply with the tenets and traditions of the Dawoodi Bohra community and certain other faults.

According to the petitioner it is "an integral part of the religion and religious faith and belief of the Dawoodi Bohra community" that excommunication should be pronounced by him in suitable cases. It was urged that even if this right to excommunicate is considered to be a religious practice as distinct from religious faith such religious practice is also a part of the religion of the Dawoodi Bohra community. It does appear to be a fact that unquestioning faith in the *Dai* as the head of the community is part of the creed of the Dawood Bohras. It is unnecessary to trace the historical reasons for this extraordinary position of the *Dai* as it does not appear to be seriously disputed that the *Dai* is considered to be the vice-regent of the Imam so long as the rightful Imam continues in seclusion.

Mention must be made in this connection of the *Mishak* which every Dawoodi Bohra takes at the time of his initiation. This includes among other things, an oath of unquestioning faith in and loyalty to the *Dai*. It is urged therefore that faith in the existence of the disciplinary power of the *Dai* including his power to excommunicate forms one of the religious tenets of this community. The argument that Article 25 has been contravened by the impugned Act is based mainly on this contention and the further contention that in any case excommunication is a religious practice in this community. As regards Article 26 (b) the argument is that excommunication among the Dawoodi Bohras forms such an integral part of the management of the community by the religious head that interference with that right cannot but amount to an interference with the right of the community to manage its own affairs in matters of religion.

Let us consider first whether the impugned Act contravenes the provisions of Article 26 (b). It is unnecessary for the purpose of the present case to enter into the difficult question whether every case of excommunication by the *Dai* on whatever grounds inflicted is a matter of religion. What appears however to be clear is that where an excommunication is itself based on religious grounds such as lapse from the orthodox religious creed or doctrine (similar to what is considered heresy, apostasy or schism under the Canon Law) or breach of some practice considered as an essential part of the religion by the Dawoodi Bohras in general, excommunication cannot but be held to be for the purpose of maintaining the strength of the religion. It necessarily follows that the exercise of this power of excommunication on religious grounds forms part of the management by the community, through its religious head, "of its own affairs in matters of religion." The impugned Act makes even such excommunications invalid and takes away the power of the *Dai* as the head of the community to excommunicate even on religious grounds. It, therefore, clearly interferes with the right of the Dawoodi Bohra community under clause (b) of Article 26 of the Constitution.

That excommunication of a member of a community will affect many of his civil rights is undoubtedly true. This particular religious denomination is possessed of properties and the necessary consequence of excommunication will be that the excommunicated member will lose his rights of enjoyment of such property. It might be thought undesirable that the head of a religious community would have the power to take away in this manner the civil rights of any person. The right given under Article 26 (b) has not however been made subject to preservation of civil rights. The express limitation in Article 26 itself is that this right under the several clauses of the article will exist subject to public order, morality and health. It has been held by this Court in *Sri Venkataramana Devaru and others v. The State of Mysore and*

1. L.R. 75 I.A. 1, at pp. 14-15 : A.I.R. 1948 P.C. 66.

others<sup>1</sup> that the right under Article 26 (b) is subject further to clause (2) of Article 25 of the Constitution.

We shall presently consider whether these limitations on the rights of a religious community to manage its own affairs in matters of religion can come to the help of the impugned Act. It is clear however that apart from these limitations the Constitution has not imposed any limit on the right of a religious community to manage its own affairs in matters of religion. The fact that civil rights of a person is affected by the exercise of this fundamental right under Article 26 (b) is therefore of no consequence. Nor is it possible to say that excommunication is prejudicial to public order, morality and health.

Though there was a statement in paragraph 10 of the respondent's counter affidavit that "the religious practice, which runs counter to the public order, morality and health must give way before the good of the people of the State", the learned Attorney-General did not advance any argument in support of this plea.

It remains to consider whether the impugned Act comes within the saving provisions embodied in clause (2) of Article 25. The clause is in these words :—

"Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice ;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."

Quite clearly, the impugned Act cannot be regarded as a law regulating or restricting any economic, financial, political or other secular activity. Indeed, that was not even suggested on behalf of the respondent State. It was faintly suggested however that the Act should be considered to be a law "providing for social welfare and reform". The mere fact that certain civil rights which might be lost by members of the Dawoodi Bohra community as a result of excommunication even though made on religious grounds and that the Act prevents such loss, does not offer sufficient basis for a conclusion that it is a law "providing for social welfare and reform". The barring of excommunication on grounds other than religious grounds, say, on the breach of some obnoxious social rule or practice might be a measure of social reform and a law which bars such excommunication merely might conceivably come within the saving provisions of clause (2) (b) of Article 25. But barring of excommunication on religious grounds pure and simple, cannot however be considered to promote social welfare and reform and consequently the law in so far as it invalidates excommunication on religious grounds and takes away the *Dai's* power to impose such excommunication cannot reasonably be considered to be a measure of social welfare and reform. As the Act invalidates excommunication on any ground whatsoever, including religious grounds, it must be held to be in clear violation of the right of the Dawoodi Bohra community under Article 26 (b) of the Constitution.

It is unnecessary to consider the other attack on the basis of Article 25 of the Constitution.

Our conclusion is that the Act is void being in violation of Article 26 of the Constitution. The contrary view taken by the Bombay High Court in *Taher Saifuddin v. Tyebbhaji Moosaji*<sup>2</sup> is not correct.

We would, therefore, allow the petition, declare the Act to be void and direct the issue of a writ in the nature of mandamus on the respondent, the State of Bombay, not to enforce the provisions of the Act. The petitioner will get his costs.

*Rajagopala Ayyangar, J.*—I agree that the petition should succeed and I generally concur in the reasoning of Das Gupta, J., by which he has reached this conclusion. In view however, of the importance of the case I consider it proper to state in my own words the grounds for my concurrence.

It was not in dispute that the Dawoodi Bohras who form a sub-sect of the Shia sect of Muslims is a "religious denomination" within the opening words of Article

1. (1958) S.C.J. 382; (1958) 1 An. W.R. S.C.R. 895.  
(S.C.) 109; (1958) 1 M.L.J. (S.C.) 109; (1958) 2. A.I.R. 1953 Bom. 183.

26 of the Constitution. There are a few further matters which were not in controversy on the basis of which the contentions urged in support of the petition have to be viewed. These might now be briefly stated :

(1) It was the accepted tenet of the Dawoodi Bohra faith that God always had and still has a representative on earth through whom His commands are conveyed to His people. That representative was the Imam. The *Dai* was the representative of the Imam and conveyed God's message to His people. The powers of the *Dai* were approximated to those of the Imam. When the Imam came out of seclusion the powers of the *Dai* would cease. The chain of intercession with the Almighty was as follows : The *Dai*—the Imam—the Holy Prophet—and the one God (*See Per Marten, J., in Advocate General of Bombay v. Yusufalli Ebrahim*<sup>1</sup>).

(2) The position and status of the petitioner as the *Dai-ul-Mutlaq* was not contested since the same had been upheld by the Privy Council in the decision reported as *Hasanali and others v. Mansoorali and others*<sup>2</sup>.

(3) It was not in dispute that subject to certain limitations and to the observance of particular formalities which were pointed out by the Privy Council in the decision just referred to, that the *Dai-ul-Mutlaq* has the power of excommunication and indeed, as observed by Lord Porter in that judgment, "the right of excommunication by a *Dai-ul-Mutlaq* was not so strenuously contested as were the limits within which it is confined."

(4) The *Dai-ul-Mutlaq* was not merely a religious leader—the religious head of the denomination but was the trustee of the property of the community.

(5) The previous history of the community shows that excommunicated persons were deprived of the exercise of religious rights. It was contended before the Privy Council that the effect of an excommunication was in the nature merely of social ostracism but this was rejected and it was held to have a larger effect as involving an exclusion from the right to the enjoyment of property dedicated for the benefit of the denomination and of worship in places of worship similarly dedicated or set apart.

The validity of Bombay Act XLII of 1949 (which I shall hereafter refer to as the impugned Act) has to be judged in the light of these admitted premises. Articles 25 and 26 which are urged as violated by the impugned Act run :

"25. (1) Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice ;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

*Explanation I.*—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

*Explanation II.*—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(a) to establish and maintain institutions for religious and charitable purposes ;

(b) to manage its own affairs in matters of religion ;

(c) to own and acquire movable and immovable property ; and

(d) to administer such property in accordance with law."

I would add that these articles embody the principle of religious toleration that has been the characteristic feature of Indian civilization from the start of history, the instances and periods when this feature was absent being merely temporary aberrations.

1. 24 Bom. L.R. 1060.

2. L.R. 75 I.A. 1: at pp. 14-15 A.I.R. 1948

tions. Besides, they serve to emphasize the secular nature of Indian Democracy which the founding fathers considered should be the very basis of the Constitution.

I now proceed to the details of the provisions of the impugned Act which are stated to infringe the rights guaranteed by these two Articles. The Preamble to the impugned Act recites :

"Whereas it has come to the notice of Government that the practice prevailing in certain communities of excommunicating its members is often followed in a manner which results in the deprivation of legitimate rights and privileges of its members ;

And whereas in keeping with the spirit of changing times and in the public interest, it is expedient to stop the practice ; it is hereby enacted as follows :— "

Section 3 is the operative provision which enacts —

"3. Notwithstanding anything contained in any law, custom or usage for the time being in force, to the contrary, no excommunication of a member of any community shall be valid and shall be of any effect."

Section 4 penalises any person who does "any act which amounts to or is in furtherance of the excommunication" and subjects him to criminal proceedings as regards which provision is made in sections 5 and 6. Section 2 contains two definitions :

(1) of the word "community" which would include the religious denomination of Dawoodi Boharas, and

(2) of "excommunication" as meaning:

"the expulsion of a person from any community of which he is a member depriving him of rights and privileges which are legally enforceable by a suit of civil nature by him or on his behalf as such member ;

*Explanation.*—For the purposes of this clause a right legally enforceable by a suit of civil nature shall include the right to office or property or to worship in any religious place or a right of burial or cremation, notwithstanding the fact that the determination of such right depends entirely on the decision of the question as to any religious rites or ceremonies or rule or usage of a community."

The question to consider is whether a law which penalises excommunication by a religious denomination or by its head whether or not the excommunication be for non-conformity to the basic essentials of the religion of that denomination and effects the nullification of such excommunication as regards the rights of the person excommunicated would or would not infringe the rights guaranteed by Articles 25 and 26.

First as to Article 25, as regards clause (1) it was not in dispute that the guarantee under it protected not merely freedom to entertain religious beliefs but also acts done in pursuance of that religion, this being made clear by the use of the expression "practice of religion". No doubt, the right to freedom of conscience and the right to profess, practise and propagate religion are all subject to "public order, morality or health and to the other provisions of this Part" but it was not suggested that (subject to an argument about the matter being a measure of social reform) the practice of excommunication offended public order, morality or health or any other part of the Constitution.

Here is a religious denomination within Article 26. The *Dai-ul-Mutlaq* is its spiritual leader, the religious head of the denomination and in accordance with the tenets of that denomination he had invested in him the power to excommunicate dissidents. Pausing here, it is necessary to examine the rational basis of the excommunication of persons who dissent from the fundamental tenets of a faith. The identity of a religious denomination consists in the identity of its doctrines, creeds and tenets and these are intended to ensure the unity of the faith which its adherents profess and the identity of the religious views are the bonds of the union



which binds them together as one community. As Smith B. said in *Dill v. Watson*,<sup>1</sup> in a passage quoted by Lord Halsbury in *Free Church of Scotland v. Overtoun*,<sup>2</sup>:

"In the absence of conformity to essentials, the denomination would not be an entity cemented into solidity by harmonious uniformity of opinion, it would be a mere incongruous heap of, as it were, grains of sand, thrown together without being united, each of these intellectual and isolated grains differing from every other, and the whole forming a but nominally united while really unconnected mass; fraught with nothing but internal dissimilitude, and mutual and reciprocal contradiction and dissension."

A denomination within Article 26 and persons who are members of that denomination are under Article 25 entitled to ensure the continuity of the denomination and such continuity is possible only by maintaining the bond of religious discipline which would secure the continued adherence of its members to certain essentials like faith, doctrine, tenets and practices. The right to such continued existence involves the right to maintain discipline by taking suitable action *inter alia* of excommunicating those who deny the fundamental basis of the religion. The consequences of the exercise of that power vested in the denomination or in its head—a power which is essential for maintaining the existence and unity of the denomination must necessarily be the exclusion of the person excommunicated from participation in the religious life of the denomination, which would include the use of places of worship or of consecrated places for burial dedicated for the use of the members of the denomination and which are vested in the religious head as a trustee for the denomination.

The learned Attorney-General who appeared for the respondent submitted three points: (1) Assuming that excommunication was part of the religious practice of the denomination, still there was no averment in the petition that the civil results flowing from excommunication in the shape of exclusion from the beneficial use of denominational property was itself a matter of religion. In other words, there was no pleading that the deprivation of the civil rights of a person excommunicated was a matter of religion or of religious practice. (2) The "excommunication" defined by the Act deals with rights of a civil nature as distinguished from religious or social rights or obligations and a law dealing with the civil consequence of an excommunication does not violate the freedom protected by Article 25 or Article 26 (3). Even on the basis that the civil consequences of an excommunication are a matter of religion still it is a measure of social reform and as such the legislation would be saved by the words in Article 25 (2) (b).

I am unable to accept any of these contentions as correct. (1) First I do not agree that the pleadings do not sufficiently raise the point that if excommunication was part of the "practice of a religion" the consequences that flow therefrom were not also part of the "practice of religion". The position of the Dai as the religious head of the denomination not being disputed and his power to excommunicate also not being in dispute and it also being admitted that places of worship and burial grounds were dedicated for the use of the members of the denomination, it appears to me that the consequence of the deprivation of the use of these properties by persons excommunicated would be logical and would flow from the order of excommunication. It could not be contested that the consequence of a valid order of excommunication was that the person excommunicated would cease to be entitled to the benefits of the trusts created or founded for the denomination or to the beneficial use or enjoyment of denominational property. If the property belongs to a community and if a person by excommunication ceased to be a member of that community it is a little difficult to see how his right to the enjoyment of the denominational property could be divorced from the religious practice which resulted in his ceasing to be a member of the community. When once it is conceded that the right guaranteed by Article 25 (1) is not confined to freedom of conscience in the sense of the right to hold a belief and to propagate that belief, but includes the right to the practice of religion, the consequences of that practice must also bear the same complexion and be the subject of a like guarantee.

(2) I shall reserve for later consideration the point about the legislation being saved as a matter of social reform under Article 25 (2) (b), and continue to deal with the argument that the impugned enactment was valid since it dealt only with the consequences on the civil rights, of persons excommunicated. It has, however, to be pointed out that though in the definition of "excommunication" under section 2 (b) of the impugned Act the consequences on the civil rights of the excommunicated persons is set out, that is for the purpose of defining an "excommunication." What I desire to point out is that it is not as if the impugned enactment saves only the civil consequences of an excommunication not interfering with the other consequences of an excommunication falling within the definition. Taking the case of the Dawoodi Bohra community, if the Dai excommunicated a person on the ground of forswearing the basic tenets of that religious community the Dai would be committing an offence under section 4, because the consequences according to the law of that religious denomination would be the exclusion from civil rights of the excommunicated person. The learned Attorney-General is therefore not right in the submission that the Act is concerned only with the civil rights of the excommunicated person. On the other hand, it would be correct to say that the Act is concerned with excommunications which might have religious significance but which also operate to deprive persons of their civil rights.

Article 26 confers on every religions denomination two rights which are relevant in the present context, by clause (b)—"to manage its own affairs in matters of religion"—and by the last clause—clause (d)—"to administer such property" which the denomination owns or has acquired (*vide* clause (c)) "in accordance with law." In considering the scope of Article 26 one has to bear in mind two basic postulates: First that a religious denomination is possessed of property which is dedicated for definite uses and which under Article 26 (d) the religious denomination has the right to administer. From this it would follow that subject to any law grounded on public order, morality or health the limitations with which Article 26 opens, the denomination has a right to have the property used for the purposes for which it was dedicated. So far as the present case is concerned, the management of the property and the right and the duty to ensure the proper application of that property is admittedly vested in the Dai as the religious head of the denomination. Article 26 (d) speaks of the administration of the property being in accordance with law and the learned Attorney-General suggested that a valid law could be enacted which would permit the diversion of those funds to purposes which the Legislature in its wisdom thought it fit to appropriate. I feel wholly unable to accept this argument. A law which provides for or permits the diversion of the property for the use of persons who have been excluded from the denomination would not be "a law" contemplated by Article 26 (d). Leaving aside for the moment the right of excommunicated persons to the enjoyment of property dedicated for the use of a denomination, let me take the case of a person who has renounced that religion; and in passing it might be observed that even in cases of an apostate according to the principles governing the Dawoodi Bohra denomination there is no *ipso facto* loss of rights, only apostasy is a ground for excommunication which however could take place without service of notice or an enquiry. It could not be contended that an apostate would be entitled to the beneficial use of property, dedicated to the Dawoodi Bohra community be it the mosque where worship goes on or other types of property like consecrated burial grounds etc. It would be obvious that if the Dai permitted the use of the property by an apostate without excommunicating him he would be committing a dereliction of his duty as the supreme head of the religion—in fact an act of sacrilege besides being guilty of a breach of trust. I consider that it hardly needs any argument to show that if a law permitted or enjoined the use of the property belonging to the denomination by an apostate it would be a wholly unauthorised diversion which would be a violation of Article 26 (d) and also of Article 26 (c), not to speak of Article 25 (1). The other postulate is the position of the Dai as the head of the religious denomination and as the medium through which spiritual grace is brought to the community and that this is the central part of the religion as well as one of the principal articles of

that faith. Any denial of this position is virtually tantamount to a denial of the very foundation of the faith of the religious denomination.

The attack on the constitutionality of the Act has to be judged on the basis of these two fundamental points. The practice of excommunication is of ancient origin. History records the existence of that practice from Pagan times and Aeschyles records "The exclusion from purification with holy water of an offender whose hands were defiled with bloodshed". Later the Druids are said to have claimed the right of excluding offenders from sacrifice. Such customary exclusions are stated to have obtained in primitive semitic tribes but it is hardly necessary to deal in detail with this point, because so far as the Muslims, and particularly among the religious denomination with which this petition is concerned, enough material has been set out in the judgment of the Privy Council already referred.

Pausing here, it might be mentioned that excommunication might bear two aspects; (1) as a punishment for crimes which the religious community justifies putting one out of its fold. In this connection it may be pointed out that in a theocratic State the punitive aspect of excommunication might get emphasized and might almost take the form of a general administration by religious dignitaries of ordinary civil law. But there is another aspect which is of real relevance to the point now under consideration. From this point of view excommunication might be defined as the judicial exclusion from the rights and privileges of the religious community to whom the offender belongs. Here it is not so much as a punishment that excommunication is inflicted but is used as a measure of discipline for the maintenance of the integrity of the community, for in the ultimate analysis the binding force which holds together a religious community and imparts to it a unity which makes it a denomination is a common faith, common belief and a belief in a common creed, doctrines and dogma. A community has a right to insist that those who claim to be within its fold are those who believe in the essentials of its creed and that one who asserts that he is a member of the denomination does not, at least, openly denounce the essentials of the creed, for if everyone were at liberty to deny these essentials, the community as a group would soon cease to exist. It is in this sense that it is a matter of the very life of a denomination that it exercises discipline over its members for the purpose of preserving unity of faith, at least so far as the basic creed or doctrines are concerned. The impugned enactment by depriving the head of the power and the right to excommunicate and penalising the exercise of the power, strikes at the very life of the community by rendering it impotent to protect itself against dissidents and schismatics. It is thus a violation of the right to practise religion guaranteed by Article 25 (1) and is also violative of Article 26 in that it interferes with the rights of the Dai as the trustee of the property of the denomination to so administer it as to exclude dissidents and excommunicated persons from the beneficial use of such property.

It is admitted however in the present case that the Dai as the head of the denomination has vested in him the power, subject to the procedural requirements indicated in the judgment of the Privy Council, to excommunicate such of the members of the community as do not adhere to the basic essentials of the faith and in particular those who repudiate him as the head of the denomination and as a medium through which the community derives spiritual satisfaction or efficiency mediately from the God-head. It might be that if the enactment had confined itself to dealing with excommunication as a punishment for secular offences merely and not as an instrument for the self preservation of a religious denomination the position would have been different and in such an event the question as to whether Articles 25 and 26 would be sufficient to render such legislation unconstitutional might require serious consideration. That is not the position here. The Act is not confined in its operation to the eventualities just now mentioned but even excommunication with a view to the preservation of the identity of the community and to prevent what might be a schism in the denomination is also brought within the mischief of the enactment. It is not possible, in the definition of excommunication which the Act carries, to read down the Act so as to confine excommunication as a punishment of offences

which are unrelated to the practice of the religion which do not touch and concern the very existence of the faith of the denomination as such. Such an exclusion cannot be achieved except by re-writing the section.

The next question is whether the impugned enactment could be sustained as a measure of social welfare and reform under Article 25 (2) (b). The learned Attorney General is, no doubt, right in his submission that on the decision of this Court in the *Mulki Temple case—Venkataramana Devaru v. State of Mysore*<sup>1</sup> the right guaranteed under Article 26 (b) is subject to a law protected by Article 25 (2) (b). The question then before the Court related to the validity of a law which threw open all public temples, even those belonging to "a religious denomination" to "every community of Hindus including 'untouchables'" and it was held that, notwithstanding that the exclusion of these communities from worship in such a temple was an essential part of the "practice of religion" of the denomination, the constitutionality of the law was saved by the second part of the provision in Article 26 (2) (b) reading; "the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus". The learned Attorney-General sought support from this ruling for the proposition that Article 25 (2) (b) could be invoked to protect the validity of a law which was "a measure of social welfare and reform" notwithstanding that it involved an abrogation of the whole or part of the essentials of a religious belief or of a religious practice. I feel unable to accept the deduction as flowing from the *Mulki Temple case*.<sup>1</sup> That decision proceeded on two bases: (1) As regards the position of "untouchables", Article 17 had made express provision stating:

"'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law."

and that had to be recognised as a limitation on the rights of religious denominations however basic and essential the practice of the exclusion of untouchables might be in its tenets or creed. (2) There was a special saving as regards laws providing for "throwing open of public Hindu Religious Institutions to all classes and sections of Hindus" in Article 25 (2) (b), and effect had to be given to the wide language in which this provision was couched. In the face of the language used, no distinction could be drawn between beliefs that were basic to a religion, or religious practices that were considered to be essential by a religious sect, on the one hand, and on the other beliefs and practices that did not form the core of a religion or of the practices of that religion. The phraseology employed cut across and effaced these distinctions.

But very different considerations arise when one has to deal with legislation which is claimed to be merely a measure "providing for social welfare and reform". To start with, it has to be admitted that this phrase is, as contrasted with the second portion of Article 25 (2) (b), far from precise and is flexible in its content. In this connection it has to be borne in mind that limitations imposed on religious practices on the ground of public order, morality or health have already been saved by the opening words of Article 25 (1) and the saving would cover beliefs and practices even though considered essential or vital by those professing the religion. I consider that in the context in which the phrase occurs, it is intended to save the validity only of those laws which do not invade the basic and essential practices of religion which are guaranteed by the operative portion of Article 25 (1) for two reasons: (1) To read the saving as covering even the basic essential practices of religion, would in effect nullify and render meaningless the entire guarantee of religious freedom—a freedom not merely to profess, but to practice religion; for very few pieces of legislation for abrogating religious practices could fail to be subsumed under the caption of "a provision for social welfare or reform". (2) If the phrase just quoted was intended to have such a wide operation as cutting at even the essentials guaranteed by Article 25 (1), there would have been no need for the special provision as to "throwing open of Hindu religious institutions" to all classes and sections of Hindus.

1. (1958) S.C.R. 895 : (1958) S.C.J. 38 : (S.C.) 109.  
(1958) 1 An.W.R. (S.C.) 109 : (1958) 1 M.L.J.

since the legislation contemplated by this provision would be par excellence one of social reform.

In my view by the phrase "laws providing for social welfare and reform" it was not intended to enable the Legislature to "reform" a religion out of existence or identity. Article 25 (2) (a) having provided for legislation dealing with "economic, financial, political or secular activity which may be associated with religious practices", the succeeding clause proceeds to deal with other activities of religious groups and these also must be those which are associated with religion. Just as the activities referred to in Article 25 (2) (a) are obviously not of the essence of the religion, similarly the saving in Article 25 (2) (b) is not intended to cover the basic essentials of the creed of a religion which is protected by Article 25 (1).

Coming back to the facts of the present petition, the position of the *Dai-ul-Mutlag*, is an essential part of the creed of the Dawoodi Bohra sect. Faith in his spiritual mission and in the efficacy of his ministration is one of the bonds that hold the community together as a unit. The power of excommunication is vested in him for the purpose of enforcing discipline and keep the denomination together as an entity. The purity of the fellowship is secured by the removal of persons who had rendered themselves unfit and unsuitable for membership of the sect. The power of excommunication for the purpose of ensuring the preservation of the community, has therefore a prime significance in the religious life of every member of the group. A legislation which penalises this power even when exercised for the purpose above-indicated cannot be sustained as a measure of social welfare or social reform without eviscerating the guarantee under Article 25 (1) and rendering the protection illusory.

In my view the petitioner is entitled to the relief that he seeks and the petition will accordingly be allowed.

ORDER OF THE COURT.—In accordance with the majority view of this Court, the petition is allowed. The petitioner is entitled to his costs.

K.L.B.

*Petition allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—B.P. SINHA, CHIEF JUSTICE P.B. GAJENDRAGADKAR, K.N. WANCHOO, K. C. DAS GUPTA AND J.C. SHAH, JJ.

Pfizer Private Limited, Bombay

.. Appellant\*

v.

The Workmen

.. Respondent.

*Industrial Disputes—Holidays—Holidays declared under the Negotiable Instruments Act—If applicable to commercial establishments.*

The holidays declared under the Negotiable Instruments Act are usually applicable to Government institutions only and they have certain financial and statutory implications envisaged by the Act itself. The commercial establishments and factories do not usually adopt these holidays and so, it would not be reasonable to insist that the employer is bound to grant holidays as sanctioned by the Negotiable Instruments Act.

Appeals by Special Leave from the Award dated the 9th June, 1962, of the Industrial Tribunal, Maharashtra in Reference (IT) No. 16 of 1962.

M.C. Setalvad, Attorney-General for India and C.K. Daphtary, Solicitor-General of India (J.B. Dadachanji, O.C. Mathur and Ravinder Narain, Advocates of M/s. J.B. Dadachanji & Co. with them), for Appellant (In C.A. No. 625 of 1962). and Respondent No. 1 (In C.A. No. 626 of 1962).

K. T. Sule, Madan G. Phadnis and Janardan Sharma, Advocates, for Respondent (In C.A. No. 625 of 1962) and the Appellant (In C.A. No. 626 of 1962).

The Judgment of the Court was delivered by

Gajendragadkar, J.—Two items of dispute between the appellant Pfizer Private Ltd., and the respondents, its employees, were referred for adjudication to the

Industrial Tribunal, Bombay, by the Government of Maharashtra under sections 10 (1) (d) and 12 (5) of the Industrial Disputes Act, 1947 on 22nd January, 1962. Both these items arose out of the proposed changes which the appellant wanted to make in the terms of employment governing the service of the respondents. The appellant proposed to reduce the existing paid holidays to 8 instead of 27 to which the respondents were entitled because so long, the appellant has been giving to its employees the benefit of public holidays as declared under the Negotiable Instruments Act. This was the first item of dispute between the parties. The second item of dispute was in regard to re-fixation of the hours of work. The appellant desired to introduce three shifts in most of its departments and accordingly it had given a notice of change under section 9-A of the Industrial Disputes Act. Both these proposed changes were resisted by the respondents. The Tribunal has rejected the appellant's case for the introduction of three shifts in its factory and this part of the award is challenged by the appellant by its Appeal No. 625 of 1962. In regard to the appellant's claim for reducing the paid holidays, the Tribunal has substantially accepted the appellant's case and has directed that the holidays should be reduced to 10 every year. It has directed the appellant to fix these holidays in consultation with the respondents. It has also added that in view of the fact that a substantial reduction was being made in the number of paid holidays, the appellant should give the respondents an additional increment in their grade with effect from 1st August, 1962. This increment would be in addition to the normal increment which may become due on or after 1st August, 1962. This part of the award reducing the number of holidays is challenged by the respondents by their Appeal No. 626 of 1962. Both the appeals have been brought before this Court by Special Leave.

The appellant is a Company incorporated under the Indian Companies Act, 1913. It has its registered office at Bombay and it runs a factory in which it manufactures life saving drugs, such as anti-biotics and anti-tubercular drugs, and vitamin products. The appellant's factory was working a multiplicity of shifts with different times. It, however, found that this working did not fully utilise the machinery installed in the factory. The utilisation of the raw product received by the appellant's factory in Bombay from its factory at Chandigarh was also not satisfactory and as a result of inadequate production, the appellant was not able to meet adequately the demand for its products from the market. That is why the appellant came to the conclusion that there was need to introduce three shifts in order to have extensive production of better quality products. The appellant felt that if it was able to produce its products on a much larger scale, it would be able to undertake export of the said products, and in any event, larger production would enable the appellant to meet its competitors in the trade. Besides, the preparation of the well-known anti-tubercular drug 'Para Amino Salicylic Acid' (P.A.S.) which the appellant had developed in its research laboratory after carrying out laboratory and pilot plant experiments in 1960-61, needed the working of the relevant section on a three-shift basis because its production was a continuous process and as a result of the investigation made by its expert, the appellant came to the conclusion that the quality of the product would be very much improved if the section working in the production of the said drug was to work continuously. That was an additional reason why the appellant wanted to introduce 3 shifts in its factory. It thought that if the chemical and pharmaceutical departments were to work in three shifts, the other subsidiary sections would also have to work in three shifts in order to cope with the production. That, in brief, is the basis on which the appellant wanted to introduce three shifts in its factory; and so, it gave notice of change to the respondents, and after the conciliation efforts failed, it moved the Maharashtra Government to refer these disputes to the Industrial Tribunal for its adjudication.

The demand for three shifts was stoutly resisted by the respondents. They urged that for several years past, in the appellant's factory the respondents have received the benefit of 5-days week and that has now become a term of their employment: the introduction of three shifts would inevitably convert the 5-days

into a 6-days week, and that would be a retrograde step highly prejudicial to the interests of the employees. They conceded that in case the needs of the factory required, they would be willing to work on two Saturdays every month, provided they were paid proper over-time wages for that work ; but they disputed the appellant's claim that there was a case for introducing such a drastic change as three shifts. Besides, the respondents contended that the inevitable consequence of the three shifts would be addition to the work-load of the respondents, and according to them, the proposal made by the appellant in that behalf was a complete departure from the pattern prevailing in the pharmaceutical industry in the region. The respondents also disputed the appellant's claim that the production of P.A.S. was a continuous process. They were, however, prepared to agree that all the manufacturing departments should be run on a two shift basis, avoiding the third shift altogether with suitable adjustments in time.

The Tribunal considered the documentary and oral evidence adduced by the parties before it in support of their respective contentions and held that the appellant had not made out a case for the introduction of three shifts. It found that the effect of the documentary evidence produced was to show that the pharmaceutical factories in Greater Bombay worked one, and in some cases, two shifts, though in a few cases, there were three shifts only in the section manufacturing chemicals and not pharmaceuticals. It agreed that the departments like Watch and Ward and maintenance were, in some companies, working three shifts, but that was so even in the appellant's factory. The Tribunal also held that the working arrangement which would result from the introduction of three shifts would not only be inconvenient to the bulk of the employees, but would involve the abolition of the 5-days week system, and it thought that, on principle, compelling the employees to work at night would be prejudicial to their interests and may not even help the production of better quality product. In regard to the appellant's claim that the production of P.A.S. involved a continuous process, the Tribunal observed that the evidence produced by the appellant did not show that in the present state of manufacture by it of P.A.S. it would be convenient to have three shifts so that the product can be produced according to specifications without too many rejections. In fact, the Tribunal was not satisfied that the production of this drug required continuous working in 3 shifts. On these findings, the Tribunal rejected the appellant's case for the introduction of 3 shifts. In rejecting this claim, the Tribunal observed that in order to give some relief to the appellant and to enable it to produce its product in larger quantity, it was reducing the number of holidays ; and that being so, there was hardly any case for increasing the working hours.

It, however, appears that while the dispute was pending before the Tribunal, an interim arrangement was allowed by it in regard to three shifts in the P.A.S. department. Under this arrangement, the appellant was authorised to introduce a third shift in that department and rotate up to two employees now engaged in the other shifts in the night shift. In its award, the Tribunal has ordered that this interim arrangement should continue for a year after the award becomes enforceable and then the question may be considered. It has also ordered that the two workers who will work in the night shift by rotation should be paid at 10 per cent, over their basic wages and dearness allowance for the days on which they are required to work in the third shift.

Then as to the holidays, the Tribunal took the view that the number of holidays under the Negotiable Instruments Act which the appellant was allowing to its employees was unreasonably high. It compared holidays allowed by other concerns and came to the conclusion that 10 days' holidays in a year would be reasonable and just. In the result, the appellant's claim for reduction of holidays succeeded, while its claim in regard to the introduction of 3 shifts failed.

Before dealing with the points raised by the parties in these appeals it would be convenient to indicate the present working arrangements in the factory of the appellant and the changes which would be introduced in the said working arrangements if three shifts are allowed. The factory of the appellant employs 821 work-

men, 235 of whom are girl employees ; and since section 66 (1) (b) of the Factories Act prohibits the employment of women in any factory, except between the hours of 6 A.M. and 7 P.M. the problem posed by the proposal to introduce three shifts involves the rotation in the 3 shifts only of male workmen and that is a factor which has to be borne in mind in dealing with the present dispute.

The statement filed by the appellant (Exhibit C-1) shows that there are four departments in the appellant's factory. The first department which works 6-day week on a three-shift basis deals with P.A.S., Watch and Ward, Maintenance and Hydrazine. Each of the three shifts is spread over 8 hours; there is a lunch break for half an hour and there are two tea breaks of ten minutes each. These breaks are common in all the departments of the factory. The actual working time in the first department is 7 hours 10 minutes per day which means 43 hours per week. The total number of employees in this department is 125. The P.A.S. section of this department, for instance, works in 3 shifts : 07.00-15.00, 15.00-23.00, 23.00-07.00, and in these 3 shifts, the number of workmen employed is 10, 8, and 2 respectively.

The second department works 5 days in a week on a one-shift basis. The actual working time in this department is 8-25 hours per day which means 42-5 hours per week. This department is concerned with the production of ointment, mixing, injection, orals, INA, INAH, protinex and protin Hydrolisate. The last two departments of this department work 5 days in a week. The total number of employees in this department is 75 out of whom 18 are girls and 57 are boys.

The third department which works 5 days in a week on a 2-shift basis, deals with packing, filling washing, tablet and capsules. The actual working time in this department is 8-25 hours per day which totals up to 42-5 hours per week. The two shifts are between 08.00-17.15 and 21.45-07.00. The total number of employees in this department in the day shift is 339, out of whom 134 are boys and 205 are girls, whereas the total number of employees in the night shift is 117 boys.

The fourth department which works 5 days in a week on one shift basis consists of research and development, quality control, factory office, stores and despatch godown. Its actual working time is 8-25 hours per day which means 42-05 hours per week. The total number of employees in this department is 165, 14 of whom are girls and 151 are boys.

Now, as a result of the 3 shifts which the appellant proposes to introduce by its notice of change, there would be substantial change in the working arrangements in Groups II and III. There would be no change in shift working hours or work spread over in the first department. It may be that the number of its employees may increase. After 3 shifts are introduced, the second and third departments would be combined for the purpose of rotating the male workmen in the night shift. The timings for the three shifts which are proposed for these two departments combined are 7-20 A.M. to 3-20 P.M., 3-20 P.M. to 11-20 P.M. and 11-20 P.M. to 7-20 A.M. The break for lunch and the break for two teas will continue. The result of the introduction of the 3 shifts would be, the working hours will increase by  $1\frac{1}{4}$ , the net increase in the working timings being 55 minutes, per week. As soon as the 3 shifts are introduced, the appellant expects that those working in the existing first shift would be placed in the new first shift and those working at present on the night shift will be placed on the second shift. The appellant proposes to increase the number of its employees in the second shift which it could not do at present because of difficulties in rotation. In the night shift about 30 to 50 employees would be engaged and night shift work would be rotated among the male employees with greater frequency. This, of course, will mean the employment of some additional hands which the appellant proposes to do. In regard to the fourth department, the present timings of 8-00 A.M. to 5-15 P.M. would be changed to 9-00 A.M. to 5-00 P.M. 6 days per week. This would result in increase in working hours by  $1\frac{1}{4}$  the net increase in working timings being 55 minutes per week. That is the nature of the working arrangements which would evolve on the introduction of the 3 shift system in the appellant's factory. The week will cease to be 5-day



week but will become 6-day week, and the working hours will increase by  $1\frac{1}{2}$ , the net increase in working timings being 55 minutes per week.

In dealing with the merits of the dispute in the present appeals, it is essential to bear in mind that in the face of the present national emergency, the complexion of the problem has completely changed. The whole economy of the country is now being put on a war basis and inevitably, industrial production must be geared up to meet the requirements of the nation. There can be no doubt that at present, capital, labour and industrial adjudication alike must be sensitive, and responsive, to the paramount requirement of the community which is faced with a grave danger, so, all legitimate efforts made by the employer to produce more and more of the goods required for the community must receive the co-operation of the employees—of course, on reasonable terms. Both the learned Attorney-General and Mr. Sule conceded that at the time when this Court is dealing with the problem raised by these appeals, it would be necessary to decide the issues in the light of the peremptory and paramount requirement of the Nation at this hour. There can be little doubt that if the Tribunal had been dealing with the present dispute at this time, it would have adopted an entirely different approach.

The main argument on which Mr. Sule has relied and which has found favour with the Tribunal is based on the pattern of industrial employment in pharmaceutical industry in the region of Bombay. We would, therefore, very briefly, refer to this pattern. It is well-known that under section 51 of the Factories Act, no adult worker shall be required or allowed to work in a factory for more than 48 hours in any week, and under section 59, where a worker works in a factory for more than 9 hours in any day or for more than 48 hours in any week, he shall be entitled to overtime payment as prescribed by the said section. Mr. Sule made a grievance of the fact that by introducing 3 shifts, the appellant would be substantially denying the respondents the overtime wages to which they would be entitled if they were called upon to work on Saturdays under the present arrangements. This grievance is, however, not well-founded because it appears from the record that the appellant was willing to pay for night work and was prepared to consider extra payment for third shift, but the respondents were not agreeable to consider that proposal because they were, on principle, opposed to the introduction of three shifts. Indeed, the learned Attorney-General has stated before us that in case we allow the appellant to introduce three shifts, the appellant is willing to go before the Tribunal and obtain its decision on the question as to the additional payment which should be made to the employees consequent upon the introduction of 3 shifts. Therefore, the grievance that the respondents would be wholly denied the overtime wages to which they would be entitled under the present arrangements loses much of its validity. We have already noticed that the maximum working hours under the present system in the factory of the appellant is 43 per week and it ranges between 42-05 to 43 hours and in no case, can the working hours be increased beyond 48. In fact, as we have already set out, according to the plan which the appellant wants to introduce, there would be an additional load of  $1\frac{1}{2}$  working hours, the net additional working load being of the order of 55 minutes per week. In considering the question about the pattern of working arrangements in the pharmaceutical industry in the region, these facts cannot be ignored.

The statement (Exhibit C-10) filed by the appellant to show that in certain pharmaceutical concerns three shifts are working, refers to 15 industries. The respondents made comments on the said statement and challenged some of the assumptions made by the appellant in that behalf. Mr. Sule has placed before us a typed statement showing the actual position in respect of those 15 factories. It appears that in most of these factories, security and maintenance departments work three shifts. In Sandoz India Ltd., Thana, the pharma plant works 3 shifts. Similarly, in Raptakes Brott & Co. Pvt. Ltd., the Dextrone Maltose section works 3 shifts. In Merck Sharp & Dohme of India Ltd., Chemical manufacturing process goes on under 3 shifts. Similarly, in Parke Davis India Ltd., Chemical Product Operators work 3 shifts besides boiler serang, watchmen and electricians. Sarabhai

Chemicals, Baroda, have some departments working 3 shifts. Alembic, Baroda, have some departments working 3 shifts. Hindustan Anti-biotic, Poona, have some departments working 3 shifts. Glaxo, Thana, works 3 shifts. Lederlo, Bulsar, works 3 shifts. It is true that the Tribunal was not prepared to consider any concerns situated outside Greater Bombay, but in dealing with the larger issue as to whether it would be permissible to introduce 3 shifts at least in respect of the chemical sections of the pharmaceutical industry, the Tribunal should not have adopted the rigid attitude. Therefore, on the material placed before us, it is clear that the chemical sections of the pharmaceutical factories do work 3 shifts and this would have a direct bearing on the appellant's case in regard to the P.A.S. section of its factory. Besides, as we have already observed, in dealing with the question about 3 shifts which would inevitably lead to more production, the background of the imperative necessity of today cannot at all be ignored.

Let us then consider whether the Tribunal was right in holding that the production of P.A.S. does not involve a continuous process. On this point, the appellant led the evidence of Dr. Joshi who is M.Sc. and Ph. D in Organic Chemistry of the Bombay University. He joined the appellant's service as a Research Chemist in 1957 and has been placed in charge of the appellant's Research Laboratory since 1959. In his affidavit, he stated that the P.A.S. was put on commercial production basis in January, 1962, and he found by experience that out of the total January production of 2,770 Kg. as much as 1,795 Kg. i.e., 65 per cent. was rejected by the Quality Control Laboratory. The rejection was mainly due to higher M.A.P. (Meta Amino Phenol) content. This large percentage of rejection raised a problem for the appellant, and so, Dr. Joshi was deputed to investigate into the cause of bad quality of P.A.S. Having conducted several test runs in the laboratory, Dr. Joshi came to the conclusion that the M.A.P. content could be lowered within tolerable limits to pass U.S.P. XVI specifications only if the operations after the purification stage were made continuous and carried out in shortest possible time. Dr. Joshi stated that he confirmed his conclusion by actually implementing his findings on the main plant itself.

According to Dr. Joshi, the operation leading to the production of P.A.S. consists of eleven items. The 6th item is purification. After the purification process is over, begins precipitation which takes one hour; it is followed by centrifuging and washing digging of centrifuge which takes 6-30 hours. Then follows wet milling which accounts for 1.30 hours. That brings in vacuum dryer including charging and discharging and this lengthy process takes 9 hours; and the last process is dry milling and packing which means 2 hours. Dr. Joshi is of the opinion that the six processes beginning with precipitation must be treated continuously in order to improve the quality of P.A.S., and since they take 20 hours, three shifts are inevitable.

Dr. Joshi was cross-examined by Mr. Sule for the respondents, and Mr. Sule very strongly relied on Dr. Joshi's statement that if aqueous solutions of P.A.S. are kept below 30 degrees centigrade, it will stop deterioration. We do not see how this statement can materially affect the main point made by Dr. Joshi that the relevant processes beginning with precipitation which take 20 hours must be continuously attended to. It is true that the respondents attempted to contradict Dr. Joshi's statement by examining Mr. Pillai who was working in the P.A.S. department under Mr. Moeller. But Mr. Pillai is obviously not a technical man and it would be futile to suggest that the statements made by him should be preferred to those made by Dr. Joshi. Besides, it is significant that when he was cross-examined, he virtually conceded that the six important processes would take at least 18 1/2 hours and that itself would make it necessary to introduce three shifts. In this connection, we ought to add that the statements made by Dr. Joshi in regard to the time occupied by each process are supported by the contemporaneous record kept by the laboratory workers. This record was produced by Dr. Joshi and it was shown to Mr. Pillai who virtually refused to look at it. Therefore, in our opinion, the Tribunal was in error in holding that Dr. Joshi's evidence did not establish the appellant's case that the process of producing P.A.S. is a continuous process and in order to improve its

quality and to avoid rejection of a large percentage of the product it is necessary that three shifts must be introduced in the section dealing with it. In fact, the finding made by the Tribunal in this behalf shows that the Tribunal did not really consider seriously the value of Dr. Joshi's evidence and was prepared to accept Mr. Pillai's statements though they are plainly partisan statements made by a person without any technical knowledge. Therefore, there can be no doubt whatever that the appellant is entitled to start 3 shifts in the P.A.S. section and produce P.A.S. in larger quantities and of a better quality.

That takes us to the question as to whether the other departments in the factory should also be allowed to work 3 shifts. Now the pharmaceutical section of the department which produces ointments, injections and other pharmaceutical products is at present working on a 1 shift basis. But the evidence given by Mr. Treharne, who is the Director of the appellant Company, makes out a strong case for working this department in 3 shifts. He has stated that the appellant has a factory at Chandigarh, and the total production of that factory is available for processing into finished goods in the Bombay factory and when it is so processed into finished goods, it becomes available for bulk sale to other pharmaceutical units in India. Mr. Treharne swore that the appellant was not in a position to utilise all the production of the Chandigarh factory because the production capacity of the Bombay factory was unable to cope with the bulk supplied from Chandigarh. At Chandigarh, there are no sufficient production facilities, and, besides, it is a different type of manufacturing unit. Thus, the material available to the appellant's factory in Bombay from its sister factory in Chandigarh cannot be promptly dealt with, because the pharmaceutical section is working only in one shift.

Mr. Treharne has also stated that a large number of orders are outstanding because the production capacity in Bombay is not adequate ; and that means that the appellant is continually losing business through its lack of production facility and is unable to meet the demand of needy patients. This factor also adversely affects the appellant's position *vis-a-vis* its competitors ; and the witness added that the appellant sometimes finds that it is unable to quote for substantial Government and hospital tenders. Under these circumstances, particularly at the present time when the need for production of beneficent drugs is so great, it is difficult to resist the appellant's claim that it should be allowed to introduce 3 shifts in order to produce more drugs and thus meet the requirements of the community. If the two departments are allowed to work 3 shifts, it would not be reasonable to hold that the department dealing in packing, filling, washing, tablet and capsules should not keep pace. The activities of these departments are integrated, and if the object in allowing the appellant to start 3 shifts in its manufacturing departments, both chemical and pharmaceutical, is to encourage and enable it to produce more goods, then that object would be assisted if the subsidiary department is also allowed to work 3 shifts. Therefore, we are inclined to take the view that the claim of the appellant to introduce 3 shifts cannot to day, be rejected.

There are, however, some other considerations which have to be taken into account before we reach a final decision in the matter. Mr. Sule has strenuously urged that the 5-day week and rest at night which are guaranteed to the respondents under the present service conditions prevailing in the appellant's factory, are benefits which the respondents value very much, and he contends that it would be a retrograde step to allow the appellant to make it 6-day week and to compel some of the respondents to work at night. There can be no doubt that industrial employees are entitled to look forward to a 5-day week and work only by day. Two days rest at the end of every week would afford adequate opportunities to the employees to take part in cultural and recreational activities and would tend to make their work for the remaining 5 days more satisfactory and efficient. Similarly, working at night may, on theoretical grounds, not be desirable. But these are goals which may be reached after we attain an adequately high level in our national economy and industrial development. In the context of today, it would be unreasonable to approach this problem in a purely doctrinaire spirit. If, to day, an employer desires to produce

more goods which would meet the requirements of the community and is prepared to compensate the employees for the additional work involved in the process industrial adjudication would be reluctant to discourage the employer and would assist both capital and labour to devise ways to co-operate with each other and produce more. Therefore, the academic arguments urged by Mr. Sule cannot be treated as effective for the purpose of deciding the present appeals.

On the question of employment of industrial labour at night, rival views, are expressed. Mr. Sule has relied upon the observations made by Watkins and Dodd<sup>1</sup> where the learned authors have criticised night work. "Night work", they observed,

"Cannot be regarded as desirable, either from the point of view of the employer or of the wage earner. It is uneconomical as less overhead costs are annually heavy.....Then, it must be remembered that it is distinctly unphysiological to turn the night into day and deprive the body of the beneficial effects of sun-shine. The human organism revolts against this procedure. Added to artificial lighting are reversed and unnatural times as eating, resting and sleeping. Much of the inferiority of night work can doubtless be traced to the failure of the workers to secure proper rest and sleep by day."

In fact, it is on this passage that the Tribunal strongly relied in rejecting the appellant's case.

On the other hand, the learned Attorney-General has referred us to the observations made on this subject in an objective and fair manner in the *Encyclopaedia of the Social Sciences* (Vol. IV). Dealing with the problem of continuous industry, it is observed that the term 'continuous industry' is used to characterise an industry in which the operations are carried on day and night, without interruption, over extended periods and in which the necessary labour is applied in a sequence of shifts. Several factors are then set out which justify the continuous working of industrial factories. Amongst them, reference is made to the seasonal characteristics of the industry; customary consumer's demand involving continuous, uninterrupted production or service, as in public utilities transportation, hotels, baking, newspapers; the desire in a competitive industry to take advantage of a peak of variable for a product as in the textile industry; the desire for full utilisation of special investments in plant and equipment before obsolescence of product or of facilities; national emergency, as the urgent needs of war; a force not yet actual but emerging the belief that the social burden of labour can be alleviated by continuous utilisation of equipment accompanied by a distribution of the attendant labour among workers organised in shifts. The authors no doubt recognised that the assumption created by industrial and social customs is that the group working during the day-light hours is the normal one and that the others are abnormal. A better intelligence and skill in labour and supervision gravitate towards the day shift and are accompanied by a better emotional attitude towards goals and methods. Furthermore, studies of night work indicate that usually a worker produces less in a night than a day shift, although it is not yet clear whether this is because of inherent physiological and psychological factors, or because the worker who labours at night yields to the temptation of activities during the day which preclude the securing of normal rest. It is then stated that the principal method of achieving equivalence of shifts is by establishing conditions of night work fully equivalent to those of day work and by such a thorough-going establishment of standards of skill, materials, facilities, processes, methods, qualities and quantities as to permit measurements, specifications and comparisons of performance. Considering the question as to the direction in which the progress would be made in this matter, the writers say that the direction of progress is not entirely clear. It is probable that night work will decrease in those industries in which it is not compelled by inherent technical conditions, for recognition of a problem of economic balance among industries as well as of the relatively lesser productivity of night work is causing the economic advantage of continuous operating to be questioned. On the other hand, it is conceivable that industry may discover how to organise night work more effectively and eliminate factors now unfavourable to workers and management, and society may decide that the social disutility of such

the appellant's case for the introduction of the 3rd shift or for the addition in working hours and he argues that if we allow the introduction of the 3rd shift, there would be no justification for confirming the award made by the Tribunal in respect of holidays. There is some force in this latter contention. It is true that the Tribunal made a drastic reduction in the number of holidays partly because he refused the appellant permission to add to the working hours.

In dealing with the question of paid holidays, it may be relevant to remember that the holidays declared under the Negotiable Instruments Act are usually applicable to Government institutions only and they have certain financial and statutory implications envisaged by the Act itself. The commercial establishments and factories do not usually adopt these holidays and so, it would not be reasonable to insist that the appellant is bound to grant holidays as sanctioned by the Negotiable Instruments Act. Besides, it is now generally accepted that there are too many public holidays in our country and that when the need for industrial production is urgent and paramount, it may be advisable to reduce the number of such holidays in industrial concerns. In dealing with the present appeals, the need for more production which has weighed in our minds in considering the question of 3 shifts, cannot be ignored. It is true that the Maharashtra Government seems to have adopted a very liberal policy in the matter of public holidays. In 1961, for instance, the said Government had declared 28 public holidays out of which 3 happened to fall on Sundays. It may be noticed that other State Governments have shown a tendency to reduce these holidays. U. P., for instance, had 18 public holidays, Andhra Pradesh had 17, Mysore 15 and Madras 14 in 1961. According to the Government of India, the number of public holidays is generally limited to 16. It is obvious that this question does not admit of a categorical answer one way or the other. It has to be decided on an *ad hoc* basis, bearing in mind all the relevant facts. Having considered all the relevant facts in the present case, we are disposed to think that the number of public holidays which are granted by the appellant to the respondents should be reduced from those sanctioned under the Negotiable Instruments Act to 16 every year.

The result is, both the appeals are allowed. Appeal No. 625 of 1962 succeeds and the change proposed to be made by the appellant according to the notice of change served by it on the respondents is allowed to be made, subject to the decision of the Tribunal on the question remitted to it. Appeal No. 626 of 1962 is also substantially allowed and the number of paid holidays in a year is raised from 10 to 16. In the circumstances of this case, there would no order as to costs.

V.S.

*Appeals allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, N. RAJAGOPALA AYYANGAR AND J.R. MUDHOLKAR, JJ.  
Nibaran Chandra Bag

*Appellant\**

v.

Mahendra Nath Ghug hu (deceased), after him his heir and legal representative

*Respondent.*

*Constitution of India (1950), Article 227—Jurisdiction of the High Court under—Scope of.*

*West Bengal Estates Acquisition Act (I of 1954), sections 44, 59 and Rules under—Draft record of rights*

*—Objection to entries—Appeal against the order—Record of evidence by the Tribunal—Necessity.*

The jurisdiction conferred by Article 227 of the Constitution is not by any means appellate in its nature for correcting errors in the decisions of Subordinate Courts or Tribunals but is merely a power of superintendence to be used to keep them within the bounds of their authority.

The maintenance of a record of the oral evidence adduced is not the requirement of any specific rule. It should not however be forgotten that the order passed in an enquiry into an objection filed under section 44 (1) of the West Bengal Estates Acquisition Act is subject to an appeal under section 44 (3) to a prescribed Tribunal as appellate authority. That appeal lies both on the facts as well as on any legal questions which might arise and be decided and is not confined to any particular grounds. It is therefore manifest that the appeal is intended to be a real remedy,

\*Civil Appeals Nos. 105 and 106 of 1960.

affording full relief to the party aggrieved. For such an appeal to be effective, the party aggrieved must be in a position to canvas the propriety and correctness of the reasoning of the Tribunal of first instance before the appellate authority and it would be obvious that it could not be done satisfactorily unless the party is in possession of the materials on which the conclusions of the first Tribunal are based and reasons are recorded for the order. In fact the order of the Tribunal cannot normally be successfully impugned unless the materials on which that order is based is placed before the appellate authority. It is therefore apparent that a record of the evidence would be as necessary as a reasoned order—for a statutory right of appeal to be of any real value.

It is implicit in the provision granting an appeal from the order of the Revenue Officer that even if the rules do not so provide, he should so conduct it that the right of appeal granted by the statute is not nullified.

However, this should not be understood to mean that he is bound to follow the procedure prescribed for civil Courts for the recording of evidence. Only he should maintain some record from which the Appellate authority would be able to gather the materials which the Officer had before him in arriving at the decision which is the subject of the appeal.

Appeals by Special Leave from the Judgment and Order, dated the 20th February, 1957, of the Calcutta High Court, in Civil Revision Case No. 1851 of 1956.

*N. C. Chatterjee*, Senior Advocate (*D. N. Mukherjee*, Advocate with him), for Appellant (In C.A. No. 105 of 1960) and Respondent (In C.A. No. 106 of 1960).

*K. B. Bagchi*, Advocate and *S. N. Mukherjee*, Advocate, for *Sukumar Ghose*, Advocate, for Respondent (In C.A. No. 105 of 1960) and Appellant (In C.A. No. 106 of 1960).

The Judgment of the Court was delivered by

*Rajagopala Ayyangar, J.*—These two appeals by Special Leave arise out of a single judgment of the High Court at Calcutta. That judgment was rendered in a petition under Article 227 filed by the Appellant in Civil Appeal No. 105 of 1960.

The proceeding out of which the appeals arise was an application made by Mahendra Nath Ghughu (whom we shall refer to as the respondent) before the Assistant Settlement Officer, 24 Parganas, objecting to certain entries in a draft record-of-rights prepared and published under the West Bengal Estates Acquisition Act, 1953 (I of 1954) relating to Nibaran Chandra Bag (to be referred to as the appellant). Section 44 (1) of that Act enacts:—

“44 (1) : When a record-of-rights has been prepared or revised, the Revenue Officer shall publish a draft of the record so prepared or revised in the prescribed manner and for the prescribed period and shall receive and consider any objections which may be made to any entry therein or to any omission therefrom during the period of such publication.

(2) When all such objections have been considered and disposed of according to such rules as the State Government may make in this behalf, the Revenue Officer shall finally frame the record and cause such record to be finally published in the prescribed manner and make a certificate stating the fact of such final publication and the date thereof and shall date and subscribe the same under his name and official designation.

(3) Any person aggrieved by an order passed by a Revenue Officer on any objection made under sub-section (1) may appeal in the prescribed manner to a tribunal appointed for the purpose of this section, and within such period and on payment of such Court-fees as may be prescribed.”

A draft record-of-rights had been prepared in respect of lands in the village of Howrahmari and it was left for public inspection as prescribed by the rules.

The application of the respondent was concerned with the entries in relation to Khatian No. 52. In the draft as published the name of the appellant had been recorded as “a raiyat” in respect of approximately 1,500 bighas of land most of which consisted of a fishery. On 29th August, 1955 within the time limited for receiving objections under section 44 (1) of the Act, the respondent, filed an objection by which he prayed that in place of the appellant his own name may be entered as the “raiyat” on the ground that he himself had been in enjoyment and possession of 1,200 bighas of this land as a fishery and the rest of the 300 bighas by cultivating it with paddy, etc. This objection was registered by the Assistant Settlement Officer. Subsequent thereto and before the petition of objection was disposed of, the respondent filed an amendment to the petition and in this he prayed for a modified relief that the name of the appellant should be recorded as a tenure-holder and his own as a lessee under him. The appellant raised no objections to this amendment being allowed and the enquiry in regard to the respondent’s petition proceeded before

the Assistant Settlement Officer. We shall have occasion to refer to the details of the enquiry before this Officer as well as of the order that he passed but to this we shall turn after narrating the history of the proceedings which have led to the appeals before us.

On the material placed before him, the Assistant Settlement Officer recorded two findings :

(1) That the status of the appellant was not that of a raiyat but of a permanent Mokarari tenure-holder and he accordingly directed such an entry in Khatian No. 52 being recorded.

(2) He found that the respondent was a temporary lessee under the appellant and accordingly directed a subordinate Khatian to be opened in which it would be recorded that the respondent was a temporary lessee for a period of two years during the period January, 1954 to January, 1956 at a rental of Rs. 25,000 per year.

Under the powers contained in section 44 (3) the District Judge having jurisdiction of the area was the authority to whom appeals could be preferred. The appellant availed himself of this remedy. The learned District Judge dismissed the appeal affirming both the above findings of the Assistant Settlement Officer. The appellant thereafter invoked the jurisdiction of the High Court under Article 227 of the Constitution. The learned Judges by their judgment now under appeal upheld the order of the Assistant Settlement Officer in so far as it altered the entry relating to the status of the appellant from a raiyat to that of a tenure-holder, but they reversed the order of the Assistant Settlement Officer in so far as he directed the opening of a sub-Khatian and the entry therein of the name of the respondent as a temporary lessee. The learned Judges held that there was no material on the basis of which it could be held that the respondent was a temporary lessee. Appeal No. 105 of 1960 is by the appellant and it seeks to question the correctness of the judgment of the High Court affirming the direction to record the name of the appellant as a tenure-holder, while Appeal No. 106 of 1960 is by the respondent and calls in question the jurisdiction and propriety of the High Court's interference with the concurrent findings of the Revenue Tribunals, which had held that the respondent was a temporary lessee for a period of two years on the rent stated earlier.

Mr. Chatterjee, learned counsel for the appellant, submitted that the learned Judges of the High Court should have set aside the entry recording the appellant as a tenure-holder, and dismissed in its entirety the objections filed by the respondent. The status of the appellant as a raiyat, he urged, lost all meaning and significance after the amendment of the objection petition filed by the respondent. The objection originally filed by the respondent sought the entry of respondent's name in place of the appellant. The appellant's name had been entered as a raiyat under one Bhudeb Sarkar, a tenure-holder since he was in possession under a registered patta dated 4th February, 1944 and his name had continued as a raiyat from that date and this was repeated in the published draft record-of-rights. By the amendment filed in September, 1955, the respondent abandoned the original objection and was content to have his name recorded as a lessee. The argument was that the only party who was interested in challenging the status of the appellant was the Government of West Bengal, since if the appellant was an intermediary as a tenure-holder, his interest would vest in them under the Abolition of Estates Act, but the Government not having evinced any interest in disturbing his title the entry should not have been interfered with.

He further submitted that the orders passed by the High Court allowing the appellant's petition in part was not logical and that the High Court having held that the respondent had not established his claim as a lessee, not therefore deriving any benefit of the objections that he filed, should have set aside the order entering the appellant's name as a tenure-holder.

We are not disposed to agree with these submissions. In the petition of amendment which he filed on 17th September, 1955, the respondent had pleaded :

"The status of the opposite party should have been recorded as that of a tenure-holder in accordance with the documents on which the opposite party relies and in accordance with the Khatian of the last district settlement survey."

"This objector, having been fully aware of the aforesaid matter during the hearing of the case on the previous date, raised objection to the status of the opposite party and the same is indeed a legal objection."

In his order dated 25th November, 1955 allowing this amendment, the Assistant Settlement Officer specifically noted that "the opposite party (the appellant) also gives his consent", i.e., to the amendment being allowed. It would therefore be seen that one of the items of objection to the record-of-rights raised by the respondent related to an error in the description of the status of the appellant as a raiyat. It would further appear that the appellant then raised no objection to the examination by the Officer to the correctness of that entry. This apart, the Assistant Settlement Officer, the District Judge and the learned Judges in the High Court have adduced several cogent and convincing reasons for the finding that the appellant was a tenure-holder and not a raiyat. Mr. Chatterjee made no attempt to attack this conclusion or the reasoning on which it was based. His only submission was that the order of the learned Judges in the High Court in this respect was illogical since their order in regard to the status of the respondent as a lessee they had deprived him of all benefit arising from his objections under section 44 (1) of the Act. This last argument about the illogicality in the order of the High Court has little merit and such as it has, would depend on the respondent's appeal (C.A. No. 106 of 1960) being dismissed. In view however of the order we propose to pass in that appeal, the submission would have no force. We are satisfied that the Assistant Settlement Officer had jurisdiction to decide the objections raised by the respondent to the draft record-of-rights in so far as it related to the status of the appellant. In these circumstances, we do not consider that there is any substance in the Appeal No. 105 of 1960 questioning the correctness of the entry by which the appellant was shown as a tenure-holder instead of as a raiyat.

What remains to be dealt with is Appeal No. 106 of 1960 which raises for consideration the propriety and correctness of the interference by the learned Judges with the concurrent findings of the Assistant Settlement Officer and the District Judge that the respondent Ghughu was a temporary lessee for two years at a rental of 25,000 rupees a year.

Before proceeding further it is necessary to notice that the matter was brought up before the High Court by Petition under Article 227 of the Constitution. The jurisdiction conferred by that Article is not by any means appellate in its nature for correcting errors in the decisions of Subordinate Courts or Tribunals but is merely a power of superintendence to be used to keep them within the bounds of their authority, vide *Nagendra Bora v. Commissioner, Hills Division, Assam*<sup>1</sup>. It was the submission of the learned counsel for the respondent (appellant in C.A. No. 106 of 1960) that the High Court exceeded its jurisdiction in interfering what at the worst was a mere error in the appreciation of evidence and that in fact there was enough material for the finding which the Revenue Tribunals had reached, as regards the lease.

The case of respondent was that he was a lessee under the appellant, in respect of the entire 1,500 bighas of land from January, 1954. He alleged that he had paid Rs. 95,000 as Salami and that the rent had been fixed at Rs. 18,500 per year. He further alleged that after he obtained possession under the lease, he had been using 1,200 bighas of land as a fishery and the rest of the 300 bighas for growing paddy and it was on the basis of these facts that he claimed the status of a raiyat. That the respondent was in possession of this area from January, 1954 was not disputed by the appellant but his case was that the respondent was his manager on a monthly salary of Rs. 100. Thus, the point of difference between the appellant and the respondent was only as regards the title under which the respondent was in possession. In support of the respondent's case he examined the President and



the Vice-President of Sarangabad, U.P., to prove payment of tax in his name, and he produced the records of certain criminal proceedings between him and third parties in which he had been described as a lessee both by the other parties as well as in the reports, submitted by police officers. Besides, he produced copies of proceedings under section 144, Criminal Procedure Code, between himself and the appellant in which there had been a compromise which according to him resulted in or confirmed his possession as a lessee. It also appears that both the appellant and the respondent examined themselves before the Settlement Officer.

The reasoning upon which the Assistant Settlement Officer proceeded to arrive at his finding was shortly this :

That possession of the land with the respondent from 1954 being admitted, the only question for consideration was whether he was a lessee as was sought to be proved by him or whether he was merely a manager and caretaker in the employ of the appellant in receipt of a monthly salary. The appellant produced his accounts for a period anterior to 1954 disclosing payments of salary to one Dhirandra Nath Pramanik his then Manager but he produced no accounts covering the period when the respondent was in possession, which would establish, if the appellant's case was true, that the respondent was his manager. From the non-production of these accounts, the Assistant Settlement Officer drew an inference adverse to the appellant. This conduct of the appellant was certainly a relevant material which the Officer could have taken into account. Secondly, in a criminal case between these very parties under section 144, Criminal Procedure Code (Case No. P.T. 1925), a joint statement was made that the respondent had sometime anterior thereto paid the appellant a sum of Rs. 3,000 "as advance". The receipt of this sum was admitted. It was the case of the respondent that this was a payment towards rent under a lease, but this was denied by the appellant, who urged that this was in part the damages or mesne profits due to him. The production of the appellant's accounts which recited the receipt of this sum might have cleared the matter, but he chose not to produce them. From this again the Officer drew an inference adverse to the appellant. Besides these pieces of evidence there were descriptions of the respondent as lessee in several criminal proceedings between the respondent and third parties. Lastly, there were criminal proceedings between the appellant and the respondent in regard to the possession of these very lands, and this dispute was agreed to be referred to the arbitration of the Sub-Divisional Officer. We do not have the award, but the two parties agreed to it and embodied the terms thereof in a signed memorandum of compromise and this provided *inter alia*, "that the respondent would pay the appellant Rs. 50,000 in four instalments ending with January, 1956" specifying the dates on which these instalments had to be paid, and it added :

"The men of the first party (appellant) will be entitled to inspect the two granaries containing paddy belonging to the first party standing on the said Bheri for the purpose of looking after them,"

and finally wound up saying :

"the second party (respondent) will no longer have title and concern of any sort in respect of the said Bheri."

The Assistant Settlement Officer construed this compromise as meaning that the respondent was to be in possession for two years as lessee, i.e., during the period during which the four instalments were to be paid and to relinquish possession after January, 1956 when the last instalment would have been due and paid, and it was on this basis that he held that the transaction amounted to a temporary lease for 2 years on an annual rental of Rs. 25,000. The learned District Judge upheld these findings and considered that all the above pieces of evidence justified the conclusion reached by the Assistant Settlement Officer. When the matter was before the High Court, the learned Judges analysed the evidence and held that the statements in the criminal proceedings in which the respondent had been described by third parties as lessee were inadmissible in evidence and irrelevant for the purpose of proving his status and also that the Assistant Settlement Officer and the District Judge had misconstrued the compromise. The learned Judges

further pointed out : (1) that the respondent had set up a case of a lease on a rental of Rs. 18,500 per year and that the temporary lease for two years found by the Officer was inconsistent with such a pleading, and (2) that the compromise on its proper construction did not constitute the respondent a lessee temporary or otherwise and the Courts below had misinterpreted the terms of that document. On reaching these conclusions the learned Judges set aside the entry of the respondent's name in the sub-Khatian as a temporary lessee. We consider that the learned Judges were not justified in the course they took in interfering with the findings of the Revenue authorities. They were not sitting as a Court of appeal and had merely to consider, firstly, whether the tribunals had out-stepped the limits of their jurisdiction, or secondly, whether the findings recorded were based on no material, or were otherwise perverse. We are clearly of the opinion that the orders of the Revenue authorities did not suffer from any of these infirmities. In the first place no significance can be attached to the fact that the finding recorded is not in line with the pleading or the case set up by the respondent. It is true that the respondent had prayed for a more favourable relief, namely, a longer tenure and on a lesser rental but if the evidence placed before the tribunal justified the granting of a lesser relief, there was no reason why such relief should be denied. Nothing therefore turns on the fact that the relief granted was different from that claimed by the respondent. The more substantial point is whether the learned Judges were right in holding that there was no material on which the authorities could find that the respondent was a temporary lessee. The respondent having admittedly been in actual possession of the property, the only controversy related to the character in which he was in possession. Even if the description of the respondent as lessee by third parties in the several criminal proceedings be discarded as *res inter alios acta*, it was certainly within the jurisdiction of a Settlement Officer to appraise the truth of the story of the appellant who claimed that the respondent was his Manager on a salary of Rs. 100 a month. No just exception could be taken to the action of the Officer in drawing an inference adverse to the appellant from the non-production of his accounts to prove the payment of salary to the respondent, or that relating to the receipt of Rs. 3,000 referred to as "an advance". If so, the Officer could legally accept the respondent's case that he was a lessee and not a paid Manager and that his possession was attributable to that character.

The next question would be as to the terms of that lease—as regards the duration and rent. The evidence disclosed by the compromise and the criminal proceedings between the parties militated against the complete acceptance of the respondent's case. The criminal proceedings arose because of the dispute raised by the respondent that he was a lessee, but under the compromise following the award by the S.D.O. he agreed to give up possession at the end of 2 years and to have nothing more to do with the property after that date. From these circumstances, the Settlement Officer inferred that the title as lessee which was put forward by the respondent had been conceded to a limited extent, namely, that he was to remain in possession only till January, 1956. Taken in conjunction with the antecedent history, it would not be an unreasonable inference to draw that the character in which the respondent was to remain in possession till he undertook to quit was as a lessee. It would therefore be not correct to say that there was no material to support the finding. If the order could be sustained to that extent, the fixation of the rent at Rs. 25,000 a year is not of much significance, because that was arrived at merely on the basis of the figure mentioned in the memo. of compromise.

Even assuming that the Revenue Tribunals erred in their interpretation of the compromise, it could not be a ground on which their finding could be set aside under Article 227, in view of the fact that the compromise was but one of the several items of evidence on which the finding was based. If thus there was material, the order could not be characterised, as perverse to permit of interference. We, therefore, consider that there was no justification to interfere with this concurrent finding of the Revenue Tribunal.

Before concluding it is necessary to deal with one matter which has also been adverted to by the learned Judges of the High Court. It concerns the method adopted by the Assistant Settlement Officer in the conduct of this enquiry. From his order it would appear that the two parties before him adduced oral evidence by examining witnesses. He however made no record of this evidence, so that one is not in a position to ascertain with exactness what each witness deposed—except in so far as any reference is made to it in the order. The learned Judges animadverted on this feature and we concur with them that this is far from satisfactory. Learned counsel for the respondent drew to our attention the rules which have been framed under section 59 of the Act which lay down the procedure to be followed by Revenue Officers conducting these enquiries, (Rule 30 (2) read with Rule 17 (2)) and pointed out that these rules did not require any record being kept of the evidence adduced and that in the absence of any such statutory provision there was no need for these tribunals to follow the procedure adopted by regular Courts and that it could not be said that any principle of natural justice was violated by such a record not being kept. We agree that the maintenance of a record of the oral evidence adduced is not the requirement of any specific rule. It should not however be forgotten that the order passed in an enquiry into an objection filed under section 44 (1) of the Act is subject to an appeal under section 44 (3) to a prescribed Tribunal as authority. That appeal lies both on the facts as well as on any legal questions which might arise and be decided and is not confined to any particular grounds. It is therefore manifest that the appeal is intended to be a real remedy, affording full relief to the party aggrieved. For such an appeal to be effective, the party aggrieved must be in a position to canvass the propriety and correctness of the reasoning of the tribunal of first instance before the appellate authority and it would be obvious that it could not be done satisfactorily unless the party is in possession of the materials on which the conclusions of the first tribunal are based and reasons are recorded for the order. In fact the order of the tribunal cannot normally be successfully impugned unless the materials on which that order is based is placed before the Appellate Authority. It is therefore apparent that a record of the evidence would be as necessary as a reasoned order—for a statutory right of appeal to be of any real value. We therefore consider that it is implicit in the provision granting an appeal from the order of the Revenue Officer that even if the rules do not so provide, he should so conduct it that the right of appeal granted by the statute is not nullified. In saying this we should not be understood to mean that he is bound to follow the procedure prescribed for civil Courts for the recording of evidence. Only he should maintain some record from which the Appellate Authority would be able to gather the materials which the Officer had before him in arriving at the decision which is the subject of the appeal.

The result is that Civil Appeal No. 105 of 1960 fails and is dismissed, while Civil Appeal No. 106 of 1960 succeeds and is allowed. As a result of the orders passed in these two appeals the Revision under Article 227 preferred by the appellant to the High Court will stand dismissed.

The respondent will be entitled to his costs in this Court (one hearing fee).

V.S.

*C.A. No. 105 of 1960 dismissed.*

*C.A. No. 106 of 1960 allowed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Dr. Vimla

.. Appellant \*

*v.*

The Delhi Administration

.. Respondent.

*Penal Code (XLV of 1860), sections 463 and 464—Forgery of document—"Defraud"—Meaning.*

*V* purchased a motor car with her own money in the name of her minor daughter *N*, had the insurance policy transferred in the name of her minor daughter by signing her name and she also received compensation for the claims made by her in regard to the two accidents to the car. The claims were true claims and she received the moneys by signing in the claim forms and also in the receipts as *N*.

Neither *V* got any advantage either pecuniary or otherwise by signing the name of *N* in any of the said documents nor the Insurance Company incurred any loss, pecuniary or otherwise by dealing with *V* in the name of *N*. The Insurance Company would not have acted differently even if the car stood in the name of *V* and she made the claims and received the amounts from the Insurance Company in her name.

The expression "defraud" involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss that is, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied.

Certainly *V* was guilty of deceit, for though her name was *V*, she signed in all the relevant papers as *N* and made the Insurance Company believe that her name was *N*, but the said deceit did not either secure to her advantage or cause any non-economic loss or injury to the Insurance Company. The charge does not disclose any such advantage or injury, nor is there any evidence to prove the same. The entire transaction was that of *V* and it was only put through in the name of her minor daughter for reasons best known to herself. On the evidence as disclosed, neither was she benefited nor did the Insurance Company incur loss in any sense of the term.

Appeal by Special Leave from the Judgment and Order, dated the 24th March, 1960 of the Punjab High Court (Circuit Bench) at Delhi in Criminal Appeal Case No. 41-D of 1958.

*H. L. Anand*, Advocate of *Anand Das Gupta, Sagar* and *K. Baldev Mehta*, Advocate, for Appellant.

*V. D. Mahajan* and *P. D. Menon*, Advocates, for Respondent.

The Judgment of the Court was delivered by

*Subba Rao, J.*—This appeal by Special Leave raises the question as to the true meaning of the expression 'fraudulently' in section 464 of the Indian Penal Code.

The facts either admitted or found by the Courts below may be briefly stated. The appellant is the wife of *Siri Chand Kaviraj*. On 20th January, 1953, she purchased an Austin 10 Horse Power Car with the registration No. DLA 4796 from *Dewan Ram Swarup* in the name of her minor daughter *Nalini* aged about six months at that time. The price for the car was paid by *Dr. Vimla*. The transfer of the car was notified in the name of *Nalini* to the Motor Registration Authority. The car at that time was insured against a policy issued by the *Bharat Fire and General Insurance Co., Ltd.*, and the policy was due to expire sometime in April, 1953. On a request made by *Dewan Ram Swarup*, the said policy was transferred in the name of *Nalini*. In that connection, *Dr. Vimla* visited the Insurance Company's Office and signed the proposal form as *Nalini*. Subsequently, she also filed two claims on the ground that the car met with accidents. In connection with these claims, she signed the claim forms as *Nalini* and also the receipts acknowledging the payments of the compensation money as *Nalini*. On a complaint made by the company alleg-

ing fraud on the part of Dr. Vimla and her husband, the police made investigation and prosecuted Dr. Vimla and her husband, Siri Chand Kaviraj in the Court of Magistrate, 1st Class, Delhi. The Magistrate committed Dr. Vimla and her husband to Sessions to take their trial under sections 120-B, 419, 467 and 468 of the Indian Penal Code. The learned Sessions Judge held that no case had been made out against the accused under any one of those sections and on that finding, acquitted both of them. The State preferred an appeal to the High Court of Punjab and the appeal was disposed of by a Division Bench of that Court comprising Falshaw and Chopra, JJ. The learned Judge confirmed the acquittal of Siri Chand; but in regard to Dr. Vimla, they confirmed her acquittal under section 419 of the Indian Penal Code, but set aside her acquittal under sections 467 and 468 of the Code and instead, convicted her under the said sections and sentenced her to imprisonment till the rising of the Court and to the payment of a fine of Rs. 100 or in default to undergo simple imprisonment for two weeks. Dr. Vimla has preferred the present appeal by Special Leave against her conviction and sentence.

The facts found may be briefly summarised thus : Dr. Vimla purchased a motor car with her own money in the name of her minor daughter, had the insurance policy transferred in the name of her minor daughter by signing her name and she also received compensation for the claims made by her in regard to the two accidents to the car. The claims were true claims and she received the moneys by signing in the claim forms and also in the receipts as Nalini. That is to say, Dr. Vimla in fact and in substance put through her transactions in connection with the said motor car in the name of her minor daughter. Nalini was in fact either a benamidar for Dr. Vimla or her name was used for luck or other sentimental considerations. On the facts found, neither Dr. Vimla got any advantage either pecuniary or otherwise by signing the name of Nalini in any of the said documents nor the Insurance Company incurred any loss, pecuniary or otherwise, by dealing with Dr. Vimla in the name of Nalini. The Insurance Company would not have acted differently even if the car stood in the name of Dr. Vimla and she made the claims and received the amounts from the Insurance Company in her name. On the said facts, the question that arises in this case is whether Dr. Vimla was guilty of offences under sections 463 and 464 of the Indian Penal Code.

Learned Counsel for the appellant contends that on the facts found, the appellant would not be guilty of forgery as she did not "fraudulently" sign the requisite forms and the receipts in the name of Nalini, as, by so signing, she did not intend to cause injury to the Insurance Company. In other words, the contention was that a person does not act fraudulently within the meaning of section 464 unless he is not only guilty of deceit but also he intends to cause injury to the person or persons deceived, and as in the present case the appellant had never had the intention to cause injury to the Insurance Company and as on the facts found no injury had been caused at all to the company, the appellant could not be found guilty under the said sections.

Before we consider the decisions cited at the Bar it would be convenient to look at the relevant provisions of the Indian Penal Code.

"Section 463 : Whoever makes any false document or part of a document with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

Section 464 : A person is said to make a false document—

First—Who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document/or part of a document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed; or

The definition of "false document" is a part of the definition of "forgery". Both must be read together. If so read, the ingredients of the offence of forgery relevant to the present enquiry are as follows : (1) fraudulently signing a document or a part of a document with an intention of causing it to be believed that such document or part of a document was signed by another or under his authority ; (2) making of such a document with an intention to commit fraud or that fraud may be committed. In the two definitions, both *mens rea* described in section 464 i.e., "fraudulently" and the intention to commit fraud in section 463 have the same meaning. This redundancy has perhaps become necessary as the element of fraud is not the ingredient of other intentions mentioned in section 463. The idea of deceit is a necessary ingredient of fraud, but it does not exhaust it ; an additional element is implicit in the expression. The scope of that something more is the subject of many decisions. We shall consider that question at a later stage in the light of the decisions bearing on the subject. The second thing to be noticed is that in section 464 two adverbs, "dishonestly" and "fraudulently" are used alternatively indicating thereby that one excludes the other. That means they are not tautological and must be given different meanings. Section 24 of the Penal Code defines "dishonestly" thus :

"Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".

"Fraudulently" is defined in section 25 thus :

"A person is said to do a thing fraudulently if he does that thing with intention to defraud but not otherwise."

The word "defraud" includes an element of deceit. Deceit is not an ingredient of the definition of the word "dishonestly" while it is an important ingredient of the definition of the word "fraudulently". The former involves a pecuniary or economic gain or loss while the latter by construction excludes that element. Further, the juxtaposition of the two expressions "dishonestly" and "fraudulently" used in the various sections of the Code indicates their close affinity and therefore the definition of one may give colour to the other. To illustrate, in the definition of "dishonestly", wrongful gain or wrongful loss is the necessary ingredient. Both need not exist, one would be enough. So too, if the expression "fraudulently" were to be held to involve the element of injury to the person or persons deceived, it would be reasonable to assume that the injury should be something other than pecuniary or economic loss. Though almost always an advantage to one causes loss to another and *vice versa*, it need not necessarily be so. Should we hold that the concept of "fraud" would include not only deceit but also some injury to the person deceived, it would be appropriate to hold by analogy drawn from the definition of "dishonestly" that to satisfy the definition of "fraudulently" it would be enough if there was a non-economic advantage to the deceiver or a non-economic loss to the deceived. Both need not co-exist.

Let us now consider some of the leading text book writers and decisions to ascertain the meaning of the word "fraudulently".

The classic definition of the word "fraudulently" is found in Stephen's History of the Criminal Law of England, Vol. 2, at page 121 and it reads :

"I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words "fraud" or "intent to defraud" or "fraudulently" occur in the definition of a crime two elements at least are essential to the commission of the crime ; namely, first, deceit or an intention to deceive or in some cases mere secrecy ; and secondly, either actual injury or possible injury or to a risk of possible injury by means of that deceit or secrecy. . . . This intent is very seldom the only, or the principal, intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage. . . . A practically conclusive test of the fraudulent character of a deception for criminal purposes is this : Did the author of the deceit derive any advantage from it which could not have been had if the truth had been known ? If so, it is hardly possible that the advantage should not have had an equivalent in loss or risk of loss to someone else, and if so, there was fraud."

It would be seen from this passage that "fraud" is made up of deceit and injury. The learned author also realizes that the principal object of every fraudulent person in nearly every case is to derive some advantage though such

advantage has a corresponding loss or risk of loss to another. Though the author has not visualized the extremely rare situation of an advantage secured by one without a corresponding loss to another, this idea is pursued in later decisions.

As regards the nature of this injury, in Kenny's Outline of Criminal Law, 15<sup>th</sup> Edn., at page 333, it is stated that pecuniary detriment is unnecessary.

In *Haycraft v. Creasy*<sup>1</sup> LeBlanc, J., observed :

"by fraud is meant an intention to deceive ; whether it be from any expectations of advantage to the party himself or from the ill-will towards the other is immaterial."

This passage for the first time brings out the distinction between an advantage derived by the person who deceives in contrast to the loss incurred by the person deceived. Buckley, J., in *re London and Globe Finance Corporation Ltd.*<sup>2</sup> brings out the ingredients of fraud thus :

"To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit : It is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind ; to defraud is by deceit to induce a course of action."

The English decisions have been elaborately considered by the Court of Criminal Appeal in *R. v. Welham*<sup>3</sup>. In that case, hire-purchase finance companies advanced money on a hire-purchase form and agreement and on credit-sale agreements witnessed by the accused. The form and agreements were forgeries. The accused was charged with offences of uttering forged documents with intent to defraud. It was not proved that he had intended to cause any loss of money to the finance companies. His intention had been by deceit to induce any person who was charged with the duty of seeing that the credit restrictions then current were observed to act in a way in which he would not act if he had known the true facts, namely, not to prevent the advancing of large sums of money exceeding the limits allowed by law at the time. The Court held that the said intention amounted to intend to defraud. Hilbery, J., speaking for the Court, pointed out the distinction between deceit and defraud and came to the conclusion that "to defraud" is to deprive by deceit. Adverting to the argument that the deprivation must be something of value, *i.e.*, economic loss, the learned Judge observed :

"We have, however, come to the conclusion that this is too narrow a view. While, no doubt in most cases of an intention to defraud the intention is to cause an economic loss, there is no reason to introduce any such limitation. Provided that the intention is to cause the person deceived to act to his real detriment, it matters not that he suffers no economic loss. It is sufficient if the intention is to deprive him of a right or to induce him to do something contrary to what it would have been his duty to do, had he not been deceived."

On the basis of the said principle, it was held that the accused by deceit induced the finance companies to advance moneys contrary to the credit restrictions and that he was guilty of the offence of forgery. This decision is therefore a clear authority for the position that the loss or the injury caused to the person deceived need not be economic loss. Even a deprivation of a right without any economic consequences would be enough. This decision has not expressed any definite opinion on the question whether a benefit to the accused without a corresponding loss to the person deceived would amount to fraud. But it has incidentally touched upon that aspect. The learned Judge again observed :

"... This the appellant was doing in order that he might benefit by getting further loans."

This may indicate that a benefit derived by the person deceiving another may amount to an act to defraud that other.

A Full Bench of the Madras High Court, in *Kotamraju Venkatarayadu v. Emperor*<sup>4</sup>, had to consider the case of a person obtaining admission to the Matriculation examination of the Madras University as a private candidate producing to the Registrar a certificate purporting to have been signed by the Headmaster of a recognized High

1. (1801) 2 East. 92.

2. L.R. (1903) 1 Ch. 732.

3. (1960) 1 All E.R. 260, 264, 266.

4. (1905) I.L.R. 28 Mad. 90, 96, 97 (F.B.)

School that he was of good character and had attained his 20th year. It was found in that case that the candidate had fabricated the signature of the Headmaster. The Court held that the accused was guilty of forgery. White, C.J., observed :

"Intending to defraud means, of course, something more than deceiving."

He illustrated this by the following example :

"A tells B a lie and B believes him. B is deceived but it does not follow that A intended to defraud B. But, as it seems to me, if A tells B a lie intending that B should do something which A conceives to be to his own benefit or advantage, and which, if done, would be to the loss or detriment of B, A intends to defraud B."

The learned Chief Justice indicated his line of thought, which has some bearing on the question now raised, by the following observations :

"I may observe, however, in this connection that by section 24, of the Code a person does a thing dishonestly who does it with the intention of causing wrongful gain or wrongful loss. It is not necessary that there should be an intention to cause both. On the analogy of this definition, it might be said that either an intention to secure a benefit or advantage on the one hand, or to cause loss or detriment on the other, by means of deceit, is an intent to defraud."

But, he found in that case that both the elements were present. Benson, J., pointed out at page 114 :

"I am of opinion that the act was fraudulent not merely by reason of the advantage which the accused intended to secure for himself by means of his deceit, but also by reason of the injury which must necessarily result to the University and through it to the public from such acts if unrepressed. The University is injured, if through the evasion of its bye-laws, it is induced to declare that certain persons have fulfilled the conditions prescribed for Matriculation and are entitled to the benefits of Matriculation, when in fact, they have not fulfilled those conditions, for the value of its examinations is depreciated in the eyes of the public if it is found that the certificate of the University that they have passed its examination is no longer a guarantee that they have in truth fulfilled the conditions on which alone the University professes to certify them as passed, and to admit them to the benefit of Matriculation."

Boddam, J., agreed with the learned Chief Justice and Benson, J. This decision accepts the principle laid down by Stephen, namely, that the intention to defraud is made up of two elements, first an intention to deceive and second, the intention to expose some person either to actual injury or risk of possible injury ; but the learned Judges were also inclined to hold on the analogy of the definition of "dishonestly" in section 24 of the Code that intention to secure a benefit or advantage to the deceiver satisfies the second condition.

The Calcutta High Court dealt with this question in *Surendra Nath Ghose v. Emperor*<sup>1</sup>. There, the accused affixed his signature to a kabuliati, which was not required by law to be attested by witnesses, after its execution and registration, below the names of the attesting witnesses but without putting a date or alleging actual presence at the time of its execution. The Court held that such an act was not fraud within the first clause of section 464 of the Penal Code inasmuch as it was not done dishonestly or fraudulently within the meaning of sections 24 and 25 thereof. Mookerjee, J., defined the words "intent to defraud" thus :

"The expression, "intent to defraud" implies conduct coupled with intention to deceive and thereby to injure ; in other words "defraud" involves two conceptions, namely, deceit and injury to the person deceived, that is, infringement of some legal right possessed by him, but not necessarily deprivation of property."

This view is in accord with the English decisions and that expressed by the Full Bench of the Madras High Court. This decision does not throw any light on the other question whether advantage to the deceiver without a corresponding loss to the deceived would satisfy the second ingredient of the expression "intent to defraud."

A Division Bench of the Bombay High Court in *Sanjiv Ratnappa v. Emperor*<sup>2</sup> had also occasion to consider the scope of the expression "fraudulently" in section 464 of the Penal Code. The Court held that for an act to be fraudulent there must be some advantage on the one side with a corresponding loss on the other. Adverting to the



argument that an advantage secured by the deceiver would constitute fraud, Broomfield, J., observed thus :

"I think in view of the Bombay decisions to which I have referred we must hold that that is an essential ingredient in the definition of forgery. In the great majority of cases, the point is not very material..... But there may occasionally be a case in which the element of loss or injury is absent, and I think the present is such a case."

This decision therefore does not accept the view of White, C.J., of the Madras High Court.

A Division Bench of the Lahore High Court, in *Emperor v. Abdul Hamid*<sup>1</sup> had also expressed its view on the meaning of the word "fraudulently". The learned Judges accepted Stephen's definition but proceeded to observe as follows :

"It may be noted in this connection that the word "injury" as defined in section 44, Penal Code is very wide as denoting "any harm whatever, illegally caused to any person, in body, mind, reputation or property."

The learned Judges were willing to assume that in almost every case an advantage to one would result in an injury to the other in the widest sense indicated by section 44 of the Penal Code.

The other decided cases cited at the Bar accept the necessity for the combination of a deceit by one and injury to the other to constitute an act to defraud and therefore, it is not necessary to multiply citations. No other decision cited at the Bar throws any light on the further question, namely, whether an advantage secured to the deceiver without a corresponding loss to the deceived would satisfy the second condition laid down by the decisions.

To summarize : the expression "defraud" involves two elements, namely, deceit and injury to the person deceived. Injury is something other than economic loss that is, deprivation of property, whether movable or immovable, or of money and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied.

Now let us apply the said principles to the facts of the present case. Certainly, Dr. Vimla was guilty of deceit, for though her name was Vimla, she signed in all the relevant papers as Nalini and made the Insurance Company believe that her name was Nalini, but the said deceit did not either secure to her advantage or cause any non-economic loss or injury to the Insurance Company. The charge does not disclose any such advantage or injury, not is there any evidence to prove the same. The fact that Dr. Vimla said that the owner of the car who sold it to her suggested that the taking of the sale of the car in the name of Nalini would be useful for income-tax purposes is not of any relevance in the present case, for one reason, the said owner did not say so in his evidence and for the other, it was not indicated in the charge or in the evidence. In the charge framed, she was alleged to have defrauded the Insurance Company and the only evidence given was that if it was disclosed that Nalini was a minor, the Insurance Company might not have paid the money. But as we have pointed out earlier, the entire transaction was that of Dr. Vimla and it was only put through in the name of her minor daughter for reasons best known to herself. On the evidence as disclosed, neither was she benefited nor the Insurance Company incurred loss in any sense of the term.

In the result, we allow the appeal and hold that the appellant was not guilty of the offence under sections 467 and 468 of the Indian Penal Code. The conviction and sentence passed on her are set aside. Fine, if paid, is directed to be refunded to the appellant.

V.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S.J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOAKAR. JJ.

RAM SAGAR PANDIT

.. Appellant\*

v.

The State of Bihar

.. Respondent.

*Prevention of Corruption Act (II of 1947), sections 5 and 6—Scope—Sanction to prosecute—Essentials—Presumption under section 5 (3)—How can be rebutted—Charge—Defect in, not raised at any prior stage—Can not be allowed.*

Sub-section (1) of section 5 of the Prevention of Corruption Act describes the ingredients of the offence of criminal misconduct. Sub-section (2) is the penal section, that is the section which imposes punishment for such a criminal misconduct. The sanction in the instant case refers to sub-section (2) which is the provision that makes criminal misconduct punishable. The sanction *ex hypothesi* must have reference only to criminal misconduct as defined in sub-section (1). The sanction, therefore, though in terms it refers to sub-section (2), in effect must be deemed to relate to sub-section (1) read with sub-section (2), for the expression criminal misconduct in sub-section (2) takes in the definition of criminal misconduct.

The sanction was given under sub-section (2) read with sub-section (3) of section 5 of the Act. The phraseology used indicates the consciousness on the part of the sanctioning authority that sub-section (3) is not a separate offence but it is only a supporting provision to the substantive offence under sub-sections (1) and (2). Sub-section (3) does not create a separate offence. It only lays down a rule of evidence which marks a departure from the well-established principle of criminal jurisprudence that onus is always on the prosecution to bring home the guilt to the accused. Under this provision in the circumstances mentioned therein the Court shall presume unless the contrary is proved that the accused person is guilty of criminal misconduct in the discharge of his official duty. When the sanction is given under sub-section (2) read with sub-section (3) it only means that on the facts disclosed in the said two documents, a case has been made out for drawing a presumption of guilt against the accused.

All the facts constituting the offence of misconduct with which the accused was charged were placed before the Government and though the sanction *ex facie* does not disclose the facts, the documents which are exhibited in the case give all the necessary relevant facts constituting the offence of criminal misconduct.

The presumption so raised in the circumstances mentioned in the sub-section (3) of section 5 of the Act can be rebutted by the accused in two ways : (1) by adducing evidence to prove that he came into possession of the said resources in a lawful manner and (2) though he has failed to explain the circumstances under which he came into possession of the said resources, by proving by other evidence that he did not take any illegal gratification. The presumption raised under sub-section (3) cannot obviously prevent an accused from proving his innocence in respect of the specific charge levelled against him.

The charge as framed clearly stated that the accused habitually accepted gratification other than legal remuneration and obtained pecuniary advantage by corrupt and illegal means. The charge contains allegations making out an offence under section 5 (1) of the Act. The charge no doubt should have contained better particulars so as to enable the accused to prove his case but the accused never complained that the charge did not contain the necessary particulars. The record discloses that the accused understood the case against him and adduced all the evidence which he wanted to place before the Court. Section 225 of the Criminal Procedure Code says "that no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice."

The accused did not raise any objection either before the Special Judge or in the High Court on the score that the charge was defective and that he was misled in his defence on the ground that particulars of the persons from whom the bribes were taken were not mentioned. Nor such an objection has been taken in the Special Leave petition, nor in the Statement of the Case. This objection is an after thought and cannot be allowed to be raised in the appeal by Special Leave.

Appeal by Special Leave from the Judgment and Order dated the 20th September, 1960, of the Patna High Court in Criminal Appeal No. 32 of 1958.

N.C. Chatterjee, Senior Advocate (R.K. Garg, D.P. Singh, S.C. Agarwal and M.K. Ramamurthi, Advocates of M/s. Ramamurthi & Co. with him), for Appellant.

S.P. Varma, Advocate, for Respondent.

The Judgment of the Court was delivered by

*Subba Rao, J.*—This Appeal by Special Leave is preferred against the Judgment of the High Court of Judicature at Patna confirming the conviction of the Appellant under section 5 of the Prevention of Corruption Act by the Special Judge, Bhagalpur.

The facts may be briefly stated. The Appellant joined Government service in 1942, as a teacher in the Reformatory School, Hazaribagh, on a pay of Rs. 125. In 1945 he became a lecturer in mechanics in Sabour Agricultural College, in which he served till 30th November, 1949 in the scale of Rs. 125 to 250 till August, 1947 and from September, 1947 to November, 1949 in the scale of Rs. 200 to 450. In December, 1949 he became Mechanical Assistant Engineer at Sabour and continued to hold that office till 31st August, 1952. During that period he was drawing salary with five advance increments in the scale of Rs. 220 to 750. Then he was reverted to the post of lecturer in mechanics in the Agricultural College in the scale of Rs. 200 to Rs. 450. It would be seen that his salary was only ranging between Rs. 125 and Rs. 300. He had two wives and had three children by them. Admittedly his family was not in affluent circumstances, and his wives did not bring him any fortune. During the year 1951-52 his Bank account and other evidence showed that he came into possession of a sum of Rs. 66,832-7-3.

The case of the Prosecution is that during the years 1950 and 1952 the Government introduced a scheme called 'Grow More Food Scheme' subsidized by it. Under that scheme pumping sets were purchased by the Government and supplied to Agriculturists on payment of 50 per cent of the cost incurred by the Government. The Appellant had a hand in the purchase of sets and in the distribution of the same to various agriculturists. In that connection he had the opportunity to make money on both ends *i.e.*, when they were purchased and when they were distributed. The Appellant took an illegal gratification during the implementation of the said scheme. On 25th March, 1957 and 11th April, 1957 the Supdt. of Police obtained the sanction of the Government of Bihar, Development Department, for prosecuting the Appellant under section 5 (2), read with clause (3) of section 5 of the Prevention of Corruption Act, 1947 (II of 1947) hereinafter called the Act. On obtaining the sanction the Appellant was put on trial before the Special Judge, Bhagalpur, for an offence punishable under section 2 read with sub-sections (1) and (3) of section 5 of the Act. The Special Judge, on a consideration of the evidence, found in the light of the presumption laid down in section 5 (3) of the Act that the accused was taking "illegal gain out of his economic position" in the scheme during the year 1951-52. On that finding the learned Judge convicted the Appellant under sub-section (1) read with sub-section (3), of section 5 of the Act, and sentenced him to undergo rigorous imprisonment for three years, and to pay a fine of Rs. 500. On appeal the High Court accepted the finding of the Special Judge and confirmed the conviction and the sentence passed on him. Hence the appeal.

Learned Counsel for the Appellant contended that the sanction given by the Government was illegal for three reasons;

1. The sanctioning authority had not before it all the relevant facts constituting the offence for which sanction was asked for before giving the sanction.
2. The sanction was given for prosecuting the Appellant under sub-section (2) read with sub-section (3) of section 5 of the Act, whereas he was convicted for a different offence under sub-section (1) of section 5 read with sub-section (3).
3. The sanction was given under sub-section (3) of section 5 which lays down only a rule of evidence on a wrong assumption that the said sub-section creates an offence.

As the argument turned upon the scope of the sanction and the manner in which it was given it will be necessary to read it *in extenso* :

"Government of Bihar Development Department.....Patna, the 11th April, 1957.  
No. 1186-D.

Whereas the Governor of Bihar has considered the facts stated in the F.I.R. and the letter No. 1195/CR., dated the 26th March, 1957 of the Superintendent of Police, Bhagalpur,

addressed to the Secretary to Government of Bihar, Development Department (copies enclosed) through the Commissioner, Bhagalpur Division.

And whereas the Governor of Bihar has reasons to believe, on a consideration of the facts mentioned in the aforesaid documents that Shri Ram Sagar Pandit, Lecturer (now under suspension), Sabour Agricultural College, Bhagalpur, has committed offences under clause (2) read with clause (3) of section 5 of the Prevention of Corruption Act, 1947 (II of 1947).

Now, therefore, the Governor of Bihar in pursuance of the provision laid down in section 6 of the said Act, 1947 is pleased to accord sanction to the prosecution of the aforesaid Shri Ram Sagar Pandit under the said section.

A copy each of the letter of the Supdt. of Police, Bhagalpur, and the F.I.R. of the case is attached herewith.

By order of the Governor of Bihar

(Sd.) H. N. Thakur,

Joint Secretary to Government."

It appears that on the 7th of May, 1957, the Supdt. of Police sent another letter to the Secretary of the Government of Bihar under section 197 of the Criminal Procedure Code as well. On receipt of that letter sanction was granted on 25th June, 1957, in the following terms :—

"No. 2250-D.—Whereas the Governor of Bihar has considered the facts stated in the F.I.R. and the letter No. 1195 Cr. dated the 25th March, 1957, of the Supdt. of Police, Bhagalpur, addressed to the Secretary to the Government of Bihar, Development Dept. (copy enclosed) through the Commissioner, Bhagalpur Division and whereas the Governor of Bihar has reasons to believe on the consideration of the facts mentioned in the aforesaid documents, that Shri Ram Sagar Pandit, Lecturer (now under suspension), Sabour Agricultural College, Bhagalpur has committed offences under clause (2) read with clause (3) of section 5 of the Prevention of Corruption Act, 1947 (II of 1947).

Now, therefore, in partial modification of the sanction accorded in Government Order No. 1136-D dated the 11th April, 1957, the Governor of Bihar, in pursuance of the provisions laid down in section 6 of the said Act and under section 197 of Criminal Procedure Code, is pleased to accord sanction to the prosecution of the aforesaid Shri Ram Sagar Pandit under the said section. A copy each of the letter of the Supdt. of Police, Bhagalpur, and the First Information Report of the case is attached herewith.

By order of the Governor of Bihar (Sd.) H. N. Thakur, 25th June, 1957, Joint Secretary to Government, Government of Bihar, Development Department."

The said sanctions show that the sanctioning authority has considered the facts stated in the First Information Report and the letter No. 1195-Criminal, dated 25th March, 1957, written by the Supdt. of Police. The First Information Report was lodged by the Sub-Inspector of Police. It was written by the said Sub-Inspector to the Officer-in-charge, Kotwali Police Station. That letter in detail gives the financial position of the Appellant, his meagre resources, large Bank balances and his possession of other funds. It also narrates how during the years 1950 and 1952 huge quantities of pumping sets worth Rs. 58 or 59 lakhs were purchased by the Agricultural Department of the State of Bihar, how the accused was in charge of the scheme of purchase and distribution of the same to various agriculturists and how he was in a position to take illegal gratification. It further states that the accused was reported to have committed some acts of commission and omission by showing favours to different firms. It concludes with an averment that the accused committed the offence of criminal misconduct as defined in section 5 (2) of the Prevention of Corruption Act, 1947, and was liable to be punished under sub-section (2), read with sub-section (3) of section 5 of the Act. The letter written by the Superintendent of Police to the Secretary to the Government of Bihar, Development Department, gives again in detail the said facts. It also gives the Appellant's inadequate economic resources and the disproportionately large amounts found in his possession. It also states that after the enquiry had started he withdrew the entire money from the Banks and disposed of the car, which he had purchased earlier. The letter further discloses that huge amounts of commission were debited in the account books of various firms against the agents who received orders for the supply of the pumping sets to Agricultural Department, Bihar. It particularises that one Baidyanath Saran, Proprietor of Messrs. Seekers & Co., Patna, stated that he had paid a sum of Rs. 400 to the accused as illegal gratification in respect of the supply of the pumping sets as demanded by him. The explanation offered by

the accused for coming into possession of such large amounts is also given which appears, on the face of it, to be unacceptable. The letter on the said facts purports to draw the conclusion (a) that the accused was receiving money by corrupt and illegal means by abusing his position as a public servant; (b) that he was in possession of pecuniary resources, disproportionate to his known resources of income which he was unable to explain and (c) that the accused had committed an offence, punishable under sub-section (2) read with sub-section (3) of section 5 of the Act. The Supdt. of Police, for the aforesaid reasons requested the Government to give sanction under section 6 of the Prevention of Corruption Act and section 197 of the Criminal Procedure Code, for the prosecution of the Appellant under section 5 (2) and (3) of the Act in a proper criminal Court of law. The First Information Report and the letter give all the necessary facts to satisfy the mind of the sanctioning authority that the Appellant was habitually receiving gratification other than legal gratification within meaning of section 5 (1) (a) of the Act, and that he by his corrupt and illegal means or otherwise was abusing his position as public servant to obtain for himself pecuniary advantage within the meaning of section 5 (1) (d) of the Act. The orders issued by the Government show that it gave the sanction under sub-section (2) read with sub-section (3) of section 5 of the Act, after considering the facts disclosed in the said two documents.

It is, therefore, clear that the learned counsel is not right in his contention that all the relevant facts necessary to satisfy the mind of the sanctioning authority were not placed before it.

The second contention, namely that the sanction was given under section 5 (2) but not under section 5 (1) is based upon a misapprehension of the scope of the said sub-sections. Sub-section (1) describes the ingredients of the offence of criminal misconduct. Sub-section (2) is the penal section, that is the section which imposes punishment for such a criminal misconduct. The sanction refers to sub-section (2) which is the provision that makes criminal misconduct punishable. The sanction *ex hypothesi* must have reference only to criminal misconduct as defined in sub-section (1). The sanction, therefore, though in term sit refers to sub-section (2), in effect must be deemed to relate to sub-section (1) read with sub-section (2), for the expression 'criminal misconduct' in sub-section (2) takes in the definition of criminal misconduct. The second contention therefore has no merits.

Nor are there any merits in the third contention either. It is said that the sanction was given to prosecute the Appellant for committing an offence under sub-section (3) of section 5 of the Act. On that assumption it is contended that sub-section (3) is only a rule of evidence and does not deal with an offence. This is again based upon a misreading of the sanction. The sanction was given under sub-section (2) read with sub-section (3) of section 5 of the Act. The phraseology used indicates the consciousness on the part of the sanctioning authority that sub-section (3) is not a separate offence but it is only a supporting provision to the substantive offence under sub-sections (1) and (2). Sub-section (3) does not create a separate offence. It only lays down a rule of evidence which marks a departure from the well-established principle of criminal jurisprudence that onus is always on the prosecution to bring home the guilt to the accused. Under this provision in the circumstances mentioned therein the Court shall presume unless the contrary is proved that the accused person is guilty of criminal misconduct in the discharge of his official duty. When the sanction is given under sub-section (2) read with sub-section (3) it only means that on the facts disclosed in the said two documents, a case has been made out for drawing a presumption of guilt against the Appellant.

Now we shall proceed to refer to the decisions cited at the Bar. The leading case on the subject is that of the Judicial Committee in *Gokulchand Dwarkadas Morarka v. The King*<sup>1</sup>. Reliance is placed upon the following passage in the judgment :—

"In order to comply with the provisions of Clause 23, it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is plainly desirable that the fact

1. (1948) 1 M.L.J. 243 : L.R. 75 I.A. 30 : A.I.R. 1948 P.C. 82.

should be referred to on the face of the sanction, but this is not essential since clause 23 does not require the sanction to be in any particular form, nor even to be in writing. But if the facts constituting the offence charged are not shown on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority."

Section 6 of the Act also does not require the sanction to be given in a particular form. The principle expressed by the Privy Council, namely, that the sanction should be given in respect of the facts constituting the offence charged equally applies to the sanction under section 6 of the Act. In the present case all the facts constituting the offence of misconduct with which the Appellant was charged were placed before the Government. The second principle, namely, that the facts should be referred to on the face of the sanction and if they do not so appear, the prosecution must prove them by extraneous evidence, is certainly sound having regard to the purpose of the requirements of a sanction. In the present case though the sanction *ex facie* does not disclose the facts, the documents which are exhibited in the case give all the necessary relevant facts constituting the offence of criminal misconduct. This Court in *Biswabhusan Naik v. The State of Orissa*<sup>1</sup> rejected a contention similar to that now raised before us. There the sanction given under section 6 of the Act referred only to sub-section (2) of section 5 of the Act and it did not specify which of the four offences mentioned in section 5 (1) was meant. This Court adverting to a similar contention observed:

"It was evident from the evidence that the facts placed before the Government could only relate to offences under section 161 of the Indian Penal Code and clause (a) of section 5 (1) of the Prevention of Corruption Act. They could not relate to clause (b) or (c). When the sanction was confined to section 5 (2) it could not, in the circumstances of the case, have related to anything but clause (a) of sub-section (1) of section 5. Therefore the omission to mention clause (a) in the sanction did not invalidate it."

The aforesaid two decisions therefore answer the first two contentions of the learned counsel.

Nor does the decision in *Maan Mohan Singh v. State of Uttar Pradesh*<sup>2</sup> help the Appellant. It is stated therein

"the burden of proving that the requisite sanction has been obtained rests on the prosecution and such burden includes proof that the sanctioning authority had given the sanction in reference to the facts on which the proposed prosecution was to be based; and these facts may appear on the face of the sanction or may be proved by extraneous evidence".

The proposition so stated is unexceptionable. In the present case not only the sanction discloses that the sanctioning authority has considered the documents placed before it, but the documents so placed give all the necessary facts constituting the offence of criminal misconduct.

Reference is made to the decision in the case of *Jaswant Singh v. State of Punjab*<sup>3</sup>. There this Court held that after the sanction was granted for the prosecution in respect of one offence, cognizance could not be taken in respect of another offence in respect of which there was no sanction. In that case sanction was granted to prosecute Jaswant Singh Patwari for accepting an illegal gratification of Rs. 50 from one Pal Singh but a charge was framed for his habitual acceptance of illegal gratification. This Court held that the prosecution for the offences under section 5 (1) (e) was valid but the offence of habitually receiving illegal gratification could not be taken cognizance of and the prosecution for that offence was void for want of sanction. This decision is relied upon in support of the contention that the letter of the Supdt. of Police only disclosed a specific act of bribery. This decision has no relevance to the question now raised before us. In the present case the sanction was given for prosecuting the Appellant for criminal misconduct under sections 5 (1) (a) and 5 (1) (d) of the Act. On the basis of the said sanction a charge was framed against the Appellant for his having habitually accepted gratification other than remuneration and

1. (1954) 2 M.L.J. 79 : (1954) S.C.J. 537 :  
A.I.R. 1954 S.C. 359.  
2. A.I.R. 1954 S.C. 637.  
3. (1958) M.L.J. (Cr.) 316 : (1958) S.C.J.  
355 : A.I.R. 1958 S.C. 124.

obtained for himself pecuniary advantage by corrupt and illegal means or by otherwise abusing his position as public servant and thereby committed the offence of criminal misconduct, an offence punishable under sub-section (2) read with sub-sections (1) and (3) of section 5 of Act II of 1947. All the facts necessary therefore to sustain a prosecution under sub-sections (1) (a) and (d) were placed before the sanctioning authority and after having obtained the sanction the appellant was charged in respect of the said offence. This decision therefore does not help the Appellant. For the aforesaid reasons we hold that there are no merits in either of the three contentions raised to invalidate the sanction.

Lastly, it is suggested that the charge is defective inasmuch as it has deprived the Appellant of his opportunity to rebut the presumption raised under sub-section (3) of section 5 of the Act. The charge reads :—

“ I, Brahmdev Narain, Special Judge, Bhagalpur, hereby charge you Ram Sagar Pandit as follows :

That during the period of the years 1951 and 1952, at Sabour P.S. Mofassil and at Bhagalpur Town, P. S. Kotwali, district Bhagalpur, you, being a public servant, *viz.*, Mechanical Assistant Engineer, Sabour Agricultural College habitually accepted gratification other than legal remuneration and obtained for yourself pecuniary advantage by corrupt and illegal means or by otherwise abusing your position as public servant with the result that during the said period you came in possession of a sum of about Rs. 62,000 which was disproportionate to your known sources of income and which you could not satisfactorily account and you thereby committed the offence of criminal misconduct, an offence punishable under sub-section (2) read with sub-sections (1) and (3) of section 5 of Act (II of 1947) the Prevention of Corruption Act, 1947 and within my cognizance and I hereby direct you be tried by this Court on the said charge.”

Sub-section (3) of section 5 is :—

“ In any trial of an offence punishable under sub-section (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the Court shall presume, unless the contrary is proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption. ”

This section does not incorporate a separate head of offence. It is only a rule of evidence. If the accused is in possession of pecuniary resources for which he cannot satisfactorily account, there will be a presumption unless the contrary is proved that the accused person is guilty of criminal misconduct. But this presumption can only apply when there is a specific charge of criminal misconduct visualised under one or the other of clauses (a) to (d) of section 5. To illustrate, if there is a charge that an accused has taken a bribe of Rs. 10,000 from a complainant as a reward, the prosecution can rely upon the presumption by establishing that the accused was in possession of pecuniary resources or property disproportionate to his known sources of income. But the presumption so raised in the circumstances mentioned in the sub-section can be rebutted by the accused in two ways, (1) by adducing evidence to prove that he came into possession of the said resources in a lawful manner and (2) though he has failed to explain the circumstances under which he came into possession of the said resources, by proving by other evidence that he did not take any illegal gratification. The presumption raised under sub-section (3) cannot obviously prevent an accused from proving his innocence in respect of the specific charge levelled against him. On this legal position it is contended that as the charge does not disclose the amounts he took as bribes and the persons from whom he had taken, the Appellant was not given an opportunity to prove his innocence. But in our view this circumstance does not invalidate the charge though it may be a ground for asking for better particulars. The charge as framed clearly stated that the Appellant habitually accepted gratification other than legal remuneration and obtained pecuniary advantage by corrupt and illegal means. The charge contains allegations making out an offence under section 5 (1) of the Act. The charge no doubt should have contained better particulars so as to enable the Appellant to prove his case but

the accused never complained that the charge did not contain the necessary particulars. The record discloses that the accused understood the case against him and adduced all the evidence which he wanted to place before the Court. Section 225 of the Criminal Procedure Code says that :

“ no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.”

That apart, the appellate Court could have set aside the conviction if the defect in the charge had occasioned a failure of justice but the Appellant did not raise any objection either before the Special Judge or in the High Court on the score that the charge was defective and that he was misled in his defence on the ground that particulars of the persons from whom the bribes were taken were not mentioned. Nor such an objection has been taken in the Special Leave petition, nor in the Statement of the Case. This objection is an afterthought and cannot be allowed to be raised at this stage of the proceedings.

The appeal fails and is dismissed.

V.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J.R. MUDHOLKAR, JJ.

Ramji Missar and another

*.. Appellant \**

*v.*

The State of Bihar

*.. Respondent.*

*Probation of Offenders Act ( XX of 1958), section 6 (1) —Age of the accused—Point of time—Time of sentence.*

The object of Probation of Offenders Act is to prevent the turning of youthful offenders into criminals by their association with hardened criminals of mature age within the walls of a prison. The method adopted is to attempt their possible reformation instead of inflicting on them the normal punishment for their crime. If this were borne in mind it would be clear that the age referred to by the opening words of section 6 (1) should be that when the Court has to choose between the two alternatives which the Act in supersession of the normal penal law vests in it, *viz.*, sentence the offender to imprisonment or to apply to him the provisions of section 6 (1) of the Act.

The Courts mentioned in section 11, be they trial Courts or Court exercising appellate or revisional jurisdiction, are thereby empowered to exercise the jurisdiction conferred on Courts not only under sections 3 and 4 and the consequential provisions but also under section 6.

An appellate Court has an unfettered discretion in dealing with a case which comes before it under section 11 and its discretion and powers are not to be governed by the terms of section 6 (1).

On the terms of the section, on grounds of logic as well as on the theory that the order passed by an appellate Court is the correct order which the trial Court should have passed, the crucial date must be that upon which the trial Court had to deal with the offender.

Appeal by Special Leave from the Judgment and Order, dated 10th May, 1962 of the Patna High Court in Criminal Appeal No. 339 of 1961.

*B. K. P. Sinha and A. G. Ratnaparkhi, Advocates, for Appellant.*

*S. P. Varma, Advocate and P. D. Menon, Advocate for R. N. Sachthey, Advocate, for Respondent.*

The Judgment of the Court was delivered by

*Rajagopala Ayyangar, J.*—This appeal by Special Leave granted by us on 7th September, 1962 raises for consideration the proper construction of sections 6 and 11



of the Probation of Offenders Act, 1958 (Central Act XX of 1958), hereinafter called the 'Act'.

The appellants are two brothers—Ramji and Basist. It was alleged that these two assaulted one Sidhnath (P.W. 2) who as a result suffered grievous injuries. Basist, the younger brother, was charged before the Assistant Sessions Judge, Arrah, with the commission of an offence under section 307, Indian Penal Code, for the reason that the injury he inflicted was a bhala blow under circumstances "that if by that act death had been caused he would have been guilty of murder," and as the injury actually sustained was grievous he was further charged with causing grievous hurt under section 326, Indian Penal Code. The elder brother who too caused hurt to the victim was charged under section 324, Indian Penal Code. The Assistant Sessions Judge held the prosecution case as alleged established against both the accused. It is now necessary to mention that according to the Sessions Judge Ramji was 21 years old and Basist 19. Section 6 of the Act enacts :

"6. (1) When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the Court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under section 3 or section 4, and if the Court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.

(2) For the purpose of satisfying itself whether it would not be desirable to deal under section 3 or section 4 with an offender referred to in sub-section (1), the Court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender."

The terms of this section excluded the application of its provisions to Basist who was found guilty of an offence punishable with imprisonment for life (both sections 307 and 326, Indian Penal Code). He accordingly sentenced Basist to undergo rigorous imprisonment for six years under section 307, Indian Penal Code and to four years under section 326, Indian Penal Code, the sentences to run concurrently. As regards Ramji, the elder brother, he considered it inappropriate to afford him the benefit of this provision and recorded his finding on this matter in these terms :

"So far as accused Ramji is concerned I am not inclined to take recourse to the provisions of the Probation of Offenders Act, 1958, because the act of assault on the informant on the part of this accused is premeditated.

He sentenced him to undergo rigorous imprisonment for two years under section 324, Indian Penal Code.

Both the accused filed an appeal to the High Court. The learned single Judge who heard the appeal considered the evidence in the case and the circumstances in which the injury was inflicted and held that there was no intention on the part of Basist to cause grievous hurt to P.W. 2, with the result that as against him the conviction under section 307 as well as that under section 326, Indian Penal Code, were set aside and in their place he recorded a finding of guilty in respect of an offence under section 324, Indian Penal Code, for which he imposed a sentence of rigorous imprisonment for two years. As against Ramji the conviction was maintained but being informed by counsel that that accused had been suffering from tuberculosis the sentence of imprisonment was reduced from 2 years to 9 months.

It was urged before the High Court that the reasons assigned by the Assistant Sessions Judge for refusing to apply the provisions of section 6 of the Act to accused Ramji were not proper. This submission was, however, repelled since the learned Judge considered the section inapplicable to that accused because, though he might have been "under 21 years of age" on the date of the offence (October 17, 1960), "he was not a person under 21 years of age" on 24th May, 1961 when the Sessions Judge found him guilty and sentenced him to a term of imprisonment, holding that the crucial date on which the age had to be determined being not the date of the offence but the date on which as a result of a finding of guilty sentence had to be passed against the accused.

As regards Basist also, it was urged before the High Court that in view of the alteration in the finding recorded as regards his guilt, the beneficial provisions of section 6 of the Act became applicable to him, the learned Judge holding that he could pass the same order as the trial Court could have done because of the provisions contained in section 11 of the Act reading:

" 11. (1) Notwithstanding anything contained in the Code or any other law, an order under this Act may be made by any Court empowered to try and sentence the offender to imprisonment and also by the High Court or any other Court when the case comes before it on appeal or in revision.

(2) Notwithstanding anything contained in the Code, where an order under section 3 or section 4 is made by any Court trying the offender (other than a High Court), an appeal shall lie to the Court to which appeals ordinarily lie from the sentences of the former Court.

(3) In any case where any person under twenty-one years of age is found guilty of having committed an offence and the Court by which he is found guilty declines to deal with him under section 3 or section 4, and passes against him any sentence of imprisonment with or without fine from which no appeal lies or is preferred, then, notwithstanding anything contained in the Code or any other law, the Court to which appeals ordinarily lie from the sentences of the former Court may, either of its own motion or on an application made to it by the convicted person or the probation officer, call for and examine the record of the case and pass such order thereon as it thinks fit.

(4) When an order has been made under section 3 or section 4 in respect of an offender, the appellate Court or the High Court in the exercise of its power of revision may set aside such order and in lieu thereof pass sentence on such offender according to law :

Provided that the Appellate Court or the High Court in revision shall not inflict a greater punishment than might have been inflicted by the Court by which the offender was found guilty."

The learned Judge however, declined to do so observing :

"No doubt, under the provisions of section 11 of the Probation of Offenders Act this Court is competent to make an order, but it is entirely discretionary for this Court to exercise the power conferred on it under section 11. In view of the fact that the Court below has already dealt with this matter, though not very satisfactorily, I do not consider it desirable to deal with the cases of these appellants under the provisions of the Probation of Offenders Act at this stage."

And instead passed the sentence of imprisonment as already mentioned. It is the correctness of these orders refusing to apply the provisions of section 6 of the Act to the cases of the appellants that is raised for consideration in this appeal.

Taking first the case of Ramji, the elder brother, we entirely agree with the High Court in their construction of section 6. The question of the age of the person is relevant not for the purpose of determining his guilt but only for the purpose of the punishment which he should suffer for the offence of which he has been found, on the evidence, guilty. The object of the Act is to prevent the turning of youthful offenders into criminals by their association with hardened criminals of mature age within the walls of a prison. The method adopted is to attempt their possible reformation instead of inflicting on them the normal punishment for their crime. If this were borne in mind it would be clear that the age referred to by the opening words of section 6 (1) should be that when the Court is dealing with the offender, that being the point of time when the Court has to choose between the two alternatives which the Act in supersession of the normal penal law vests in it, *viz.*, sentence the offender to imprisonment or to apply to him the provisions of section 6 (1) of the Act. As the High Court has found that Ramji was not a person under the age of 21 on 24th May, 1961 when the learned Sessions Judge found him guilty it is clear that section 6 (1) of the Act has no application to him.

The position in regard to the second appellant, Basist, stands on an entirely different footing. He was said to be of the age of 19 by the Sessions Judge which is apparently a reference to the time when the offence was committed. If so, he would have been about 20 at the time when the Sessions Judge found him guilty of offences under sections 307 and 326, Indian Penal Code and possibly also below 21 at the time when the High Court altered his conviction into one under section 324, Indian Penal Code.

If by reason of his age, and the offence of which he has been found guilty the provisions of section 6 (1) are not excluded, the question that has next to be considered is whether the learned Judge had an absolute and unfettered discretion to pass or refuse an order under the Act by virtue of the terms of section 11 of the Act. This.

would obviously turn on (1) whether or not section 6 (1) was applicable to the High Court, and (2) the proper construction of the terms of section 11 which empowers appellate and revisional Courts to pass orders under the Act.

It was urged by learned counsel for the appellant that the High Court when it recorded a finding that Basist was guilty of an offence under section 324, Indian Penal Code, was squarely within the words "the Court by which a person is found guilty" occurring in section 6 (1) as it was only by that Court that for the first time the accused was found guilty of an offence which was not excluded by the opening words of that section. Learned counsel relied for this position on the judgment of the High Court of Madras in *Narayanawami Naidu v. Emperor*<sup>1</sup> following a decision of the Allahabad High Court to a similar effect in *Emperor v. Birch*<sup>2</sup>. The question that arose in the first of the above cases related to the scope of the words "Court before whom he is convicted" occurring in section 562, Criminal Procedure Code, as it originally stood. The provision in section 562, Criminal Procedure Code, is somewhat in *pari materia* with section 4 of the Act wherein a person found guilty of having committed offences not punishable with death or imprisonment for life may, instead of being sentenced to imprisonment, be released on entering into a bond. In the Code as originally enacted which the decision referred to had to deal with, there was no express provision as regards the power of appellate Courts to pass similar orders. The accused in that case was tried and convicted by a Magistrate under sections 447 and 352, Indian Penal Code, and sentenced to undergo rigorous imprisonment for two weeks. The accused filed an appeal and the Deputy Magistrate who heard it while affirming the conviction directed his release on his executing a bond applying to him the provisions contained in section 562, Criminal Procedure Code. The District Judge considered that the Deputy Magistrate had exceeded his jurisdiction in making this order and referred the question to the High Court. The learned Judges rejected the Reference observing that the words "Court before whom he is convicted" used in section 562 were not intended to limit the power of making orders under that section to the Court of first instance.

It might be mentioned that the Code has since been amended by the addition of sub-section (2) which runs :

"An order under this section may be made by an appellate or by the High Court when exercising its powers of revision"

so that it is no longer necessary for an appellate or revisional Court to rely on any construction of the words "the Court by which the person is found guilty" for invoking or exercising its jurisdiction. The position therefore comes to this: the words referring to "the Court by which a person is found guilty" are wide enough to include an appellate Court, and particularly so where it is the appellate Court alone which by reason of its finding on the guilt of the accused becomes for the first time vested with the power or the duty to act under the section. Undoubtedly if section 11 were attracted to the case, then there would be no need for invoking the jurisdiction of the High Court under section 6, and indeed in those circumstances the proper construction of section 6 itself would be to exclude an appellate or revisional Court, since a redundancy could not have been intended by the statute.

The first question would therefore be to ascertain whether the jurisdiction of powers envisaged by section 6 (1) are within the scope of the jurisdiction conferred by section 11. The power conferred on the High Court is to pass "an order under the Act." One is thrown back on the Act for determining what these are. They are :

- (1) Under section 3 a Court might order the release of a person found guilty of an offence of the type specified in the section after due admonition.
- (2) Under section 4 an order may be passed in circumstances set out in it releasing such person on entering into a bond with or without sureties or pass a supervision order.

(3) Orders which are consequential on orders under section 3 or section 4 like those for which provision is made by sections 5 and 9. So far as section 6 is concerned it is, to say the least, doubtful whether it involves the "passing of an order," for the operative words are that the Court finding a person guilty refrains from passing any sentence. An injunction enacted by this Act against passing a sentence of imprisonment which the Court under the normal law is empowered or enjoined to pass can hardly be termed "passing an order" under the Act. If this were correct, the result would be that on the reasoning which the High Courts of Madras and Allahabad adopted to construe the words in section 562 of the Code, the High Court, when hearing an appeal, would be subject to the provisions of section 6.

It is however possible that the words in section 11 (1) "pass an order under the Act" are not to be construed so strictly and literally, but to be understood to mean "to exercise the powers or jurisdiction conferred by the Act." This wider interpretation might perhaps be justified by the scope and object of this section. Section 11 is to apply "notwithstanding anything in the Code or any other law" to all Courts empowered to sentence offenders to imprisonment. To read a beneficial provision of this universal type in a restricted sense, so as to confine the power of these Courts to the exercise of the powers under sections 3 and 4 alone would not, in our opinion, be in accord with sound principles of statutory interpretation. We are, therefore, inclined to hold that the Courts mentioned in section 11 be they trial Courts or Courts exercising appellate or revisional jurisdiction are thereby empowered to exercise the jurisdiction conferred on Courts not only under sections 3 and 4 and the consequential provisions but also under section 6.

Accepting therefore the interpretation of section 11 (1) which was urged by Counsel for the respondent, that the Courts mentioned in it could pass orders under sections 3, 4 or 6, the question next to be considered relates to the incidence of that jurisdiction with regard to the amount and nature of discretion vested in these Courts.

It was submitted on behalf of the appellant that the power conferred on the High Court and other Courts by section 11 (1) was neither more nor less than those of the Court under section 6 (1) and that the former were bound to exercise it, subject to the same conditions and limitations as are set out in the latter provision. Stated in other words the interpretation suggested was that the terms of section 6 had, so to speak, to be read into the jurisdiction of the Courts acting under section 11 (1). On the other hand, the contention urged by the respondent was that section 11 (1) had to be read on its own language and so read it conferred on the Courts mentioned in it, an absolute and unfettered discretion "to pass or not to pass an order under the Act" as they thought fit having regard to the circumstances of each case.

A considerable portion of the argument by the respondent was based on the import of the facultative verb "may" in the words "may be made" occurring in the operative part of the sub-section as conferring a discretion and that as no limitations were placed by this or any other section on the exercise of this discretion, the same should be held to be unfettered and therefore capable of being exercised, no doubt, on judicial principles but not subject to any statutory limitations. It might be mentioned that from the relevant passage of the judgment of the High Court which we have extracted, it would appear that the learned Judge has proceeded on this interpretation of section 11.

Though the word "may" might connote merely an enabling or permissive power in the sense of the usual phrase "it shall be lawful", it is also capable of being construed as referring to a compellable duty, particularly when it refers to a power conferred on a Court or other judicial authority. As observed in Maxwell on Statutes :

"Statutes which authorise persons to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when confer-

ring the authority in terms simply enabling and not mandatory. In enacting that they 'may' or 'shall, if they 'think fit' or, 'shall have power', or 'that it shall be lawful' for them to do such acts, a statute appears to use the language of mere permission; but it has been so often decided as to have become an axiom that in such cases such expressions may have—to say the least—a compulsory force."

The fact that the power is conferred on a Court might militate against the literal interpretation of "may" suggested by the respondent. This apart, the power conferred by section 11 (1) is to pass "an order under the Act" and the question arises as to the precise import of these words, and in particular whether these words would not imply that the order to be passed would be subject to the same limitations or conditions as the orders under what might be termed the primary provisions of the Act. Thus section 3 empowers a Court to release certain offenders on probation of good conduct after due admonition, and it lays down certain tests as a guidance or the basis upon which that discretion is to be exercised: (1) that no previous conviction should have been proved against him, and (2) that the Court by which the person is found guilty should be of the opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender it is expedient so to do. Similarly, section 4 empowers a Court to release certain offenders on probation of good conduct. The criteria laid down there and the guidance set out is that the Court by which the person is found guilty should be of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, with a proviso that the power is not to be exercised unless the Court were satisfied that the offender or his surety has a fixed place of abode or regular occupation in the place over which the Court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

Would it be a proper construction of section 11 (1) to hold that the High Court etc. could pass orders in appeal or revision without reference to these standards, tests or guidance which the statute has prescribed for the primary Courts? We are clearly of the opinion that this is capable only of a negative answer and that the power conferred on appellate or other Courts by section 11 (1) was of the same nature and characteristics and subject to the same criteria and limitations as that conferred on the Courts under sections 3 and 4. We are confirmed in this view by the terms of section 11 (3). If this were so it would not be possible to adopt a different rule of interpretation when one came to consider the power under section 6. It cannot, for instance, be suggested that the High Court could in its discretion exercise the power under section 6 in the case of a person who is above the age of 21; nor where a person is found guilty of an offence punishable with death or imprisonment for life. These limitations on the exercise of the discretion have surely to be gathered only from the terms of section 6 (1). If section 6 (1) applies so far to restrict the absolute and unfettered discretion implied by the word "may", it appears to us that logically the conclusion is inescapable that the entirety of section 6 (1) applies to guide or condition the jurisdiction of the High Court under section 11 (1). We therefore reject the submission made to us on behalf of the respondent that an appellate Court has an unfettered discretion in dealing with a case which comes before it under section 11 and that its discretion and powers are not to be governed by the terms of section 6 (1).

The question next to be considered is the result of applying the terms of section 6 (1) to a person in the position of Basist. It was not disputed by learned counsel for the respondent that the learned Judge of the High Court failed to consider the case of this accused with reference to the terms of section 6 since he has proceeded on the basis that he had an unfettered discretion in the matter and which in the circumstances of the present case he was not inclined to exercise in favour of the accused. The order of the High Court in so far as it relates to the second appellant—Basist—must therefore be set aside and the High Court directed to exercise its discretion on the basis that it was judging the matter with reference to the criteria laid down in section 6.

We shall now proceed to consider one question which was mooted before us in regard to the crucial date for reckoning the age where an appellate Court modifies the judgment of the trial Judge, when section 5 becomes applicable to a person only on the decision of an appellate or a revisional Court. Is the age of the offender to be reckoned as at the date of the judgment of the trial Judge or is it the date when the accused is, for the first time, in a position to claim the benefit of section 6. We consider that on the terms of the section, on grounds of logic as well as on the theory that the order passed by an appellate Court is the correct order which the trial Court should have passed, the crucial date must be that upon which the trial Court had to deal with the offender. In this view as Basist was admittedly below 21 years of age at the time of the judgment of the Assistant Sessions Judge, section 6 was not inapplicable to him even assuming he was above that age by the date of the order in appeal.

The appeal is accordingly allowed in part *i.e.*, in regard to the second appellant—Basist and is remanded to the High Court to consider the proper order to be passed in his case by applying the provisions of section 6 of the Probation of Offenders Act, 1958.

V.S.

*Appeal allowed in part.*

# THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S.J. IMAM, K. SUBBA RAO, RAJAGOPALA AYYANGAR AND J.R. MUDHOLKAR, JJ.

Venkata Reddy and others

.. Appellants\*

v.

Pethi Reddy

.. Respondent.

*Provincial Insolvency Act (V of 1920), section 28-A introduced by Act XXV of 1948, First Proviso—Applicability—“Final decision”—Construction—Insolvency of father—Sale of entire joint family property by the Official Receiver—Suit for partition by sons—Preliminary decree for partition holding sons’ interest did not vest in the Official Receiver—Amounts to final decision—Code of Civil Procedure (V of 1908), section 97—Preliminary decree—Finality and executability.*

The word decision even in its popular sense means a concluded opinion. Where therefore the decision is embodied in the judgment which is followed by a decree, finality must naturally attach itself to it in the sense that it is no longer open to question by either party except in an appeal, review or revision petition as provided for by law. It would mean a decision which would operate as *res judicata* between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code of Civil Procedure.

A preliminary decree passed, whether it is in a mortgage suit or a partition suit is not a tentative decree but must, in so far as the matters dealt with by it are concerned be regarded as conclusive. No doubt in suits which contemplate the making of two decrees a preliminary and a final decree—the decree which would be executable would be the final decree. But the finality of a decree or decision does not necessarily depend upon its being executable. The Legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the Court arrived at the earlier stage also has finality attached to it. Section 97 of the Code clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the Court passing that decree.

The sale by the Official Receiver during the insolvency of the father was the subject of a final decision by a competent Court in as much as that Court decided in the preliminary decree in the partition suit that the sale was of no avail to the purchaser as the Official Receiver had no power to make that sale. Nothing more was required to be established by the sons before being entitled to the protection of the First Proviso to section 28-A of the Provincial Insolvency Act.

Appeal by Special Leave from the Judgment and Decree dated the 1st December, 1955 of the Madras High Court in Second Appeal No. 736 of 1953.†

R. Ganapathy Iyer, and R. Thiagarajan, Advocates and G. Gopalakrishnan, Advocate of M/s. Gagrath & Co., for Appellants.

V.S. Prashar, A.S. Chaturvedi and K.R. Chaudhuri, Advocates, for Respondent.

\*Civil Appeal No. 199 of 1960.

30th November, 1962:

† (1956) 1 M.L.J. 576.

The Judgment of the Court was delivered by

*Mudholkar, J.*—Only one question arises for consideration in this appeal by Special Leave and that is the meaning to be given to the expression 'final decision' occurring in the First Proviso to section 28-A of the Provincial Insolvency Act, 1920 (Act No. V of 1920), introduced by Act No. XXV of 1948.

For appreciating the argument advanced before us a few facts have to be stated. Venkata Reddy, the father of the appellants, was adjudicated an insolvent by the Sub-Court, Salem, in I.P. No. 73 of 1935. At that time only the appellants 1 and 2 were born while the third appellant was born later. The father's one-third share was put up for auction by the Official Receiver and was purchased by one Karuppan Pillai for Rs. 80. The Official Receiver then put up for auction the two-thirds share belonging to appellants 1 and 2 on 27th July, 1936 which was purchased by the same person for Rs. 341. He sold the entire property to the respondent, Pethi Reddy on 25th May, 1939, for Rs. 300.

The appellants instituted a suit on 1st February, 1943 for the partition of the joint family property to which suit they made Pethi Reddy a party and claimed thereunder two-thirds share in the property purchased by him. In that suit it was contended on behalf of the respondent that on their father's insolvency the share of the appellants in the joint family property also vested in the Official Receiver and that he had the power to sell it. The contention was negatived by the trial Court which passed a preliminary decree for partition in favour of the appellants. The decree was affirmed in appeal by the District Judge and eventually by the High Court in Second Appeal, except with a slight variation regarding the amount of mesne profits. The decision of the High Court is dated 18th November, 1946. On 18th January, 1946, the appellants made an application for a final decree which was granted *ex parte* on 17th August, 1946. At the instance of the present respondent this decree was set aside. By that time the new provision, that is, section 28-A of the Provincial Insolvency Act had come into force. On the basis of this provision it was contended by the respondent that the appellants were not entitled to the allotment of their two-thirds share in the property purchased by him inasmuch as that share had also vested in the Official Receiver. The District Munsif held that Act XXV of 1948 which introduced section 28-A did not affect the preliminary decree for partition since it had been passed on 20th August, 1943. He, therefore, restored the *ex parte* final decree which had been set aside on 17th December 1950. The appeal preferred by the respondent against the decision of the District Munsif was dismissed by the Principal Subordinate Judge, Salem, whereupon he preferred a Second Appeal before the High Court. The High Court allowed the appeal and dismissed the application of the appellant for passing the final decree.

Section 28-A of the Provincial Insolvency Act runs as follows :

"The property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge :

Provided that nothing in this section shall affect any sale, mortgage or other transfer of the property of the insolvent by a Court or Receiver or the Collector acting under section 60 made before the commencement of the Provincial Insolvency (Amendment) Act, 1948, which has been the subject of a final decision by a competent Court :

Provided further that the property of the insolvent shall not be deemed by any reason of anything contained in this section to comprise his capacity referred to in this section in respect of any such sale, mortgage or other transfer of property made in the State of Madras after 28th July, 1942, and before the commencement of the Provincial Insolvency (Amendment) Act, 1948."

The Objects and Reasons set out in the Bill which sought to introduce this provision were to bring the provisions of the Provincial Insolvency Act in line with those of the Presidency Towns Insolvency Act in so far as the vesting of the joint family property in the Official Receiver upon the father's insolvency was concerned. While under the Presidency Towns Insolvency Act, in a case of this kind, the disposing power of the father over the interest of his undivided sons also vests in the

Official Receiver and not merely the father's own interest in the joint family property, there was divergence of opinion amongst the High Courts in India as to whether under the Provincial Insolvency Act the father's disposing power over his undivided sons' interest also vests in the Official Receiver. A Full Bench of the Madras High Court held in *Ramasastrulu v Balakrishna Rao*<sup>1</sup>, that it does not. It was in the light of this decision that in the appellants' suit for partition, a preliminary decree was passed with respect to their two-thirds interest in the joint family property which had been sold by the Official Receiver. In the course of the decision of the Full Bench a suggestion was made that the Legislature should step in and bring the provisions of the Provincial Insolvency Act in the relevant respect in line with those of the Presidency Towns Insolvency Act.

The new provision makes it clear that the law is and has always been that upon the father's insolvency his disposing power over the interest of his undivided sons in the joint family property vests in the Official Receiver and that consequently the latter has a right to sell that interest. The provision is thus declaratory of the law and was intended to apply to all cases except those covered by the two provisos. We are concerned here only with the First Proviso. This Proviso excepts from the operation of the Act a transaction such as a sale by an Official Receiver which has been the subject of a final decision by a competent Court. The short question, therefore, is whether the preliminary decree for partition passed in this case which was affirmed finally in Second Appeal by the High Court of Madras can be regarded as a final decision. The competence of the Court is not in question here. What is, however, contended is that in a partition suit the only decision which can be said to be a final decision is the final decree passed in the case and that since final decree proceedings were still going on when the Amending Act came into force the First Proviso was not available to the appellants. It is contended on behalf of the appellants that since the rights of the parties are adjudicated upon by the Court before a preliminary decree is passed that decree must, in so far as rights adjudicated upon are concerned, be deemed to be a final decision. The word 'decision' even in its popular sense means a concluded opinion (see Stroud's Judicial Dictionary, 3rd ed., Vol. I, p. 743). Where, therefore, the decision is embodied in the judgment which is followed by a decree finality must naturally attach itself to it in the sense that it is no longer open to question by either party except in an appeal, review or revision petition as provided for by law. The High Court has, however, observed :

"The mere declaration of the rights of the plaintiff by the preliminary decree, would, in our opinion not amount to a final decision for it is well known that even if a preliminary decree is passed either in a mortgage suit or in a partition suit, there are certain contingencies in which such a preliminary decree can be modified or amended and therefore would not become final."

It is not clear from the judgment what the contingencies referred to by the High Court are in which a preliminary decree can be modified or amended unless what the learned Judges meant was modified or amended in appeal or in review or in revision or in exceptional circumstances by resorting to the powers conferred by sections 151 and 152 of the Code of Civil Procedure. If that is what the High Court meant then every decree passed by a Court including decrees passed in cases which do not contemplate making of a preliminary decree are liable to be "modified and amended". Therefore, if the reason given by the High Court is accepted it would mean that no finality attaches to decree at all. That is not the law. A decision is said to be final when, so far as the Court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as *res judicata* between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees a



preliminary decree and a final decree—the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The Legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the Court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to section 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the Court passing that decree.

The High Court, however, thinks that a decision cannot be regarded as final if further proceedings are required to be taken for procuring the relief to which a party is held entitled by that decision. In support of its view the High Court has referred to the following observations in *In re A Debtor*<sup>1</sup> :

“It is clear, therefore, that further proceedings will be necessary to get the money out of Court and I think it is also clear that the order of 24th October, in its own terms, did not finally determine the right of the petitioner, or any one else, in respect of the sum to be paid. In my opinion, therefore, the order is not a ‘final order.’”

In that case the Divorce Court made an order that

“The co-respondent do within seven days from the service of this order pay into Court the sum of £67 *1s. 9d.* being the amount of the petitioner’s costs, as taxed and certified by one of the Registrars of this Division.”

The order was made in that form because at that time the ultimate fate of the petition was undecided. No doubt, the decree *nisi* had been passed but it had yet to be made absolute and the right of the petitioner to receive the costs might never have been brought to fruition. The money had therefore to be paid into the Court. A little later a further order was made by the President of the Divorce Court in these terms :

“Upon hearing the Solicitors for the petitioner I do order that the order herein dated 11th July, 1928, be varied and that (the debtor) the co-respondent do within seven days from the service of this order pay to Messrs. H. L. Lumley & Co., of 36 Piccadilly W-1, the Solicitors of the petitioner, the sum of £67 *1s. 9d.* being the amount of the petitioner’s taxed costs as taxed and certified by one of the Registrars of this Division, the said Solicitors undertaking to lodge in Court any sums recovered under this order.”

Pursuant to this order the Solicitors gave an undertaking required by the Court to the Registrar on 26th October. On 5th November, the decree *nisi* was made absolute. On 2nd January, 1929, a bankruptcy notice was issued by the Solicitors against the debtor for payment to them of the amount of £67 *1s. 9d.* The co-respondent did not comply with the bankruptcy notice and accordingly on 27th January, the Solicitors presented a bankruptcy petition against him. Overruling the objection by the co-respondent, that is, the debtor that the bankruptcy notice was bad on, amongst other things, the ground that the second order made by the President of the Divorce Division was not a final order within sub-section (1) (g) of section 1 of the Bankruptcy Act, 1914, the Registrar made a receiving order. In appeal it was contended that the receiving order was wrong because the Solicitors were not the creditors of the debtor and also because the order for payment of the costs to them was not a final order. While upholding the latter contention Lord Hanworth, M.R., said what has been quoted above and relied upon by the High Court. Upon the particular facts of the case the order was clearly not a final order and in making the observations quoted above the Master of Rolls did not formulate a test for determining what could be regarded as a final order in every kind of case. The observations of the Master of Rolls must be read in the context of the facts of the case decided by him. Read that way those observations do not help the respondents.

Apart from this, the short answer to the reason given by the High Court is that even a money decree passed in a suit would cease to be a final decision because if the judgment-debtor against whom the decree is passed does not pay the amount voluntarily execution proceedings will have to be taken for recovering the amount from

him. It would thus lead to an absurdity if the test adopted by the High Court is accepted. In support of the High Court's view a few decisions were cited at the Bar but as they are of no assistance we have not thought it fit to refer to them. We may, however, refer to a decision of this Court upon which reliance was placed by the respondents. That is the decision in *Vakalapudi Sri Ranga Rao and others v. Mutvala Amamma and others*<sup>1</sup> in which it was held that a particular order was not a final decision within the meaning of the First Proviso to section 28-A. There, in a suit for partition and another suit for possession of the suit property and arrears of rent, it was contended that upon the father's insolvency the Official Receiver was incompetent to sell the son's interest in the joint family property. The contention was negated by the trial Court but upheld in appeals by the Subordinate Judge who remanded the suits to the trial Court with certain directions. Appeals preferred against his decision were dismissed by the High Court. Before the decision of the suits after remand, the Amending Act XXV of 1948 came into force and it was contended before the trial Court that in view of the new provision the sale by the Official Receiver must be held to be good even so far as the sons' interest was concerned. This contention was negated by the trial Court on the ground that the decision of the High Court on the point was a 'final order' within the meaning of the proviso. The District Judge, before whom appeals were preferred, however, negated the contention and held that there was no final order with regard to the sale by the Official Receiver. The High Court reversed the decision of the District Judge but this Court held that the orders of remand made by the Subordinate Judge and upheld by the High Court were interlocutory orders as also were the orders of the High Court in the appeals preferred before it and as such could be challenged in the appeal preferred before this Court against the decision of the High Court in the appeal against, the final decree in the suit. In the case before us the preliminary decree was never challenged at all by preferring any appeal and, therefore, the matters concluded by it are not open to challenge in an appeal against the final decree. Further, a preliminary decree cannot be equated with an interlocutory order within the meaning of section 105, Civil Procedure Code. It will thus be seen that the decision relied upon has no application to the facts of this case.

Our conclusion, therefore, is that in this case the sale made by the Official Receiver during the insolvency of the appellant's father was the subject of a final decision by a competent Court inasmuch as that Court decided that the sale was of no avail to the purchaser as the Official Receiver had no power to make that sale. Nothing more was required to be established by the appellants before being entitled to the protection of the First Proviso to section 28-A. Since they have established what was required to be established by them, they are entitled to a final decree and the High Court was in error in dismissing their application in that behalf. In the result we allow the appeal, set aside the judgment and decree of the High Court and restore that of the trial Court as affirmed in appeal by the learned Subordinate Judge. Cost in this Court and in the High Court will be borne by the present respondent. The remaining costs will be borne as ordered by the first appellate Court.

V.S.

*Appeal allowed.*

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1. C.A. No. 634 of 1957, decided on 29th March, 1961.

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—S. J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

M. Narayanan Nambiar

.. Appellant \*

v.

The State of Kerala

.. Respondent.

*Prevention of Corruption Act (II of 1947), section 5 (1) (d)—Public servant getting a land assigned to his near relation—Offence—‘By otherwise abusing his position’—Dishonest intention to be present—Obtains a benefit—Not necessarily from any party—Includes Government also.*

As the Prevention of Corruption Act is a socially useful measure conceived in public interest it should be liberally construed so as to bring about the desired object *i.e.*, to prevent corruption among public servants and to prevent harassment of the honest among them.

The word “otherwise” has wide connotation and if no limitation is placed on it, the words ‘corrupt’, ‘illegal’ and ‘otherwise’ mentioned in the clause become surplusage, for on that construction every abuse of position is gathered by the clause. So some limitation will have to be put on that word and that limitation is that it takes colour from the preceding words along with which it appears in the clause, that is to say something savouring of dishonest act on his part.

The juxtaposition of the word ‘otherwise’ with the words ‘corrupt or illegal means’, and the dishonesty implicit in the word ‘abuse’ indicate the necessity for a dishonest intention on his part to bring him within the meaning of the clause.

‘Obtains’ in clauses (a) and (b) of section 5 of the Act in the context of those provisions may mean taking a bribe from a third party, but there is no reason why the same meaning should be given to that word used in a different context when that word is comprehensive enough to fit in the scheme of that provision. Nor can it be said that as dishonest misappropriation has been provided for in clause (c), the other cases of wrongful loss caused to the Government by the deceit practised by a public officer should fall outside the section. There is no reason why when a comprehensive statute was passed to prevent corruption this particular category of corruption should have been excluded therefrom because the consequences of such acts are equally harmful to the public as acts of bribery. On a plain reading of the express words used in the clause, every benefit obtained by a public servant for himself, or for any other person by abusing his position as a public servant falls within the mischief of the said clause.

The accused in order to assign the land to his brother-in-law underestimated the value of the said land to conform with the Rules and thereby abused his position as a public servant and obtained for him a valuable thing or a pecuniary advantage within the meaning of the said clause and therefore is guilty of an offence under sub-section (2) of section 5.

The principles of natural justice requires that no Court shall give a finding whether on fact or law and particularly on facts without giving an opportunity to all the contesting parties.

Appeal by Special Leave from the Judgment and Order, dated the 10th April, 1961 of the Kerala High Court in Criminal Appeal No. 143 of 1960.

B. L. R. Iyengar, and T. S. Venkataraman, Advocates, for Appellants.

V. Narayana Menon and Sardar Bahadur, Advocates, for Respondent.

The Judgment of the Court was delivered by

*Subba Rao, J.*—This appeal by Special Leave is preferred against the judgment of the High Court of Kerala, confirming that of the Special Judge, Trivandrum, convicting the accused under section 5 (2), read with section 5 (1) (e) of the Prevention of Corruption Act (II of 1947), hereafter called the Act, and sentencing him to pay a fine of Rs. 1,000, or in default to undergo simple imprisonment for four months.

The appellant was a Special Revenue Inspector for Land Assignment at Manantoddy in Wynad Taluk in the old Malabar district.

The case of the prosecution was that he, by abusing his position as a public servant, got 4 acres and 80 cents of Government land in R.S. No. 376/2 of Tavinhal village assigned in the name of his brother-in-law, P.V. Gopinathan Nambiar, without revealing the fact that he was his brother-in-law and by making false entries in the relevant records showing that the said land contained only 97 trees valued at Rs. 165

whereas the land had actually 150 trees worth Rs. 1,450. The suppression of the fact that the assignee was his brother-in-law and the under-estimate of the value of the land were dishonestly made to circumvent the rules governing the assignment of lands to landless poor.

The Special Judge and on appeal the High Court held that the appellant dishonestly under-estimated the extent and the values of the trees in the said land with a view to help his brother-in-law and thereby committed an offence under section 5 (2), read with section 1 (4) of the Act. Hence the appeal.

Learned counsel for the appellant raised before us two points : (1) Section 5 (d) of the Act does not apply to a case of wrongful loss caused to Government by a public servant who by deceit induced it to part with its property : (2) The High Court acted erroneously in relying upon a report, dated 5th April, 1961 made by the District Forest Officer, Kozhikode, filed by the Public Prosecutor after the appeal was reserved for judgment without giving an opportunity to the appellant to file objections thereto or contesting the correctness of the valuation given therein.

As the first contention turns upon the provisions of section 5 (1), it will be convenient to read the same :—

5. (1) A public servant is said to commit the offence of criminal misconduct in the discharge of his duty—

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in section 161 of the Indian Penal Code, or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable things without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

(d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage.

We are concerned in this case with section 5 (1) (d) of the Act. Under that clause if a public servant by corrupt or illegal means or by otherwise abusing his position as public servant obtains for himself or for any other person valuable thing or pecuniary advantage, he will be guilty of criminal misconduct, punishable under section 5 (2) of the Act with imprisonment for a term which shall not be less than one year and which may extend to 7 years, and shall also be liable to fine. The learned counsel contends that clause (d) being a penal provision shall be strictly construed ; and that if so construed, it would only take in cases of direct benefit obtained by a public servant for himself or for any other person from a third party in the manner described therein and does not cover a case of a wrongful loss caused to the Government by abuse of his power.

This conclusion, the argument proceeds, flows from three circumstances : (1) The benefit obtained in clause (d) must be similar to that provided for in clauses (a) and (b) i.e., benefit obtained from a third party ; (2) the case of wrongful loss to the Government is provided by clause (c) and any other loss which does not fall within that clause is outside the scope of the section ; (3) though the word ' obtains ' has a wide meaning in the setting in which it appears in clause (d), but in view of the fact that the same word is used in a limited sense in clauses (a) and (b), it should be given a limited meaning, namely, " gets a benefit from a third party. " It takes colour from the same word used in clauses (a) and (b). He finally contends that the cons-

struction he is seeking to put forward for our acceptance fits in the general scope and scheme of the Act and that the Legislature intended to leave the losses caused to the Government by the deception caused by its public servant to be dealt with in accordance with the provisions of the Indian Penal Code or other appropriate laws. At the outset we may say that the argument is rather subtle but on a deeper scrutiny of the provisions and the clear phraseology used therein, we find that the contention is not sound.

Before we construe the relevant provisions of the section in the light of the criticism levelled by the learned counsel, it will be useful and convenient to know briefly the scope and the object of the Act. The Long Title of the Act reads :

‘An Act for the more effective prevention of bribery and corruption.’

The Preamble indicates that the Act was passed as it was expedient to make more effective provisions for the prevention of bribery and corruption. The Long Title as well as the Preamble indicate that the Act was passed to put down the said social evil *i.e.* bribery and corruption by the public servant. Bribery is a form of corruption. The fact that in addition to the word “bribery” the word “corruption” is used shows that the legislation was intended to combat also other evils in addition to bribery. The existing law *i.e.* Penal Code was found insufficient to eradicate or even to control the growing evil of bribery and corruption corroding the public service of our country. The provisions broadly include the existing offences under sections 161 and 165 of the Indian Penal Code committed by public servants and enact a new rule of presumptive evidence against the accused. The Act also creates a new offence of criminal misconduct by public servants though to some extent it overlaps on the pre-existing offences and enacts a rebuttable presumption contrary to the well-known principles of Criminal Jurisprudence. It also aims to protect honest public servants from harassment by prescribing that the investigation against them could be made only by police officials of particular status and by making the sanction of the Government or other appropriate officer a pre-condition for their prosecution. As it is a socially useful measure conceived in public interest, it should be liberally construed so as to bring about the desired object, *i.e.*, to prevent corruption among public servants and to prevent harassment of the honest among them.

A decision of the Judicial Committee in ‘*Francis Hart Dyke (Appellant) and Henry William Elliot, and the owners of the steam-tug or Vessel ‘Gauntlet’*’<sup>1</sup> cited by the learned counsel as an aid for construction neatly states the principle and therefore may be extracted :—Lord Justice James speaking for the Board observes at page 191 :—

“No doubt all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included if thought of. On the other hand, the person charged has a right to say that the thing charged although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair commonsense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.”

In our view this passage, if we may say so, restates the rule of construction of a penal provision from a correct perspective. As we will presently show the case of the appellant on the facts found clearly falls not only within the words of clause (d) but also within its spirit. Indeed if his argument be accepted not only we will be doing violence to the language but also to the spirit of the enactment. First taking the phraseology used in the clause, the case of a public servant causing wrongful loss to the Government by benefiting a third party squarely falls within it. Let us look at

the clause "by otherwise abusing the position of a public servant," for the argument mainly turns upon the said clause. The phraseology is very comprehensive. It covers acts done "otherwise" than by corrupt or illegal means by an officer abusing his position. The gist of the offence under this clause is, that a public officer abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage. "Abuse" means misuse *i.e.* using his position for something for which it is not intended. That abuse may be by corrupt or illegal means or otherwise than those means. The word 'otherwise' has wide connotation and if no limitation is placed on it, the words 'corrupt', 'illegal', and 'otherwise' mentioned in the clause become surplusage, for on that construction every abuse of position is gathered by the clause. So some limitation will have to be put on that word and that limitation is that it takes colour from the preceding words along with which it appears in the clause, that is to say something savouring of dishonest act on his part. The contention of the learned counsel that if the clause is widely construed even a recommendation made by a public servant for securing a job for another may come within the clause and that could not have been the intention of the Legislature. But in our view such innocuous acts will not be covered by the said clause. The juxtaposition of the word 'otherwise' with the words 'corrupt or illegal means', and the dishonesty implicit in the word 'abuse' indicate the necessity for a dishonest intention on his part to bring him within the meaning of the clause. Whether he abused his position or not depends upon the facts of each case; nor can the word 'obtains' be sought in aid to limit the express words of the section. 'Obtain' means acquire or get. If a corrupt officer by the said means obtains a valuable thing or a pecuniary advantage, he can certainly be said to obtain the said thing or a pecuniary advantage; but it is said that in clauses (a) and (c) the same word is used and in the context of those clauses it can only mean getting from a third party other than the Government and therefore the same meaning must be given to the said word in clause (d). 'Obtains' in clauses (a) and (b) in the context of those provisions may mean taking a bribe from a third party, but there is no reason why the same meaning shall be given to that word used in a different context when that word is comprehensive enough to fit in the scheme of that provision. Nor can we agree that as dishonest misappropriation has been provided for in clause (c), the other cases of wrongful loss caused to the Government by the deceit practised by a public officer should fall outside the section. There is no reason why when a comprehensive Statute was passed to prevent corruption this particular category of corruption should have been excluded therefrom because the consequences of such acts are equally harmful to the public as acts of bribery. On a plain reading of the express words used in the clause, we have no doubt that every benefit obtained by a public servant for himself, or for any other person by abusing his position as a public servant falls within the mischief of the said clause.

Coming to the spirit of the provision, there cannot be two views. As we have expressed earlier, the object of the Act was to make more effective provision for the prevention of bribery and corruption. Bribery means the conferring of benefit by one upon another, in cash or in kind, to procure an illegal or dishonest action in favour of the giver. Corruption includes bribery but has a wider connotation. It may take in the use of all kinds of corrupt practices. The Act was brought in to purify public administration. When the Legislature used comprehensive terminology in section 5 (1) (d) to achieve the said purpose, it would be appropriate not to limit the content by construction when particularly the spirit of the Statute is in accord with the words used therein.

Two decisions of this Court cited at the Bar indicate that a wide construction was placed by this Court on the provisions of section 5 (1) (d) of the Act. (1) In *Ram Krishna and another v. The State of Delhi*<sup>1</sup> the appellants were prosecuted for offering bribe to a Railway Officer for hushing up the case against them. In that context section 5 (1) (d) was construed by this Court. At page 188 Chandrasekara Ayyar, J. speaking for the Court made the following observations:—

1. (1956) S.C.J. 432 : (1956) 2 M.L.J. (S.C.) 4 : 1956 S.C.R. 182.

"Apart from 'corrupt and illegal means' we have also the words 'or by otherwise abusing his position as a public servant.' If a man obtains a pecuniary advantage by the abuse of his position, he will be guilty under sub-clause (d). Sections 161, 162 and 163 refer to a motive or a reward for doing or forbearing to do something, showing favour or disfavour to any person, or for inducing such conduct by the exercise of personal influence. It is not necessary for an offence under clause (d) to prove all this. It is enough if by abusing his position as a public servant a man obtains for himself any pecuniary advantage, entirely irrespective of motive or reward for showing favour or disfavour."

This Court again in *Dhaneshwar Narain Saxena v. The Delhi Administration*<sup>1</sup>, pointed the wide net cast by this provision in order to put down corruption. There the appellant was an Upper Division Clerk in the office of the Chief Commissioner of Delhi. He knew one Ram Narain who was a fireman serving in Delhi Fire Brigade. The latter sought the assistance of the appellant who had nothing to do with the issuing of licence of fire-arms which was done by the office of the Deputy Commissioner, Delhi. The appellant took a bribe in order to get the licence for him. It was argued that as it was not the duty of the appellant to issue licences or do something in connection therewith, he did not commit any offence within the meaning of section 5 (1) (d) of the Act. This Court rejected his contention. Sinha C.J. speaking for the Court observed at page 198 :

"The Legislature advisedly widened the scope of the crime by giving a very wide definition in section 5 with a view to punish those who, holding public office and taking advantage of their position obtain any valuable thing or pecuniary advantage."

The observations made by this Court in the above two cases though made in a different context show the comprehensive nature of the said provision. We therefore hold that the accused in order to assign the land to his brother-in-law underestimated the value of the said land to conform with the rules and thereby abused his position as a public servant and obtained for him a valuable thing or a pecuniary advantage within the meaning of the said clause and therefore is guilty of an offence under sub-section (2) thereof.

It is next contended that the said finding was vitiated by the fact that the High Court in arriving at that finding relied upon a valuation list prepared by the District Forest Officer and filed into Court without giving an opportunity to the appellant to canvass its correctness. The admitted facts relevant to the argument may be stated. The arguments in the appeals were concluded on 22nd March, 1961. On 6th April, 1961, the Public Prosecutor filed a Valuation list purporting to have been made by the District Forest Officer, Kozhikode. No notice of this list was given to the appellant and therefore he did not file any objections. On 10th April, 1961, the High Court delivered the judgment basing its finding on the said Valuation list and rejecting the appeal. Before the Special Leave was granted by this Court, a report was called for from the High Court with regard to the said facts. The report sent by the Registrar is as follows :—

"The learned Counsel for the appellant contended before the High Court that the method of calculation adopted by P. W. 15 in assessing the value of the timber was not correct and that the following method should have been adopted viz., 'in the case of timber trees to calculate the value of each tree at the rate given in the Madras Forest Manual for that particular species, and for [fuel trees, to calculate the value at the official rate for cart load fixed by the Government.' Thereupon the Court directed in open Court that a statement showing the value of the timber calculated by the above method may be submitted by either of the parties. No statement was filed by the appellant's counsel and on 6th April, 1961, the State filed a Statement. Since the statement was meant only to assist the Court in calculating the correct value of the timber along the lines suggested by the appellant's counsel the matter was not posted for further arguments."

The appellant denied in his affidavit filed before us that any direction was given by the Court before the judgment was reserved but the Public Prosecutor filed an affidavit to the effect that such a statement was made in the open Court. We have no reason to reject the report of the Registrar and the affidavits filed by the Public Prosecutor. Even so, the fact remains that the learned Judge acted upon a document filed by the respondent without giving an opportunity to the appellant to file objections or to contest its reliability. We think the principles of natural justice require that no Court shall give a finding whether on fact or law and parti-

cularly on facts without giving an opportunity to all the contesting parties. As that principle has been violated in this case, we have no option but to set aside the finding of the learned Judge on the question of the valuation of the trees on the plot assigned to the appellant's brother-in-law. We, therefore, set aside this finding and request the High Court to submit a revised finding on the said question within two months from the receipt of the record. The respondent may file a further statement if he so chooses to explain or even to correct the valuation list already filed by it. Thereafter an opportunity will be given to the appellant to file his objections. The objections filed by the appellant in this Court may also be considered by the High Court. The High Court will submit the finding on the evidence already on record including the said objections and statements. The parties may file objections to the finding within two weeks from the date the said finding is received. The appeal will be posted as early as possible after objections are filed or after the expiry of the time given for filing the objections.

V.S.

*Ordered accordingly.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA AND J. C. SHAH. JJ.

The Indian Oxygen, Ltd.

.. Appellant\*

v.

The Workmen and others

.. Respondents.

*Industrial Disputes—Classification of jobs and fitting staff into jobs—Function of the Tribunal—Fitting employees into jobs—May be left to the management.*

Classification is of two kinds, namely, (i) classification of jobs, and (ii) fitting of existing staff into the various classified jobs. Now the first matter, (namely classification of jobs) if it is in dispute between the management and the workmen should be dealt with by Tribunals themselves.

Generally speaking, the fixing of individual workmen in particular classified jobs can best be done by the management in consultation with the union and it is only the disputed cases which may be referred, if necessary, to the Tribunal.

The Tribunal's direction in the present case with reference to second type of classification does not suffer from any infirmity.

Appeal by Special Leave from the Award dated the 10th March, 1962 of the Industrial Tribunal, Maharashtra in Reference (IT) No. 114 of 1961.

*M.C. Setalvad*, Attorney-General for India and *Purshottam Trikamdas*, Senior Advocate (*J.B. Dadachanji*, *O.C. Mathur* and *Ravinder Narain*, Advocates of *J.B. Dadachanji & Co.*, with them), for Appellant.

*C.L. Dudhia*, *Yatik Rehman* and *K.L. Hathi*, Advocates, for Respondents Nos. 1 and 2.

The Judgment of the Court was delivered by

*Wanchoo, J.*—This is an appeal by Special Leave from the award of the Industrial Tribunal, Maharashtra in a dispute between the appellant-company and its workmen. The reference was on six matters, namely (i) wage-scales, (ii) adjustments, (iii) increments, (iv) classification, (v) designation of certain workmen and (vi) merger of dearness allowance. The Tribunal rejected the demands relating to increments and merger of dearness allowance. With respect to the other four matters referred to it, the Tribunal fixed revised scales of wages and provided for the manner in which adjustments would be made. As to classification, the Tribunal ordered that the employees would be classified by the appellant after consulting both the unions in an advisory capacity. It also changed the designation of plant-attendants to plant-operators.

The present appeal by the appellant-company is directed against two matters dealt with in the award, namely, (i) wage-scales, and (ii) classification. The ap-



pellant contends that the Tribunal made a mistake when it held that wage-scales required reconsideration, particularly as this matter had been considered by another Tribunal in 1957 and that Tribunal had decided to keep the previously existing scales which were in force since 1949, except in the case of Mazdoor I and Mazdoor II. It is further contended that the Tribunal was not justified in comparing wage-scales in concerns which were clearly not comparable with the appellant-company. Further, it is pointed out that the Tribunal made obvious mistakes in the award some of which it later corrected and this clearly shows that the matter was not given that consideration by the Tribunal which it deserved. As to classification, it has been urged that the Tribunal should not have left the question of classification to the appellant-company as that would lead to endless disputes between the appellant and its workmen.

We are of opinion that there is no force in any of these contentions. There is no doubt that wage-scales which were revised by the Tribunal were fixed as far back as 1949. Obviously, therefore, there would be a clear case for revision of wage-scales in 1962, for it is not, and cannot be, disputed that there has been considerable change in circumstances between 1949 and 1962. But it is urged on behalf of the appellant-company that though wage-scales, which have been revised under the present award, were fixed in 1949, they came up for revision before another Tribunal in 1957. The then Tribunal was of opinion that the scales of pay of most of the categories of workmen were quite satisfactory and proceeded only to revise the scales of pay of Mazdoor I and Mazdoor II. It is therefore urged that the fact that the existing scales which have been revised under the award were fixed in 1949 loses all importance because they came up for reconsideration in 1957, and the then Tribunal thought that no case had been made out for their revision. Therefore, the argument is that unless there is a change in circumstances after 1957, there would be no reason to revise the wage-scales as has been done by the Tribunal. But as the Tribunal has pointed out, there has been an increase in the cost of living even since 1957. It has further pointed out that dearness allowance at the best may neutralise the increase in the cost of living fully in the case of workmen drawing a basic wage of Rs. 30; it does not neutralise the increase in the cost of living in the case of those drawing above the minimum wage, and as the wage increases the neutralisation affected by dearness allowance becomes less and less. Therefore, when cost of living has gone up since 1957, a case has been made out for revising wage scales in 1962. The Tribunal has further pointed out that there have been since 1949 a large number of awards and agreements in prosperous concerns like the appellant-company wherein higher wages have been fixed. It may be that the wage-scales fixed in the appellant-company in 1949 were on the high side as compared to other concerns of the same standing in that region. But if, as pointed out by the Tribunal, the other concerns are now giving higher wages than they were giving in 1949 due either to agreements or to awards, wage-scales fixed in the appellant-company should also be revised in order to maintain it in the same leading position as it apparently held in 1949. In this connection our attention was drawn to a number of charts filed on behalf of the appellant comparing the total wage packet of the appellant-company as it stands after revision with such other concerns as the appellant considered comparable. These charts in our opinion as prepared do not depict the correct position because the dearness allowance payable by the appellant-company is on a different basis from the dearness allowance payable in the concerns, which appear in these charts. The appellant company apparently pays dearness allowance at the old textile scale but for all days in the month while the other companies which have been taken for comparison pay the revised textile scale which is apparently higher than the old textile scale for all days in the month which the appellant is paying. So, the comparison made in these charts is not very helpful in showing that the revised wage scales have made such changes in the wage structure in the appellant-company as to put it completely out of line with comparable concerns. It appears to us that with the changes

made in the wage scales all that has happened is that the appellant company still maintains a lead in the matter of total wage packet as against the comparable concerns in the same way as it did in 1949. In the circumstances we agree with the Tribunal that a case had made out for revising the wage-scales even though in 1957 the then Tribunal did not think it necessary to make any change in the wage-scales prevailing in this company except in the case of Mazdoor I and Mazdoor II.

As to the contention that the Tribunal compared the appellant-company with concerns which were really not comparable, it may be mentioned that at present the appellant is the only company of its kind carrying on business in Bombay. There was thus no comparable concern in its own line of business in that region. Therefore, the Tribunal would be justified in looking for comparison at concerns nearly similar to the appellant. The appellant also conceded, and we think rightly, that the nearest industry for purposes of comparison with the appellant-company was the engineering industry. The workmen on the other hand wanted that the appellant-company should be compared with the oil refineries and Greaves Cotton and Company Limited, Imperial Tobacco Limited, Associated Cement Companies Limited and some other concerns. The Tribunal held that the oil refineries stood in a class by themselves. It also held that Greaves Cotton and Company Limited was a managing agency concern and was therefore not comparable. It also refused to compare the appellant-company with the Associated Cement Companies on the ground that it had no factory in Bombay but only its head office. The Tribunal also was not prepared to compare the appellant-company with the Imperial Tobacco Company which was in an altogether different line of business. The Tribunal was prepared to compare the appellant with the engineering firms which the appellant itself relied on except one concern which was considered by the Tribunal to be too small. It seems to us therefore that for the purpose of comparison the Tribunal rightly took into account practically the companies suggested by the appellant. The Tribunal also mentioned some other companies which were indicated on behalf of the workmen, for example, the Indian Cable Company Limited, and the Automobile Products. These also cannot be said to be non-comparable though they are not quite as near the appellant-company as the engineering concerns which the appellant-company relied on. In the main, however, it appears that the Tribunal has relied on the engineering concerns on which the appellant-company relied, though, as already indicated, it has given a slightly higher scale in some cases to the workmen of the appellant-company—apparently in view of the fact that the appellant-company was always a leading employer in the matter of wage-scales. We are therefore of opinion that the Tribunal cannot be said to have made any mistake in the matter of taking into account comparable concerns.

Then our attention was drawn to a few mistakes in the Tribunal's award, and it is urged that these mistakes show that the Tribunal did not give such consideration to the matter as was expected of it. It may be pointed out that three of these mistakes were corrected by the Tribunal later. So far as two of these corrections are concerned, namely, (i) carpenters, and (ii) Assistant foreman, there appears to have been a slip inasmuch as the Tribunal reduced the maximum for these workmen which was already prevalent, which of course it could not do. The third mistake that the Tribunal corrected was with respect to cylinder weighers. There undoubtedly the Tribunal made a mistake inasmuch as it fixed wages for cylinder weighers which were even lower than Mazdoor I, though cylinder weighers always used to get more than Mazdoor I. That mistake was also corrected by the Tribunal. One more mistake has been pointed out to us with respect to masons. In the case of masons, the grade demanded was 60-5-110-7½-140 while the existing scale was 60-4-100. The Tribunal revised the scale to 64-4-100-5-110. The complaint is that the minimum awarded by the Tribunal is more than the minimum demanded by the workmen. It seems to us that this is due to a slip and the learned counsel for the respondents conceded that the starting pay should be Rs. 60. We therefore correct this mistake and fix the grade of masons at 60-4-100-5-110. It is clear therefore that there were three slips by the Tribunal and there was only one mistake

with respect to cylinder weighers. That however does not mean that the Tribunal did not bestow that attention to the matter before it which it was expected to do. The Tribunal's award appears to be on the whole a careful one and it cannot be thrown over-board because of these slips. We therefore see no force in the contention of the appellant with respect to wage-scales and hold that the revised grades introduced by the Tribunal are fair.

Turning now to classification, the contention is that the Tribunal should have made the classification itself and should not have asked the appellant to make the classification after consulting the unions in an advisory capacity. Reliance in this connection is placed on a decision of this Court in *Novex Dry Cleaners v. Its Workmen*<sup>1</sup>. In that case also there was a question of classification and this Court pointed out that it was not a satisfactory way of dealing with the matter to leave the question of classification to the management in consultation with the workmen. Classification, however, is of two kinds, namely, (i) classification of jobs, and (ii) fitting of existing staff into the various classified jobs. Now the first matter, (namely, classification of jobs) if it is in dispute between the management and the workmen should be dealt with by Tribunals themselves and the case relied on by the appellant is more of this nature, though it also involved the question of fitting each workman in the various classified jobs. In that case six categories were fixed, but apparently the functions of the categories concerned were not defined by the Tribunal. Therefore, it was observed that the Tribunal should have described the functions of different categories and given indication in the award as to how different employees should be placed in what category. That case did not lay down that the Tribunal must fix each man into a particular classified job and that if it leaves this second kind of classification to be done by the management in consultation with the workmen, the award must be set aside. We may in this connection refer to *French Motor Car Co., Ltd. v. Workmen*<sup>2</sup>, where the Tribunal had left the fixation of individual workmen into particular classified jobs to the management in consultation with the workman and that was upheld by this Court. Generally speaking, the fixing of individual workmen in particular classified jobs can best be done by the management in consultation with the union and it is only the disputed cases which may be referred, if necessary, to the Tribunal. In the present case also, the Tribunal has left it to the appellant to fix individual workmen into the various classified jobs after consultation with the unions. It is true that the Tribunal has remarked that some of the Mazdoor I and Mazdoor II appear to it to be doing work of higher category but that is merely a general remark and it will be for the appellant to classify the workmen in consultation with the unions *i.e.*, to fix each workmen in particular classified jobs which already exist in this company and about which there is no dispute. In the circumstances, the Tribunal's direction in the present case with reference to second type of classification does not suffer from any infirmity.

We, therefore, dismiss the appeal except with the modification with respect to masons. In the circumstances we pass no order as to costs.

V.S.

*Appeal dismissed.*

1. (1962) 1 L.L.J. 271.

2. C.A. No. 391 of 1962 decided on 13th

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT —S. K. DAS, J. L. KAPUR, A. K. SARKAR, M. Hidayatullah and Raghubar Dayal, JJ.

The City of Nagpur Corporation, Nagpur

.. Appellant \*

v.

John Servage Philip and another

.. Respondents.

*City of Nagpur Corporation Act, 1948 (II of 1950) section 58 (s)—Promotion of public health, safety and convenience of public—Sending of delegation to a foreign country to attend a Health Congress—If within the powers of the Corporation.*

*Constitution of India (1950), Article 136—Special Appeal—Question of great importance involved—Question becoming academic after filing appeal—Appeal can still be dealt with.*

There is no doubt that if what a Corporation proposes to do is what it had been authorised by its incorporating statute to do, it is not the business of a Court to interfere with the mode in which the Corporation decides to act.

A delegate attending a Health Congress in a foreign country would certainly have acquired much useful knowledge or matters concerning public health and become acquainted with the modern equipment and appliances used in, and organisations suited for and the latest trend of thoughts regarding matters concerning public health. By sending delegates to the Congress, the Corporation would have acquired useful knowledge connected with public health. The sending of delegates, therefore, was something which the Corporation was authorised by section 58 (s) of its incorporating statute (City of Nagpur Corporation Act) to do.

Statutes cannot be confined only as to thoughts prevalent at the time when they were enacted. They are put in general words to embrace innovations as they come along. Therefore even at the passing of the Act delegation by Corporation was not in the contemplation, there is nothing to prevent the Court from interpreting section 58 (s) as including within the matters likely to promote public health actions involving the sending of delegations where promotion of public health becomes likely as a result thereof.

The point raised by the Corporation as to its powers under the statute and how far the Courts can review the exercise of its powers by the Corporation is of great importance and must be decided in the appeal by Special Leave even though the question might have become academic at the time of the hearing of the appeal.

Appeal by Special Leave from the Judgment and Order, dated the 23rd April, 1959 of the Bombay High Court at Nagpur in Special Civil Application No. 110 of 1959.

*S. T. Desai*, Senior Advocate, *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocate of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant.

*Dr. W. S. Barlingay*, Senior Advocate, (*R. Mahalingier* and *Ganpat Rai*, Advocates, with him), for Respondent No. 1.

*M. S. K. Sastri* and *R. N. Sachthey*, Advocates, for Respondent No. 2.

The Judgment of the Court was delivered by

*Sarkar, J.*—This appeal is against an order of the High Court of Bombay issuing a writ whereby the Municipal Corporation of Nagpur, the appellant before us, was restrained from carrying out a resolution proposing to send two of its members as delegates to a Health Congress at Harrogate in U.K. and sanctioning certain expenses in connection with the delegation.

There is no doubt that if what a Corporation proposes to do is what it had been authorised by its incorporating statute to do, it is not the business of a Court to interfere with the mode in which the Corporation decides to act : see *Mayor etc., of Westminster v. London and North Western Railway Company*<sup>1</sup>. If, therefore, the appellant Corporation had power under its incorporating statute, the City of Nagpur Corporation Act, 1948, to send delegates to the Congress at Harrogate, it would appear *prima facie* that the writ was erroneously issued by the High Court. Now, section 58 (s) of the Act provides,

\* Civil Appeal No. 508 of 1960.

29th November, 1962.

1. L.R. (1905) A.C. 426.

"The Corporation may in its discretion provide from time to time either wholly or partly for all or any of the following matters, namely :—

.....  
 (s) any other matter likely to promote the public health, safety and convenience of the public.

The question is whether the action of the appellant Corporation is within this section.

It appears that the convenors of the Congress at Harrogate had sent an invitation to the appellant Corporation to send delegates to the Congress. The following facts appear from the invitation : delegates representing all aspects of public health would discuss at the Congress subjects of common interest : there would be a health exhibition where latest equipment and products of leading manufacturers and trade and research organisations would be put on show ; and the delegates might visit water supply undertaking, sewage disposal works, housing schemes, hospitals, health service centres, food factories and canteens and similar organisations. We think it beyond question that a delegate attending the Congress would certainly have acquired much useful knowledge of matters concerning public health and become acquainted with the modern equipment and appliances used in, and organisations suited for and the latest trend of thoughts regarding, matters concerning public health. It appears to us plain that by sending delegates to the Congress, the appellant Corporation would have acquired useful knowledge connected with public health which it could utilise later to promote public health at Nagpur. The sending of delegates, therefore, was something which the appellant Corporation was authorised by section 58 (s) of its incorporating statute to do.

As we understand the judgment of the High Court, it does not seem to have felt much doubt about this. The High Court appears, however, to have taken the view that there was no reasonable and legitimate connection between the sending of the delegates to the Congress and the promotion of public health at Nagpur. It is somewhat difficult to appreciate the High Court's point of view. In the first place, the High Court seems to have been sceptical of the benefit to be derived from the delegation because the subjects to be discussed at the Congress were, in its opinion, highly technical and the delegates proposed to be sent being non-technical men, namely lawyers, were not likely to be in a position to follow the discussion. We have no reason to think that the subjects to be discussed at the Congress were highly technical. That it would not have been so, appears to us clear from the fact that a very large gathering was expected at the Congress, over 2,600 having attended at the previous one. There is further no reason to think that the delegates proposed to be sent by the appellant Corporation would not have been able to acquire at the Congress a great deal of useful general knowledge regarding matters of public health. Lastly, it is not for this Court to decide how the delegation should have been constituted so that the appellant Corporation might have had the largest benefit from it. It was for the Corporation to decide how the thing which it had the power to do was to be done. It was not a case where it could be said that the delegation proposed to be sent would have been of no benefit to the appellant Corporation at all, and that is enough to prevent an interference by the Courts in the method of the exercise of its undoubted power by the appellant Corporation. We are unable to agree with the view of the High Court that there is no reasonable or legitimate connection between the sending of the delegation to the Congress and the provisions of section 58 (s) which we have earlier set out.

The High Court also said that the capacity of the appellant Corporation to make use of the knowledge gained at the Congress was extremely limited. There are no materials on which this observation can be justified. The appellant Corporation can no doubt increase its capacity. In any event, it would, after the delegation had returned, have been in a better position to discharge its functions concerning public health within its present capacity. It would be absurd to say that the appellant Corporation did not have the capacity to improve its public health services. There was no warrant to issue the writ on the ground of want of capacity.

The High Court also relied on certain sections dealing with the budget. It was said that there was no provision in the budget for expenses of sending a delegation abroad. Under section 84 of the incorporating statute, no payment can be made out of the municipal funds unless the expenditure is covered by the budget. The High Court, therefore, observed that the resolution sanctioning expenses for the sending of the delegation abroad was beyond the powers of the appellant Corporation. In the first place, we are not sure that the budget did not provide for such expenses. There was a head in it which dealt with allowances payable to the members of the Corporation. It may reasonably be contended that the expenses of the members for the visit to the Congress are such allowances. But assume, they are not. Section 88 of the Act gives the Corporation power to transfer the amount of one budget grant from one major head to another provided however a certain balance is maintained in the budget. There is nothing to show that the appellant Corporation could not have acted in this case under section 88 and altered the provisions of the budget making express provision for the expenses of the delegation. It was not even suggested that the appellant Corporation could not do so.

We think it right also to point out that in the petition for the writ it had not been said that the resolution was bad because the expenses sanctioned by it were outside the budget. That being so, this point should not have been taken into consideration by the High Court. It is true that the Corporation at the request of the High Court placed before the High Court some of the papers in connection with the budget. That, the Corporation out of respect to the High Court should have done and, therefore, actually did. From this it cannot be contended that the appellant Corporation never objected to the resolution being challenged on the ground of a want of express provision in the budget for the expenses of the delegation or would not have been prejudiced in the hearing of the petition if the resolution was attacked on the ground of want of a provision in the budget. This challenge involved a question of fact and without proper pleadings, the appellant Corporation was surely at a disadvantage in meeting it. Furthermore, we are not sure that section 84 would have made the resolution invalid. That section only prohibits an expenditure for which the budget does not provide. So it may be that all that section 84 affects is the actual expenditure. It may not affect the resolution itself.

We think it right to point out that the High Court held that the appellant Corporation had acted honestly. It observed that the circumstances did not warrant the inference that the action of the Corporation was *mala fide*. That being so, and the action proposed being clearly within the statutory powers of the appellant Corporation, we think that the High Court was in error in issuing the writ.

We may now notice one or two points of minor importance argued at the Bar on behalf of the respondents. It was said that the question raised in this appeal has become academic since the Congress was long over. It may be stated that the Congress was held from 27th April to 1st May, 1959 and the writ was issued by the High Court on 23rd April, 1959. It is suggested that it is not, therefore, a fit case for decision in an appeal under Article 136 of the Constitution. We are not at all impressed by this contention. It seems to us that it is a matter of the utmost importance for the appellant Corporation to know its rights under its incorporating statute. It will have to guide itself according to our decision in future when a similar point arises again. If we do not decide the point raised now, then on every subsequent occasion the Corporation would be bound by the judgment of the High Court under appeal and by the time the matter is brought up here the same argument that the question has become academic can always be raised to defeat the point. We think that the point raised by the appellant Corporation as to its powers under the statute and how far Courts can review the exercise of its power by the appellant Corporation is of great importance and must be decided in this appeal.

It is also said that in 1948 when the City of a Nagpur Corporation Act was passed, these delegations were not in contemplation. Therefore, section 58 (s) cannot be interpreted as including promotion of public health by sending of delegations. This

is, in our view, a completely idle contention. We have no reason to think that the delegations were not sent in 1948. In any case, statutes cannot be confined only to thoughts prevalent at the time when they were enacted. They are put in general words to embrace innovations as they come along. Therefore, even if in 1948, delegations by Corporations were not in contemplation, there is nothing to prevent us interpreting section 58 (s) as including within matters likely to promote public health, actions involving the sending of delegations where promotion of public health becomes likely as a result thereof.

We allow the appeal. In view of the Order of 19th October, 1959, the appellant will pay the costs of the respondent Philip.

V.S.

*Appeal allowed.*

# THE SUPREME COURT JOURNAL

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K. SANKARANARAYANAN, B.A., B.L.

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(1963) I S.C.J.

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1963.

# JUDGES OF THE SUPREME COURT OF INDIA.

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(1st January, 1963 to 30th June, 1963).

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## *Chief Justice :*

The Hon'ble Mr. Bhuvaneshwar Prasad Sinha.

## *Puisne Judges :*

The Hon'ble Mr. Justice Syed Jafer Imam.

"	"	S. K. Das.
"	"	P. B. Gajendragadkar.
"	"	Amal Kumar Sarkar.
"	"	K. Subba Rao.
"	"	K. N. Wanchoo.
"	"	M. Hidayatullah.
"	"	K. C. Das Gupta.
"	"	J. C. Shah.
"	"	Raghubar Dayal.
"	"	N. Rajagopala Ayyangar.
"	"	J. R. Mudholkar.

## *The Attorney-General of India :*

Shri C. K. Daphtary (from 3rd March, 1963).

## *The Solicitor-General of India :*

Shri C. K. Daphtary (upto 2nd March, 1963).

Shri H. N. Sanyal (from 3rd March, 1963).

## *The Additional Solicitor-General of India :*

Shri H. N. Sanyal (upto 2nd March, 1963).

Shri S. V. Gupta (from 22nd March, 1963).

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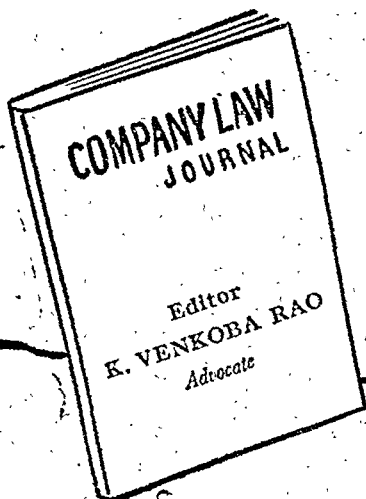
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[SUPREME COURT.]

*S. J. Imam, K. Subba Rao,  
N. Rajagopala Ayyangar and  
J. R. Mudholkar, JJ.*  
29th January, 1963.

*Ram Bilas Singh v.  
State of Bihar.*  
Cr.A. No. 73 of 1961.

*Penal Code (XLV of 1860), sections 304, Part II, read with sections 149, 326, read with section 149, section 147 and section 426—Scope.*

Upon the law as stated by this Court in *Mohan Singh and another v. The State of Punjab*, A.I.R. 1963 S.C. 174, and in other cases it would have been competent to the High Court to look into the entire evidence in the case, oral and documentary, and consider whether there was an unlawful assembly or not. But it has not done so. Had the High Court, come to a reasoned conclusion that there was an unlawful assembly consisting of more than five persons, including the appellants and some other persons who were unidentified and convicted the appellants under section 147 and, with the aid of Section 149, also of some other offence committed by a member or members of the unlawful assembly other than the acquitted persons the matter would have stood on a different footing. But it has not done so. It is clear from its judgment that the High Court was not satisfied by the manner in which the case had been dealt with by the Court of Sessions; but then, it should not have stopped there. Instead, it should have fully examined the evidence and come to a definite conclusion as to whether there was an unlawful assembly or not and stated its reasons for coming to such a conclusion. It should then have ascertained the particular acts committed by any member or members of that assembly in furtherance of the common object as also the question whether any of the appellants had participated in the incident. In the light of its findings on these matters the High Court should then have proceeded to consider whether all or any of the appellants could be held liable vicariously for all or any of the acts found to have been committed by the unlawful assembly or any member or members thereof other than those alleged to have been committed by persons whose acquittal has become final. It is a matter of regret that the High Court has failed to determine questions which it was essential for it to determine. We therefore, set aside that judgment and send back the case to the High Court for deciding it afresh.

*Jai Gopal Sethi*, Senior Advocate (*C. L. Sareen* and *R. L. Kohli*, Advocates, with him), for Appellants.

*S. P. Varma* and *R. N. Sachthey*, Advocates for Respondent.

G.R.

— Appeal allowed and case remanded for fresh disposal.

[SUPREME COURT.]

*S. J. Imam, K. Subba Rao, Raghubar  
Dayal and J. R. Mudholkar, JJ.*  
7th February, 1963.

*Abdul Aziz v.  
The State of Maharashtra.*  
Cr. A. No. 168 of 1961.

*Imports and Exports Control Act (XVIII of 1947)—section 3—Scope—Entry 19 of List I and Entry 31 of List II of the Seventh Schedule of the Constitution.*

The provision of clause 5 of the Yarn Control Order empowering the licensing authority to attach a condition to the effect that the goods covered by the licence shall not be disposed of except in the manner prescribed by the licensing authority is a valid provision which comes within the powers conferred by section 3 of the Imports and Exports Control Act on the Central Government and can validly affect the ordinary rights of the importer. In a deliberate case of securing import licence with a view to misapply the goods imported a heavy sentence is proper.

*Shaukat Husain* and *P. C. Agarwala*, Advocates, for Appellant.

*C. K. Daphlary*, Solicitor-General of India and *D. R. Prem*, Senior Advocate (*R. N. Sachthey*, Advocate with them), for Respondent.

G.R.

— Appeal dismissed.

## [SUPREME COURT.]

P. B. Gajendragadkar, K. N. Wanchoo,  
M. Hidayatullah, K. C. Das Gupta  
and J. C. Shah, JJ.  
8th February, 1963.

S. N. Ranade v.  
The Union of India.  
C.A. No. 212 of 1961.

*Transfer of Property Act (IV of 1882), section 8—Riparian Right—Construction of Sanad—Watan—Meaning—Title to flowing water of river—If included in right to bed of river.*

The word "water" means only water in the ponds or wells and does not refer to the flowing water of the river. The language of the Sanad in the instant case precisely defines the nature of the water that is conveyed and in doing so, by necessary implication, excludes the flowing water of the river.

Besides, it is by no means clear that the title to the flowing water of the river necessarily goes with the title to the bed of the river. As was observed by Lord Selborne in *William Lyon v. The Wardens & Co., of the Fishmongers' Company and the Conservators of the River Thames*, (1876) L.R. 1 A. C. 662 at p. 683, "the title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having a right of access to it."

G. S. Pathak, Senior Advocate, (N. D. Karkhanis, B. Dutta, Advocates, (J. B. Dadachandji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J.B. Dadachandji & Co. with him), for Appellant.

C.K. Daphtary, Solicitor-General of India and N.S. Bindra, Senior Advocate, (R. H. Dhebar, Advocate for P. D. Menon, Advocate with them), for Respondents.

G.R.

*Appeal dismissed.*

## [SUPREME COURT.]

B.P. Sinha, Chief Justice, P.B. Gajendragadkar,  
K. N. Wanchoo, M. Hidayatullah and  
J.C. Shah, JJ.  
8th February, 1963.

Sekendar Sheikh v.  
The State of W. Bengal.  
Cr. A. No. 110 of 1961.

*Penal Code (XLV of 1860), sections 467, 109—Powers of High Court.*

Relying upon the decision of the Privy Council in *Malak Khan v. Emperor*, L.R. 72 I.A. 305, the Court held: "the High Court was therefore not debarred from founding the order of conviction for the offences under section 467, Indian Penal Code and abetment thereof, of the appellants upon evidence, which corroborated the story of the prosecution in support of those charges merely because that evidence was not accepted by the Sessions Court in considering the charge against them of false personation for procuring registration of the *Heba-nama*."

D. N. Mukherjee, Advocate, for Appellants.

K.B. Bagchi, Advocate and S.N. Mukherji, Advocate for P.K. Bose, Advocates, for Respondents.

G.R.

*Appeal dismissed.*

## [SUPREME COURT.]

B.P. Sinha, Chief Justice P.B. Gajendragadkar,  
K.N. Wanchoo, K.C. Das Gupta and J.C. Shah, JJ.  
11th February, 1963.

Ukha Kolhe v.  
The State of Maharashtra.  
Cr. A. No. 131 of 1962.

*Bombay Prohibition Act (XXV of 1949), section 66 (B)—Meaning of words "duly submitted"—Section 510, Criminal Procedure Code (V of 1898)—Evidence of Chemical Examiner.*

*By Majority.*—In the present case, where the blood specimen was collected by Dr. Rote and thereafter it was handed over to the police officer on demand by

him and ultimately submitted to the Chemical Examiner for his examination, it would, in our judgment be regarded as "duly submitted."

The Sessions Judge may require the presence of the Chemical Examiner for examination before him or by the Magistrate, if he thinks that examination *viva voce* of the Chemical Examiner is necessary to do complete justice in the case.

R.K. Garg, S.C. Agarwala and M.K. Ramamurthi, Advocates of M/s. Ramamurthi & Co., for Appellant.

G.K. Daphtary, Solicitor-General of India and N.S. Bindra, Senior Advocate, (R.H. Dhebar, Advocate with them), for Respondent.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

P.B. Gajendragdkar, K.N. Wanchoo,

Panna Lal v.

M. Hidayatullah, K.C. Das

The State of Bombay.

Gupta and J.C. Shah, JJ.

C. As. Nos. 207-209 of 1961.

11th February, 1963.

Civil Procedure Code (V of 1908)—Order 41, rule 33, Order 21, rule 22—Cross-objections—When permissible against other respondents.

In our opinion, the view that has now been accepted by all the High Courts that Order 41, rule 22 permits as a general rule, a respondent to prefer an objection directed only against the appellant and it is only in exceptional cases, such as where the relief sought against the appellant in such an objection is intermixed with the relief granted to the other respondents, so that the relief against the appellant cannot be granted without the question being re-opened between the objecting respondent and other respondents, that an objection under Order 41, rule 22 can be directed against the other respondents, is correct.

S.T. Desai, Senior Advocate, (J.B. Dadachanji, O.C. Mathur and Ravinder Narain Advocates of M/s. Dadachanji & Co., with him), for Appellant (In all the appeals) :

C.K. Daphtary, Solicitor-General of India, N.S. Bindra, Senior Advocate (R.H. Dhebar, Advocate for P.D. Menon, Advocate, with him), for Respondent No. 1 (In all the appeals).

Girish Chandra, Advocate for Sardar Bahadur, Advocate, for Respondents Nos. 3 and 8.

G.R.

*Case remanded.*

[SUPREME COURT.]

P.B. Gajendragadkar, K.N. Wanchoo,

K. Venkataramiah v.

M. Hidayatullah, K.C. Das Gupta and

A. Seetharama Reddy.

J.C. Shah, JJ.

C.A. No. 767 of 1962.

12th February, 1963.

Civil Procedure Code (V of 1908), Order 41, rule 27—Scope.

We are satisfied that in the present case the High Court allowed additional evidence to be admitted as it required such evidence either to enable it to pronounce judgment or for any other substantial cause within the meaning of rule 27 (1) (b) of Order 41 of the Code.

On the principle laid down in *Jagarnath Pershad v. Hanuman Pershad*, (1909) L.R. 36 I.A. 221 : 19 M.L.J. 435, that when additional evidence was taken with the assent of both sides or without objection at the time it was taken, it is not open to a party to complain of it later on, the appellant cannot now be heard to say that the additional evidence was taken in this case in breach of the provisions of law.

K. Bhimasankaram and A. Ranganadham Chetty, Senior Advocates (A. Vedavalli, E. Udayarathnam and A. V. Rangan), Advocates with them, for Appellant,

A. V. Viswanatha Sastri, Senior Advocate (*R. Thiagarajan*, Advocate with him),  
for Respondent No. 1.

V. C. Prashar, Amar Singh Chaturvedi and K. R. Chaudhri, Advocates for  
Respondent No. 2.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

S. J. Imam, K. Subba Rao, Raghubar  
Dayal and J. R. Mudholkar, JJ.  
13th February, 1963.

Shyam Lal v.  
The State of U.P.  
Cr. A. No. 9 of 1962.

*Railways Act (IX of 1890), section 121—Obstruction to guard in discharge of his duties while train was not in motion—Offence.*

*By Majority.*—It is not only when the train is in motion that a Guard is on duty, but also while the train is standing at the platform and person who has wilfully created obstruction in the discharge of the public duty by a Guard is guilty under section 121 of the Railways Act.

Rules 93 to 103 of the Rules framed under certain sections of the Indian Railways Act, 1890, deal with the attendance, discipline and equipment of staff working trains. In Rule 95, it is stated that the Guard shall be in charge of the train in all matters affecting stopping or movement of the train for traffic purposes.

D. S. Golani and K. L. Mehta, Advocates, for Appellant.

C. P. Lal, Advocate, for Respondent.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

K. Subba Rao, Raghubar Dayal and  
J. R. Mudholkar, JJ.  
13th February, 1963.

Mst. Jagir Kaur v.  
Jaswant Singh.  
Cr. A. No. 143 of 1961.

*Criminal Procedure Code (V of 1898), section 488 (8)—Jurisdiction of Courts.*

Temporary residence with *animus manendi* will amount to residence within the meaning of the provisions of section 488 (8) of the Criminal Procedure Code. When the respondent came to India and lived with his wife in his or in his mother's house in village Hans Kalan, he had a clear intention to temporarily reside with his wife in that place. He did not go to that place as a casual visitor in the course of his peregrinations. He came there with the definite purpose of living with his wife in his native place and he lived there for about 6 months with her. The second visit appears to be only a flying visit to take her to Africa. In the circumstance we must hold that he last resided with her in a place within the jurisdiction of the First Class Magistrate, Ludhiana. That apart, it is admitted that he was in a place within the jurisdiction of the said Magistrate on the date when the appellant filed her application for maintenance against him. The said Magistrate had jurisdiction to entertain the petition, as the said proceedings can be taken against any person in any district where he "is". We, therefore, hold that the First Class Magistrate, Ludhiana, had jurisdiction to entertain the petition under section 488 (8) of the Code.

S. K. Kapur Advocate (*amicus curiae*), for Appellants.

Harnam Singh Chadha and Harbans Singh, Advocates, for Respondent.

G.R.

*Appeal allowed.*



[SUPREME COURT.]

K. Subba Rao, Raghubar Dayal and  
J.R. Mudholkar, JJ.  
14th February, 1963.

Commr., Municipal Council Palai v.  
T.J. Joseph and others.  
C.A. Nos. 79-81 of 1961.

*Travancore-Cochin Motor Vehicles Act, section 72—Travancore District Municipalities Act, sections 286 and 287.*

It seems to us, however, clear that bearing in mind the fact that the provisions of section 72 of the Travancore-Cochin Motor Vehicles Act were intended to apply to a much wider area than those of sections 286 and 287 of the Travancore District Municipalities Act it cannot be said that section 72 was intended to replace those provisions of the Travancore District Municipalities Act. The proper way of construing the two sets of provisions would be to regard section 72 of the Travancore-Cochin Motor Vehicles Act as a provision in continuity with sections 286 and 287 of the Travancore District Municipalities Act so that it could be availed of by the appropriate authority as and when it chose. In other words the intention of the Legislature appears to be to allow the two sets of provisions to co-exist because both are enabling ones. Where such is the position, we cannot imply repeal. The result of this undoubtedly would be that a provision which is added subsequently, that is, which represents the latest will of the Legislature will have an overriding effect on the earlier provision in the sense that despite the fact that some action has been taken by the Municipal Council by resorting to the earlier provision the appropriate authority may nevertheless take action under section 72 of the Travancore-Cochin Motor Vehicles Act, the result of which would be to override the action taken by the Municipal Council under section 287 of the District Municipalities Act. No action under section 72 has so far been taken by the Government and, therefore, the resolutions of the Municipal Council still hold good. Upon this view it is not necessary to consider certain other points raised by learned counsel.

M.U. Isaac, Girish Chandra and Sardar Bahadur, Advocates for Appellant.

G.R.

*Appeals allowed.*

[SUPREME COURT.]

S.K. Das, A.K. Sarkar, K.C. Das Gupta and  
N. Rajagopala Ayyangar, JJ.  
15th February, 1963.

The State of Punjab v.  
The British India Corporation Ltd.,  
and Shri Gopal Paper Mills. Ltd.  
C.A. Nos. 639 of 1961 and 287 of 1962.

*Punjab Urban Immovable Property Tax Act, 1940, sections 3 and 4—Punjab Urban Immovable Property Tax Rules, 1941—Meaning of 'rent'.*

In the instant case the allotment of these buildings for the use of the workmen was made for a purpose which was necessary to the efficiency of the workmen.

The word "rent" in clause (ii) of rule 18 (4) of Punjab Urban Immovable Property Tax Rules, 1941 means a payment to a landlord by a tenant for the demised property and does not include payments made by licensees.

"In coming to this conclusion we have not overlooked the fact that there is scope for an argument that in clauses (d) and (e) of section 4 of the Act as they stand after the amendments in 1954 and 1957, respectively, the word "rent" has been used in the wider sense. Assuming that this is so, such use of the word in 1954 and 1957 cannot be taken into account for the purpose of interpretation, as the Rule under consideration was framed long before these dates.

"Coming now to the facts of the two cases before us, we find that admittedly, in both the cases the property that has been assessed was allowed to be used by the employees on leave and license. Whatever payment was received from them was not therefore "rent" within the meaning of clause (ii).

"Our conclusion therefore is that no tax is leviable under the Punjab Urban Immovable Property Tax Act, 1940, in respect of the buildings in these two appeals."

*S.M. Sekhri*, Advocate-General for the State of Punjab and *N.S. Bindra*, Senior Advocate (*P.D. Menon*, Advocate, with them), for Appellant (In both the appeals).

*Bhagirath Das* and *B. P. Maheshwari*, Advocates, for Respondent (In C.A. No. 639 of 1961).

*A.V. Viswanatha Sastri*, Senior Advocate (*O.P. Malhotra*, Advocate and *O.C. Mathur*, *J.B. Dadachanji* and *Ravinder Narain*, Advocates of *M/s. J.B. Dadachanji & Co.* with him), for Respondent (In C.A. No. 287 of 1962).

G.R.

*Appeals dismissed.*

[SUPREME COURT.]

*B.P. Sinha*, *C.J.*, *M. Hidayatullah* and

*Jang Singh v.*

*J.C. Shah*, *J.J.*

*Brij Jal.*

20th February, 1963.

C. A. No. 687 of 1962.

*Practice—Mistake of Court and its Officer—Duty of Court.*

If the Court in supplying the information makes a mistake the responsibility of the litigant, though it does not altogether cease, is at least shared by the Court. If the litigant acts on the faith of that information the Courts cannot hold him responsible for a mistake which it itself caused. There is no higher principle for the guidance of the Court than the one that no act of Courts should harm a litigant and it is the bounden duty of Courts to see that if a person is harmed by a mistake of the Court he should be restored to the position he would have occupied but for that mistake. This is aptly summed up in the maxim : "*Actus curiae neminem gravabit*". Where a party paid a lesser amount as pre-emption deposit on information given by Court Officer he must be allowed to correct the error by paying the balance due.

*K.L. Mehta*, Advocate, for Appellant.

*K.L. Gosain*, Senior Advocate, (*K.K. Jain* and *P.C. Khanna*, Advocates with him), for Respondent Nos. 2 to 6.

G.R.

*Appeal allowed.*

[SUPREME COURT.]

*K. Subba Rao*, *Raghubar Dayal* and

*London Rubber Co., Ltd. v.*

*J.R. Mudholkar*, *J.J.*

*Durex Products Incorporated.*

4th March, 1963.

C.A. No. 26 of 1961.

*Trade Marks Act, (V of 1940), sections 8 and 10—Scope.*

The provisions of sub-section (2) of section 10 of the Trade Marks Act are by way of an exception to the prohibitory provisions of the Trade Marks Act. Those provisions are contained in section 8 (a) and section 10 (1). A trade mark is not necessarily entitled to protection because its use might deceive or cause confusion. In the instant case the finding was that there was no reasonable probability of confusion.

*G. S. Pathak* and *B. Sen*, Senior Advocates, (*D. N. Mukherjee*, Advocate, with them), for Appellant.

*H. N. Sanyal*, Additional Solicitor-General of India (*A. N. Sinha* and *B. N. Ghosh*, Advocates with him), for Respondent No. 1.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

*P. B. Gajendragadkar*,

*Chinna Venkata Reddi v.*

*M. Hidayatullah* and

*Lakshmama.*

*J. C. Shah*, *J.J.*

C.A. No. 251 of 1961.

4th March, 1963.

*Hindu Law—Minors right to partition—The property devised under the will to coparcener and its blending with the joint family estate.*

Action by a minor for a decree for partition and separate possession of his share in the family property is not founded on a cause of action personal to him. The

right claimed is in property, and devolves on his death even during minority upon his legal representative. The Court, it is true, will direct partition only if partition is in the interest of the minor but that limitation arises not because of any peculiarity in the estate of the minor but is imposed for the protection of his interest. The effect of the decision of the Court granting a decree for partition in a suit instituted by a minor is not to create a new right which the minor did not possess, but merely to recognise the right which accrued to him when the action was commenced. It is the institution of the suit, subject to the decision of the Court, and not the decree of the Court that brings about the severance. In *Kakumanu Peda Subbayyas and another v. Kakumany Akkamma and another*, (1959) S.C.J. 138 : (1959) 1 M.L.J. (S.C.) 60 : (1959) 1 An.W.R. (S.C.) 60 : (1959) S.C.R. 1249, it was held by this Court that a suit filed on behalf of a Hindu minor for partition of joint family properties does not on the death of the minor during the pendency of the suit abate, and may be continued by his legal representative and decree obtained therein if the Court holds that the institution of the suit was for the benefit of the minor. Death of the minor Pulla Reddy during the pendency of the suit had not, therefore, on the view ultimately taken by the Court, the effect of terminating the suit which was instituted for partition of the property in suit.

Property separate or self-acquired of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein : but to establish such abandonment a clear intention to waive separate rights must be established. From the mere fact that other members of the family were allowed to use the property jointly with himself, or that the income of the separate property was utilised out of generosity to support persons whom the holder was not bound to support, or from the failure to maintain separate accounts, abandonment cannot be inferred, for an act of generosity or kindness will not ordinarily be regarded as an admission of a legal obligation.

*A. Ranganadham Chetty*, Senior Advocate, (*A. Veda Valli* and *A. V. Rangam*, Advocates, with him), for Appellants.

*B. K. B. Naidu*, Advocate, for Respondent.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

*P. B. Gajendragadkar*,  
*M. Hidayatullah* and *J. C. Shah*, JJ.  
4th March, 1963.

The State of U.P. v.  
Jogendra Singh.  
C.A. No. 301 of 1961.

*Uttar Pradesh Disciplinary Proceedings (Administrative Tribunal) Rules, 1947—Construction of rule 4 (2)—Discretionary powers of a Governor—Where “May” means “shall” or “must”—Distinction between Administrative Tribunal and Administrative Officer.*

Rule 4 (2) deals with the class of Gazetted Government servants and gives them the right to make a request to the Governor that their cases should be referred to the Tribunal in respect of matters specified in clauses (a) to (d) or sub-rule (1). The question for our decision is whether like the word “may” in rule 4 (1) which confers the discretion on the Governor, the word “may” in sub-rule (2) confers the discretion on him, or does the word “may” in sub-rule (2) really mean “shall” or “must”? There is no doubt that the word “may” generally does not mean “must” or “shall”. But it is well-settled that the word “may” is capable of meaning “must” or “shall” in the light of the context. It is also clear that where a discretion is conferred upon a public authority coupled with an obligation, the word “may” which denotes discretion should be construed to mean a command. Sometimes, the Legislature uses the word “may” out of deference to the high status of the authority on whom the power and the obligation are intended to be conferred and imposed. In the present case, it is the context which is decisive. The whole purpose of rule 4 (2) would be frustrated if the word “may” in the said rule

receives the same construction as in sub-rule (1). It is because in regard to Gazetted Government servants the discretion had already been given to the Governor to refer their cases to the Tribunal that the rule-making authority wanted to make a special provision in respect of them as distinguished from other Government servants falling under rule 4 (1) and rule 4 (2) has been prescribed ; otherwise rule 4 (2) would be wholly redundant. In other words, the plain and unambiguous object of enacting rule 4 (2) is to provide an option to the Gazetted Government servants to request the Governor that their cases should be tried by a Tribunal and not otherwise. The rule-making authority presumably thought that having regard to the status of the Gazetted Government servants, it would be legitimate to give such an option to them. Therefore, we feel no difficulty in accepting the view taken by the High Court that rule 4 (2) imposes an obligation on the Governor to grant a request made by the Gazetted Government servant that his case should be referred to the Tribunal under the Rules. Such a request was admittedly made by the respondent and has not been granted. Therefore, we are satisfied that the High Court was right in quashing the proceedings proposed to be taken by the appellant against the respondent otherwise than by referring his case to the Tribunal under the Rules.

*K. S. Hajela*, Senior Advocate, (*C. P. Lal*, Advocate, with him), for Appellant.

*K. L. Gosain*, Senior Advocate, (*Naunit Lal*, Advocate, with him), for Respondent.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

*P. B. Gajendragadkar*,  
*M. Hidayatullah* and *J. C. Shah*, JJ.  
4th March, 1963.

*Hari Narain v.*  
*Badridas.*  
C.A. No. 14 of 1963.

*Practice—Supreme Court—Special Leave—When can be revoked.*

It is true that in the present case, Special Leave was granted on the 26th September, 1962 and it is possible for Mr. Setalvad to recall what he argued before the Court when Special Leave was granted. But it is necessary to bear in mind that the appeal may come on for hearing long after Special Leave is granted, that counsel appearing at the stage of admission may not be same as at the stage of final hearing, and the Bench that granted Special Leave may not necessarily deal with the appeal at the final stage. Therefore, it is no answer to the respondent's contention that though the material statements in the Special Leave Petition may be substantially inaccurate, though not wholly untrue, those statements may not have influenced the Court in granting Special Leave. Mr. Setalvad has also invited our attention to the fact that the impugned statements and grounds are substantially copied from the averments made in the appeal before the High Court. That may be so, but the fact still remains that two important statements which, if true, may have been of considerable assistance to the appellant in invoking the protection of certain provisions of a statute even on the construction placed by the High Court on that section are found to be untrue, and that, in our opinion, is a very serious infirmity in the petition itself. It is of utmost importance that in making material statements and setting forth grounds in applications for Special Leave, care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with applications for Special Leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. That is why we have come to the conclusion that in the present case, Special Leave granted to the appellant ought to be revoked.

*M. C. Setalvad* and *S. T. Desai*, Senior Advocates, (*Naunit Lal*, Advocate, with them), for Appellants.

*G. S. Pathak*, Senior Advocate, (*S. N. Andley*, Advocate of *M/s. Rajinder Narain & Co.*, with him), for Respondent.

G.R.

*Leave revoked and appeal dismissed.*

*Continued from July Part.*

against him, Mr. Majumdar, Inspector, C.I.D., made a preliminary investigation, examined a number of witnesses and recorded their statements, and submitted his report recommending further action. On that the Deputy Superintendent of Police, Belgaum, started proceedings against the respondent, framed six charges against him, and called for his explanation. The respondent denied the charges, and then a regular inquiry was held on 4th November, 1954. Clause (8) of section 545 of the Bombay Police Manual which lays down the procedure to be followed in such inquiries is as follows:—

"The officer conducting the inquiry should then recall all necessary witnesses in support of the charge and, in the defaulter's presence, read out any statements they may have made in the preliminary inquiry and record, if necessary, any further statements they may have to make. He should then give the defaulter an opportunity of cross-examining each witness after his statement in support of the charge is completed, any such cross-examination being recorded below the statement of the witness concerned."

In accordance with this provision the Deputy Superintendent recalled the witnesses who had been examined by Mr. Majumdar during the preliminary investigation, brought on record the previous statements given by them, and after putting a few questions to them tendered them for cross-examination by the respondent. As a fact all the witnesses were cross-examined by the respondent in great detail. The Deputy Superintendent held that all the charges framed against the respondent had been proved and he accordingly issued on 14th December, 1954 a notice to him to show cause why he should not be punished by his pay being reduced from Rs. 125 to Rs. 120 per month for two years. To this again the respondent submitted his explanation and thereafter the Deputy Superintendent passed on 5th January, 1955 an order reducing his pay as aforesaid.

The respondent would have been well advised to have left the matter there. But he chose to prefer an appeal against the order. The Deputy Inspector-General of Police, Belgaum, before whom it came, not only dismissed it but issued, in exercise of his powers in revision, a notice to the respondent to show cause why he should not be removed from service and after taking his explanation ordered his dismissal on 5th July, 1956. The respondent filed a revision against this order to the Government of Bombay and under the States Reorganisation Act, 1956 that came before the Government of Mysore and was dismissed on 31st August, 1957. The respondent thereupon filed in the High Court of Mysore, the Writ Petition, out of which the present appeal arises, questioning the validity of the order of dismissal dated 5th July, 1956 on a number of grounds of which we are concerned in this appeal with only one, namely, that the inquiry by the Deputy Superintendent of Police was conducted in disregard of the rules of natural justice and in consequence the order made was bad. The learned Judges of the High Court agreed with this contention. They held, on the authority of certain observations made by this Court in *The Union of India v. T. R. Verma*<sup>1</sup>, and by the Bombay High Court in *The State of Bombay v. Gajanan Mahadev*<sup>2</sup> that principles of natural justice required that the evidence of witnesses in support of the charges should be recorded in the presence of the enquiring officer and of the person against whom it is sought to be used. In this view they held further that section 545 (8) of the Bombay Police Manual was bad as it contravened principles of natural justice. They accordingly held that the enquiry was vitiated by the admission in evidence of the statements made by the witnesses before Mr. Majumdar without an independent examination of them before the Deputy Superintendent of Police. In the result the order of dismissal was set aside. It is the correctness of this Judgment that is now under challenge before us.

The sole point for determination in this appeal therefore is whether the procedure adopted by the Deputy Superintendent of Police in admitting the statements of witnesses examined before Mr. Majumdar in evidence is opposed to the rules of natural justice. The question is one of importance, because as appears from the

1. (1958) 1 M.L.J. (S.C.) 67 : (1958) 67 : (1958) S.C.J. 142 : 1958 S.C.R. 499.  
M.L.J. (Grl.) 123 : (1958) 1 An. W.R. (S.C.) 2. I.L.R. (1954) Bom. 915.

cases which have come before us the procedure followed by the Deputy Superintendent of Police in this case is the one followed by many tribunals exercising quasi-judicial powers. For a correct appreciation of the position, it is necessary to repeat what has often been said that tribunals exercising quasi-judicial functions are not Courts and that therefore they are not bound to follow the procedure prescribed for trial of actions in Courts nor are they bound by strict rules of evidence. They can, unlike Courts, obtain all information material for the points under enquiry from all sources, and through all channels, without being fettered by rules and procedure, which govern proceedings in Court. The only obligation which the law casts on them is that they should not act on any information which they may receive unless they put it to the party against whom it is to be used and give him a fair opportunity to explain it. What is a fair opportunity must depend on the facts and circumstances of each case but where such an opportunity had been given, the proceedings are not open to attack on the ground that the enquiry was not conducted in accordance with the procedure followed in Courts.

The question as to the contents of the rules of natural justice has been subject of numerous decisions in England and in this country. Dealing with this question Lord Loreburn, L.C., observed in *Board of Education v. Rice*<sup>1</sup>, as follows :—

“In such cases the Board of Education will have to ascertain the law as also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.”

This statement of the law was adopted again by the House of Lords in *Local Government Board v. Arlidge*<sup>2</sup>.

This question has also been considered by this Court in several decisions. One of the earliest of them is the decision in *New Prakash Transport Company, Ltd. v. New Suwarna Transport Company, Ltd.*<sup>3</sup>. There the facts were that a Tribunal constituted under the Motor Vehicles Act had refused to grant a permit to a company to run a bus on a certain route. Then the company filed a writ application in the High Court of Nagpur, attacking the order refusing the permit on the ground, *inter alia*, that the Tribunal had acted on a police report which was produced at the time of the hearing without giving the petitioner sufficient opportunity to meet it, and had thereby violated the rules of natural justice. Agreeing with this contention the learned Judges of the High Court had set aside the order. In reversing this order, this Court held that the police report was information on which the Tribunal was entitled to act, and as it was read at the enquiry, in the presence of the parties, and they had been heard on it, there had been sufficient compliance with the rules of natural justice.

We may next refer to the decision of this Court in *The Union of India v. T. R. Verma*<sup>4</sup>. That arose out of a Writ Petition filed by a Government servant in the High Court of Punjab, calling in question an order of dismissal passed against him on the ground that the enquiry which resulted in the order had not been conducted in accordance with the rules of natural justice. The facts were that when the petitioner, and his witnesses appeared for giving evidence, the enquiring officer took their examination on hand himself, put them questions, and after he had finished, asked them to make their statements. The complaint of the petitioner was that he and his witnesses should have been allowed to give their own evidence, and then cross-examined, and that the departure from the normal procedure in taking evidence, was a violation of the rules of natural justice. In rejecting this contention this Court observed as follows :—

1. L.R. (1911) A.C. 179, 182.

2. L.R. (1915) A.C. 120.

3. (1957) S.C.J. 236 : (1957) M.L.J. (Crl.) 157 : 1957 S.C.R. 98.

4. (1958) 1 M.L.J. (S.C.) 67 : (1958) 1 An. W.R. (S.C.) 67 : (1958) M.L.J. (Crl.) 123 : (1958) S.C.J. 142 : 1958 S.C.R. 499.

"Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed. *Vide* the recent decision of this Court in *New Prakash Transport Co. v. New Suvarna Transport Co.*<sup>1</sup>, where this question is discussed."

It is on the observation that "the evidence of the opponent should be taken in his presence" that the decision of the learned Judges that the evidence of witnesses should be recorded in the presence of the person against whom it is to be used is based. Read literally the passage quoted above is susceptible of the construction which the learned Judges have put on it, but when read in the context of the facts stated above, it will be clear that that is not its true import. No question arose there as to the propriety of admitting in evidence the statement of a witness recorded behind the back of a party. The entire oral evidence in that case was recorded before the enquiring officer, and in the presence of the petitioner. So there was no question of a contrast between evidence recorded behind a party and admitted in evidence against him, and evidence recorded in his presence. What was actually under consideration was the procedure to be followed by quasi-judicial bodies in holding enquiries, and the decision was that they were not bound to adopt the procedure followed in Courts, and that it was only necessary that rules of natural justice should be observed. Discussing next what those rules required, it was observed that the person against whom a charge is made should know the evidence which is given against him, so that he might be in a position to give his explanation. When the evidence is oral, normally the examination of the witness will in its entirety, take place before the party charged, who will have full opportunity of cross-examining him. The position is the same when a witness is called, the statement given previously by him behind the back of the party is put to him, and admitted in evidence, a copy thereof is given to the party, and he is given an opportunity to cross-examine him. To require in that case that the contents of the previous statements should be repeated by the witness word by word, and sentence by sentence, is to insist on bare technicalities, and rules of natural justice are matters not of form but of substance. In our opinion they are sufficiently complied with when previous statements given by witnesses are read over to them, marked on their admission, copies thereof given to the person charged, and he is given an opportunity to cross-examine them.

This question came up for consideration by this Court more recently in *Phulbari Tea Estate v. Its Workmen*<sup>2</sup>. There the facts were that one of the workmen, B. N. Das was dismissed by the management as the result of an enquiry into a charge of theft. The Industrial Tribunal set aside this order on the ground that there had been no proper enquiry. What had happened was that the management had first made an investigation, and taken statements of witnesses, and at the regular enquiry these statements were brought on record but they were not put to the witnesses, who were present, nor had copies thereof been given to the workman. The question was whether the enquiry was in accordance with rules of natural justice. In answering it in the negative, Wanchop, J., speaking for the Court, observed that the admission in evidence of the prior statements under the circumstances stated above, was not in consonance with the principles of natural justice laid down in *The Union of India v. T. R. Verma*<sup>3</sup>. This decision is clearly of no assistance to the respondent.

Reliance was also placed on the following observations by Chagla, C.J., in the *State of Bombay v. Gajanan Mahadev*<sup>4</sup>:

1. (1957) S.C.J. 236 : (1957) M.L.J. (Crl.) 157 : (1957) S.C.R. 98.  
2. (1960) 1 S.C.R. 32.  
3. (1958) 1 M.L.J. (S.C.) 67 : (1958) 1

An.W.R. (S.C.) 67: (1958) M.L.J. (Crl.) 123 : (1958) S.C.J. 142 : (1958) S.C.R. 499.  
4. I.L.R. (1954) Bom. 915.

"Even assuming that a statement of such a witness is furnished to the Government servant, it is a sound rule that Courts of law follow and which even domestic tribunals should follow that all evidence must be given in the presence of an accused person and in the presence of a person against whom action is proposed to be taken. It is one thing to make a statement behind the back of a person ; it is entirely a different thing to make a statement in front of the Court or a domestic tribunal and in the presence of a person against whom you are going to make serious charges."

But in our opinion, the purpose of an examination in the presence of a party against whom an enquiry is made, is sufficiently achieved, when a witness who has given a prior statement is recalled, that statement is put to him, and made known to the opposite party, and the witness is tendered for cross-examination by that party. In this view we must hold that the order dated 5th July, 1956 is not liable to be set aside on the ground that the procedure followed at the inquiry by the Deputy Superintendent of Police was in violation of the rules of natural justice. It is hardly necessary to add that clause (8) of section 545 of the Bombay Police Manual cannot be held to be bad as contravening the rules of natural justice.

This finding however does not dispose of the entire matter. It is the contention of the respondent that the Deputy Inspector-General of Police was not entitled in revision to enhance the punishment and this question has not been decided by the learned Judges. It is therefore necessary to remand this case for hearing on this and all other issues which might arise for decision. We accordingly set aside the order in appeal and remand the case for hearing on the other points in this case. Costs of this appeal will abide the result of the hearing in the Court below.

*Case remanded.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, A. K. SARKAR, AND K. N. WANGHOO, JJ.  
Inder Lal

*.. Appellant\**

*v.*

Lal Singh and others

*.. Respondents.*

*Representation of the People Act (XLIII of 1951), section 123 (4)—Corrupt practice under—Gist of.*

To constitute a corrupt practice under section 123 (4) of the Representation of the People Act (XLIII of 1951) the publication in question must be by a candidate or his agent or by any other person; the said publication should be in regard to a statement of fact which is false and which he either believes to be false or does not believe to be true and it must have relation to the personal character or conduct of the candidate and it should be a statement reasonably calculated to prejudice the prospect of that candidate's election. In the instant case the statement made in the pamphlet amounts to an allegation that respondent No. 2 was offering bribe in securing votes and it is idle to contend that it does not affect the personal character of that candidate.

Appeal by Special Leave from the Judgment and Order dated the 2nd August, 1960, of the Rajasthan High Court in D.B. Civil Miscellaneous (Election) Appeal No. 1 of 1960.

G. S. Pathak and A. V. Viswanatha Sastri, Senior Advocates (S. N. Andley and P. L. Vohra, Advocates of M/s. Rajinder Narain & Co., with them) for Appellant.

G. C. Mathur, Advocate (*amicus curiae*) for Respondent No. 1.

The Judgment of the Court was delivered by

Gajendragadkar, J.—This appeal by Special Leave arises out of an election petition filed by the appellant challenging the validity of the election of respondent No. 1, Lal Singh on several grounds. The appellant is an elector in the Chittorgarh Constituency and the election which led to the present petition was held in March, 1957 for the Rajasthan Legislative Assembly from the said constituency. As a result of the election, respondent No. 1 was declared to have been duly elected on



March 11, 1957. He secured 7,272 votes whereas respondent No. 2 Laxman Singh son of Maharawal Sir Bijay Singh secured 7,261 votes and respondent No. 3 Chhogalal secured 569 votes. The appellant's case was that respondent No. 1's election was invalid inasmuch as he had practised corrupt practices at the said election. According to the appellant, respondent No. 1 procured or abetted or attempted to procure either by himself or by his agents or by other persons with his connivance or that of his agents the reception of invalid votes and as a result of the said votes, the result of the Election had been materially affected. The appellant stated in detail the manner in which the said invalid votes had been procured. The appellant further pleaded that respondent No. 1, his agents and other persons with the connivance of respondent No. 1 or that of his agents published such statements of facts (Exhibits 3 and 6) which were false and which they either believed to be false or did not believe to be true, in relation to the personal character or conduct of respondent No. 2 which were likely to prejudice the prospects of respondent No. 2 at the election. It is on these two grounds that the appellant claimed a declaration that the election of respondent No. 1 was invalid. He also claimed that respondent No. 2 should be declared to have been validly elected.

Respondent No. 2 filed his written statement supporting the petition but he did not appear before the Tribunal at the hearing. Respondent No. 3 did not appear at all, while respondent No. 1 denied all the allegations made by the appellant and contended that the election petition filed by the appellant should be dismissed.

On the pleadings of the parties, the Election Tribunal framed as many as 26 issues. In substance, it held that the several allegations made by the appellant in respect of the receipt of invalid votes had not been proved and so the first ground on which respondent No. 1's election was challenged by the appellant, could not succeed. In regard to the second ground on which respondent No. 1's election was challenged by the appellant, the Tribunal held that Exhibit 3 had been published by the agent of respondent No. 1 but not with his express consent and in regard to Exhibit 6, the Tribunal was not satisfied that it had been published by respondent No. 1's agent. That is how even the second ground made by the appellant disputing the validity of respondent No. 1's election did not succeed. In the result the election petition was dismissed.

Against the said decision, the appellant preferred an appeal in the Rajasthan High Court. The High Court confirmed the finding of the Tribunal on the first point in regard to the receipt of invalid votes. It is true that the High Court was not satisfied with the approach adopted by the Tribunal in dealing with this part of the case and it thought that some of the reasons given by the Tribunal in support of its conclusions were not satisfactory. Even so, the High Court felt that the final conclusion of the Tribunal was, on the whole, correct and need not be reversed. Thus, both the Tribunal and the High Court have recorded findings against the appellant on the first part of his case.

In regard to the second contention raised by the appellant, the High Court has accepted the finding of the Tribunal about the publication of Exhibit 3. In regard to the other document Exhibit 6, the High Court has reversed the conclusion of the Tribunal and held that the said document had been published for the benefit of respondent No. 1 and differing from the view taken by the Tribunal, the High Court has held that the publication of both the pamphlets was with the consent of respondent No. 1 and so was outside the purview of section 100 (2) of the Representation of the People Act 1951 (XLIII of 1951) (hereinafter called the Act). Having thus found that the two pamphlets had been published by the agent of respondent No. 1 and with his consent, the High Court proceeded to examine the question as to whether the material allegations made against respondent No. 2 by the said pamphlets were true or false. The High Court held that the said material allegations were false and it came to the conclusion that they were calculated to affect prejudicially the prospects of the election of respondent No. 2. The High Court was, however, not satisfied that the said allegations had relation to the personal character or conduct of respondent No. 2 and so it held that the corrupt practice alleged by

the appellant against respondent No. 2 on the strength of the said two pamphlets under section 123 (4) of the Act had not been proved. The result was that though the High Court differed from the Election Tribunal in regard to some of the findings recorded by the Tribunal on the second ground, its ultimate conclusion was the same as that of the Tribunal. The appeal preferred by the appellant was accordingly dismissed. It is against this order that the appellant has come to this Court by Special Leave.

In this appeal, the only question which we are called upon to consider is whether the two pamphlets justify the contention of the appellant that respondent No. 1 has committed a corrupt practice under section 123 (4). The question as to whether respondent No. 1's election has been materially assisted by the receipt of invalid votes, is concluded by concurrent finding of fact recorded against the appellant and so we have not allowed Mr. Sastri to dispute the correctness of that finding.

Before dealing with the short point raised for our decision under section 123 (4) of the Act, it is necessary to set out the material portion of the pamphlets on which the appellant's case of corrupt practice is based. The relevant portion in the pamphlet Exhibit 3 to which objection is taken by the appellant reads thus :—

- “(1) Enemy of Democracy ?
- (2) Agent of the foreigners strangling the freedom of Bharat ?
- (3) Supporter and collaborator of the conspiracy of Pakistani attack on Bharat ?
- (4) Bringer of tyrannical rule of Rajas in Rajasthan ?
- (5) Destroyer of Hindu Muslim unity by raising the slogan of Ram Rajya ?
- (6) Purchaser of the opponents of the Congress by means of money ?

P. Maharawal of Dungarpur, Shri Laxman Singh, who was defeated in the last election by thousands of votes, has come to mislead the people of Chittor, has come to push back the backward district of Chittor by 100 years, has come to destroy the peace and tranquility of Chittor under cover of communal organisation, has come to provide means to the public to spend their hard earned money on drinking orgies, has come to intensify again the tyranny of Raja Maharajas in Rajasthan, has come to make a gift of Kashmir to the aggressor Pakistan, has come to enslave India again by collaborating with Pakistan and Pakistan's friends. He is a friend of Raja Maharajas and an enemy of cultivators and labourers. He wants to grant land to Bhooswamis and thereby oust the cultivators and wants to establish once more his pageant by exploitation of the hard labour of cultivators.”

The other pamphlet contains substantially the same portion and so it need not be reproduced.

It is urged for the appellant that in describing respondent No. 2 as the agent of foreigners strangling the freedom of Bharat, the personal character of respondent No. 2 has been falsely and adversely criticised. The same comment is made in respect of the description of respondent No. 2 as the supporter and collaborator of the conspiracy of Pakistani attack on Bharat and in support of this argument, reliance has been placed on the further statement in the pamphlet that respondent No. 2 had come to make a gift of Kashmir to the aggressor Pakistan and had come to enslave India by collaborating with Pakistan and Pakistan's friends. It is also argued that describing respondent No. 2 as the purchaser of the opponents of the Congress by means of money, attracts the provisions of section 123 (4). It is mainly on these three allegations in the pamphlet that the case of the appellant rests and the argument is that by making these allegations, the private character of respondent No. 2 has been falsely villified and that the said vilification was reasonably calculated to prejudice the prospects of his election.

On the other hand, for respondent No. 1 Mr. Mathur who appeared *amicus curiae* at our request has contended that all the three allegations, though false, cannot be said to touch or affect the private character of respondent No. 2. He has argued that in dealing with section 123 (4), it is necessary to make a distinction between the personal or private character or conduct of a candidate and his public or political character. Mr. Mathur's contention is that though the criticism made against respondent No. 2 by the impugned pamphlet may be extravagant, unreasonable, and false, it is nevertheless criticism made against him in his public and political character and as such, section 123 (4) cannot be invoked.

It is, therefore, necessary to determine the true scope and effect of the relevant provision in section 123 (4). Section 123 deals with corrupt practices and amongst them, is the corrupt practice specified by sub-section (4). That sub-section reads thus :—

“The publication by a candidate or his agent or by any other person, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal or retirement from contest, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election.”

It would thus be seen that the publication in question must be by a candidate or his agent or by any other person ; the said publication should be in regard to a statement of fact which is false and which he either believes to be false or does not believe to be true ; that it must have relation to the personal character or conduct of the candidate, or should have relation to the candidature, withdrawal or retirement from contest of any candidate and that it should be a statement reasonably calculated to prejudice the prospects of that candidate's election. All the requirements of this sub-section, except one, are held to have been satisfied by the High Court. The only requirement of the sub-section which has not been satisfied according to the High Court is that the statement has no relation to the personal character or conduct of respondent No. 2. Mr. Sastri contends that this finding of the High Court is erroneous in law.

It would be noticed that in prescribing the requirement that the false statement should have relation to the personal character of the candidate, a distinction is intended to be drawn between the personal character of the candidate and his public or political character. The provision postulates that if a false statement is made in regard to the public or political character of the candidate, it would not constitute a corrupt practice even if it is likely to prejudice the prospects of that candidate's election. This assumption is presumably based on the theory that the electorate being politically educated and mature, would not be deceived by a false criticism against the public or political character of any candidate. The public and political character of a candidate is open to public view and public criticism and even if any false statements are made about the political views of a candidate or his public conduct or character, the electorate would be able to judge the allegations on the merits and may not be misled by any false allegations in that behalf. It is on this theory that false statements of fact affecting the public or political character of a candidate are not brought within the mischief of section 123 (4). In order that the elections should be free, it is necessary that the electorate should be educated on political issues in a fearless manner and so, the Legislature thought that full and ample scope should be left for free and fearless criticism by candidates against the public and political character of their opponents.

But the position with regard to the private or personal character of the candidate is very different. Circulation of false statements about the private or personal character of the candidate during the period preceding elections is likely to work against the freedom of election itself inasmuch as the effect created by false statements cannot be met by denials in proper time and so the constituency has to be protected against the circulation of such false statements which are likely to affect the voting of the electors. That is why it is for the protection of the constituency against acts which would be fatal to the freedom of election that the statute provides for the inclusion of the circulation of false statements concerning the private character of a candidate amongst corrupt practices. Dissemination of false statements about the personal character of a candidate thus constitutes a corrupt practice.

Though it is clear that the statute wants to make a broad distinction between public and political character on the one hand and private character on the other, it is obvious that a sharp and clear-cut dividing line cannot be drawn to distinguish the one from the other. In discussing the distinction between the private character and the public character, sometimes reference is made to the “man beneath the politician” and it is said that if a statement of fact affects the man beneath the politi-

cian it touches private character and if it affects the politician, it does not touch his private character. There may be some false statements of fact which clearly affect the private character of the candidate. If, for instance, it is said that the candidate is a cheat or murderer there can be no doubt that the statement is in regard to his private character and conduct and so if the statement is shown to be false, it would undoubtedly be a corrupt practice. Similarly, if the economic policy of the party to which the candidate belongs or its political ideology is falsely criticised and in strong words it is suggested that the said policy and ideology would cause the ruin of the country, that clearly would be criticism, though false, against the public character of the candidate and his political party and as such, it would be outside the purview of the statute. But there may be cases on the borderline where the false statement may affect both the politician and the man beneath the politician and it is precisely in dealing with cases on the border-line that difficulties are experienced in determining whether the impugned false statement constitutes a corrupt practice or not. If, for instance, it is said that in his public life, the candidate has utilised his position for the selfish purpose of securing jobs for his relations, it may be argued that it is criticism against the candidate in his public character and it may also be suggested that it nevertheless affects his private character. Therefore, it is clear that in dealing with corrupt practices alleged under section 123 (4) where we are concerned with border-line cases, we will have to draw a working line to distinguish private character from public character and it may also have to be borne in mind that in some cases, the false statement may affect both the private and the public character as well.

In the present case, we are satisfied that the allegation made in the pamphlet that respondent No. 2 is a purchaser of the opponents of the Congress by means of money clearly attracts the provisions of section 123 (4). In plain terms, the statement amounts to an allegation that respondent No. 2 buys by offering bribes the votes of the opponents of the Congress. Bribery is itself a corrupt practice and if it is said against a candidate that he practises the corrupt practice of buying the votes of the opponents of the Congress by means of bribery, that clearly and unequivocally affects his private character. Offering a bribe in an election introduces an element of moral turpitude and it cannot be denied that a person who offers bribe loses reputation as an individual in the eyes of the public. The statement alleges that the bribes are offered by respondent No. 2 for the purpose of election and in that sense it may be that it is his public character which is falsely criticised. But, in our opinion, it would be idle to contend that it is a false statement only against the public character of respondent No. 2. Having regard to the moral turpitude involved in the offering of the bribe, the statement in question undoubtedly affects his private character as well. Unfortunately, in dealing with this point, the High Court does not appear to have considered this statement at all. It has dealt with this problem in very general terms. It has observed that the impugned statements all refer to the Maharawal as one of those various persons of his class who as a body appear to be responsible in the opinion of the writer for the political mischiefs referred to in the statements, and that a general reading of the document shows that the attack upon him is a part of a bigger organisation of individuals who do not appear to be as the writer thinks, well inclined towards the progress of the country. It is perfectly true that in dealing with the contention that the false statement contained in the pamphlet amounts to a corrupt practice under section 123 (4), it is necessary to read the document as a whole before determining the effect of any particular objectionable statement. But reading the document as a whole, we see no justification whatever for the view expressed by the High Court that the criticism made in the document is directed against a body of persons and not against respondent No. 2 himself. The failure of the High Court to deal with the several specific statements on which the argument of the appellant is based, has introduced a serious infirmity in its final conclusion. If only the High Court had considered the allegation that respondent No. 2 was the purchaser of opponents of the Congress by means of money, we are inclined to think that the High Court would not have brushed aside the appellant's case with the general observations:

which it has made in its judgment. We are, therefore, satisfied that the appellant is right in contending that the false statement of fact to which we have just referred constitutes a corrupt practice under section 123 (4) of the Act. In that view of the matter, it is unnecessary to consider whether the other impugned statements of fact also attract the provisions of section 123 (4).

In the result, we must reverse the finding of the High Court that publication of the impugned pamphlets does not constitute a corrupt practice under section 123 (4). The result of this conclusion inevitably is that the election of respondent No. 1 must be declared to be invalid because there is no doubt that the corrupt practice proved in this case falls under section 101 (b) and is outside the purview of section 100 (2).

That takes us to the question as to whether respondent No. 2 can be declared to have been validly elected at the election in question. This question will have to be decided in the light of provisions of section 101 (b) of the Act. The said section provides, *inter alia*, that

"if any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that any other candidate has been duly elected and the Tribunal is of opinion that but for the votes obtained by such returned candidate by corrupt practices such other candidate would have obtained a majority of the valid votes, the Tribunal shall after declaring the election of the returned candidate to be void declare such other candidate to have been duly elected."

This question has not been considered by the High Court and it cannot be decided unless the relevant facts are examined on the merits and that normally would mean our remanding the case to the High Court for the decision of the point in accordance with law. We do not, however, propose to adopt such a course in view of the fact that it would be futile to give any further lease of life to this petition. The election which is challenged took place in 1957 and in fact we are now on the verge of fresh elections which would take place this month. That is why we think it would serve no purpose in sending the matter back for the decision of the question as to whether on the evidence adduced in the case, respondent No. 2 can be declared to have been validly elected.

The result is, the appeal is allowed and the election of respondent No. 1 is set aside. Since respondent No. 1 did not appear, there would be no order as to costs.

K.L.B.

*Appeals allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, M. Hidayatullah and J. C. Shah, JJ.

Nedunuri Kameswaramma

.. *Appellant\**

*v.*

Sampati Subba Rao

.. *Respondent.*

*Practice—Absence of specific issue—If ground for dismissal of suit.*

*Madras Proprietary Estates' Village Services Act (II of 1894), section 17—Scope—Resumption of Karnikam service inam by Zamindar—Effect.*

Though no doubt, no issue was framed, and the one, which was framed, could have been more elaborate, since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mis-trial which vitiates proceedings.

The gist of section 17 of Madras Act II of 1894 was that lands granted for the remuneration of the *karnam* were to be resumed by the State if granted by the State and by the proprietor, if granted by the proprietor.

On an analysis of the documents it was held that the suit lands were *Karnikam* service inam and resumed by the Zamindar as such and became *jeroyti* land after resumption of the *Karnikam* service inam.

Appeal by Special Leave from the Judgment and Decree dated the 4th September, 1958, of the Andhra Pradesh High Court in Second Appeal No. 633 of 1955.

*A. Ranganadham Chetty*, Senior Advocate (*A. V. Rangam* and *T. Satyanarayana*, Advocates, with him), for Appellant.

*K. Bhimasankaram*, Senior Advocate (*T. V. R. Tatachari*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

*Hidayatullah, J.*—This is an appeal with Special Leave against a judgment in Second Appeal of the High Court of Andhra Pradesh, by which a suit filed by the appellant was ordered to be dismissed, thus reversing the judgments and decrees of the two Courts below.

The suit was simple, but as it went on from appeal to appeal, it has widened out. It was filed by the appellant for ejectment of the respondent from 4.80 acres of *jeroyti* land bearing R. S. No. 186/1-2 in Nedunuru Village and for mesne profits. The suit was based on a *kadapa* executed by the respondent agreeing to pay an annual rent of 58 bags of paddy and a sum of Rs. 38 towards *thirwa* and cesses, the appellant undertaking to pay the *jeroyti* tax. The respondent agreed to vacate the land peacefully at the end of the year of tenancy. This *kadapa* is Exhibit A-1 dated 4th April, 1951. Similarly, yearly *kadapas* were executed in earlier years, and some of them executed between 1931 and 1948 were also produced in the case.

The respondent, however, raised many pleas. He denied that the land was *jeroyti* land, and alleged that it was part of a *Dharmila* inam land bearing R. S. No. 186/1-2, that the inam was granted to the appellant's predecessors more than 100 years ago, that the respondent's ancestors were ryots of that land from the very beginning, though *muchalikas* were taken from them every year and were executed by him and also his predecessors out of ignorance and under threats. The respondent claimed the *kudiwaram* rights for himself and averred that the appellant had only the *melwaram* rights which she lost, as they became vested in the Government after the Estates Abolition Act. He, therefore, contended that the appellant was now entitled only to a right to compensation, but had no right to the *kudiwaram* or the right to bring the present suit. The respondent also alleged that the appellant's husband who was a *karnam* had himself made entries in the *Adangal* accounts which he maintained, showing the suit land as *Dharmila* inam.

The appellant did not seek permission of the Court to file a rejoinder to the pleas of the respondent, but must be taken to have denied them. It appears that in the trial her stand was that this was not a *Sarvadumbala* inam but a *Karnikam* service inam, i.e., an inam in lieu of wages for village service, which was resumed by the Zamindar of Pithapuram, who granted a *jeroyti* patta (Exhibit A-5) of 1st September, 1925 to Vakkalanka Venkatasubbarayudu, the predecessor of the appellant. The question which was thus tried by the District Munsif, Amalapuram, embraced an issue as to whether the suit land was a *Dumbala Dharmila* inam before 1925 and had continued till the Estates Abolition Act was passed and enforced, or whether it was a *Karnikam* service inam granted by the Zamindar of Pithapuram, who could and did resume it in 1925 regranting the land to Vakkalanka Venkatasubbarayudu. It is clear that if the suit land was a *Dharmila Dumbala* inam, the appellant would have had only *melwaram* rights, which she must be deemed to have lost under the Estates Abolition Act, and consequently the respondent would now be considered to have become a ryot. If the suit land was a *Karnikam* service inam, then the resumption by the Zamindar of Pithapuram in 1925 would be valid and the re-grant to Venkatasubbarayudu would make him a tenant and the respondent, a sub-tenant liable to ejectment according to the terms of the *kadapa* executed by him. Unfortunately, by reason of the fact that the pleas on the subject of *Dharmila* inam were exclusively raised in the written statement, which pleas were not traversed by the appellant, the issue framed was :

“Whether the suit land is a *Dharmila* inam, and if so, whether the suit in ejectment is maintainable?”

The issues whether the land was a *Karnikam* service inam and whether there was a valid resumption and a valid re-grant, were not framed. Before the District Munsif, Amalapuram, however, parties led their evidence on the issue, as if it embraced all the other issues not specifically framed. Twice the case was re-opened to give the respondent a chance to lead more evidence, though even so late as that, no attempt was made to get the issue modified or the proper pleadings to be made. After the District Munsif decreed the suit, a ground was raised before the Subordinate Judge, Amalapuram in appeal that the respondent had been prejudiced, because the decision was given without any plea or issue that this was a *Karnikam* service inam, which decision lay at the root of the decree. The learned Subordinate Judge in the appeal before him held that the absence of the issue regarding the *Karnikam* service inam had not prejudiced the respondent, who had himself set up a case of *Dharmila* inam and had also met the case of a *Karnikam* service inam and had filed documents and led evidence in refutation of the other case. He upheld the decision of the District Munsif that this was a *Karnikam* service inam, and confirmed the decree passed by him. On Second Appeal, the learned single Judge in the judgment under appeal held that the suit deserved to be dismissed on the short ground that the decision of the two Courts below proceeded on a matter not pleaded or raised as an issue. He, however, went on to consider whether the land in question was a *Sarvadumbala Dharmila* inam or a *Karnikam* service inam, and came to the conclusion that the two Courts below were wrong in holding that it was a *Karnikam* service inam. He, therefore, allowed the appeal, and ordered the dismissal of the suit.

In this appeal with Special Leave, only two questions arise, and they are (a) whether the suit should be dismissed on the ground of want of proper pleas by the appellant in answer to the written statement, and (b) whether the decision that this was not a *Karnikam* service inam is proper in the circumstances of this case.

On the first point, we do not see how the suit could be ordered to be dismissed, for, on the facts of the case, a remit was clearly indicated. The appellant had already pleaded that this was *jeroyti* land, in which a *patta* in favour of her predecessors existed, and had based the suit on a *kadapa*, which showed a sub-tenancy. It was the respondent who had pleaded that this was a *Dharmila* inam and not *jeroyti* land, and that he was in possession of the *kudiwaram* rights through his predecessors for over a hundred years, and had become an occupancy tenant. Though the appellant had not mentioned a *Karnikam* service inam, parties well understood that the two cases opposed to each other were of *Dharmila Sarvadumbala* inam as against a *Karnikam* service inam. The evidence which has been led in the case clearly showed that the respondent attempted to prove that this was a *Dharmila* inam and to refute that this was a *Karnikam* service inam. No doubt, no issue was framed, and the one, which was framed, could have been more elaborate; but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mis-trial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion. Neither party claimed before us that it had any further evidence to offer. We, therefore, proceed to consider the central point in the case, to which we have amply referred already.

The appellant examined four witnesses and the respondent, seven in support of their respective cases. The High Court and the two Courts below did not rely upon the oral testimony at all. In view of this, it is not necessary to refer to the evidence of these witnesses, except where the proof of a document is to be considered. The decision in this case, therefore, depends upon the documents produced by the two parties in proof of their own contentions. These documents stand divided into two kinds: (a) those in which the inam is described as *Dharmila* inam and (b) those in which it is described as *Karnikam* service inam. Some of these

documents do not appear to have been properly proved. There are, besides, many documents which were filed in the case but which are difficult to connect with the land in dispute. The last category will obviously have to be excluded from consideration. The most important document, of course, is the *jeroyti patta* (Exhibit A-5) granted by the Zamindar of Pithapuram on 1st September, 1925, because if the land was held for *Karnikam* service from the Zamindar, then it is admitted that it could be validly resumed and re-granted by the Zamindar. The attempt of the respondent, therefore, which succeeded before the High Court but which had failed before the two Courts below was to show that the land was a *Sarvadumbala inam*, which could neither be resumed by the Zamindar of Pithapuram nor re-granted by him.

The learned single Judge in the High Court treated the finding, that prior to 1925 what existed was a *Karnikam* service inam, as a finding of law open to him to consider in Second Appeal. After a painstaking examination of the documents filed by the parties, he came to the conclusion that there was no such thing as a *Dharmila Karnikam* service inam. He held that the Zamindar had no power to resume this land under the Second Proviso to section 17 of the Madras Proprietary Estates' Village Services Act, 1894 (II of 1894) or to re-grant it on *jeroyti patta*. In this appeal, it is argued, at the outset, that the learned single Judge, in substance, reversed a finding of fact and that he was not entitled to do so under section 100 of the Code of Civil Procedure.

A construction of documents (unless they are documents of title) produced by the parties to prove a question of fact does not involve an issue of law, unless it can be shown that the material evidence contained in them was misunderstood by the Court of fact. The documents in this case, which have been the subject of three separate considerations, were the Land Registers, the *Amarkam*, and *Bhooband* Accounts and the *Adangal* Registers, together with certain documents derived from the Zamindari records. None of these documents can be correctly described as a document of title, whatever its evidentiary value otherwise. We do not, however, wish to rest our decision on this narrow ground even if right, because the legal inference from the proved facts may still raise a question of law.

Before we examine for ourselves the various documents in the record of the case, we wish to determine the exact point which the evidence has been held to establish. The term "*Dharmila*" is not a term of art, but is a convenient expression to describe those inams which are post-settlement as distinguished from those that are pre-settlement. Under section 11 of the Estates (Abolition and Conversion into Ryotwari) Act, 1948 (XXVI of 1948), every ryot in an estate shall, with effect on and from the notified date, be entitled to a ryotwari *patta* in respect of all ryoti lands. The Act abolishes all rights and interests in an estate belonging to any landholder, and the word "estate" includes an inam estate within the meaning of section 3 (2) (d) of the Estates Land Act. Another consequence of the notification is to extinguish the relationship of the landholder and ryot from the notified date. To avoid the consequences of the Estates (Abolition and Conversion into Ryotwari) Act, both sides claim the benefit of section 11 of that Act, the appellant claiming occupancy right on the strength of the *patta* read with the provisions of the Madras Estates Land Act as amended in 1936, and the respondent, on the strength of the averment that the appellant and her predecessors held an inam estate having only the *melwaram* rights, which got extinguished. Whether the one or the other is right, therefore, depends upon whether the appellant held an inam or was merely a *pattadar* and thus an occupancy tenant now entitled to be a ryot, and the respondent was merely a sub-tenant. It is from this point of view that the evidence of documents in this case should be viewed.

Before considering this evidence, it is necessary to refer to the provisions of three statutes, which will clear the ground for our findings. The Madras Permanent Settlement Regulation of 1802 (Madras Regulation XXV of 1802) was passed to fix for ever a moderate assessment of public revenue not liable to be increased under any circumstance, to ensure to the proprietors of lands the proprietary right of the



soil. Under that Settlement, instruments fixing the demand were to be delivered to the proprietors, and they, in their turn, were to execute *Kabuliyats* accepting the assessment. Where a part of the Zamindari, etc., was sold either *in invitum* or by private negotiation, the assessment on the separated lands bore the same proportion to the actual value of the separated portion, as the total permanent *jama* on the Zamindari bore to the actual value of the whole Zamindari. The Zamindars were required to furnish true accounts for this purpose. Section 11 of the Regulation provided that the Zamindars or landholders should support the regular and established number of *karnams* in the several villages of their respective Zamindaries. These *karnams* were to obey all legal orders, but were removable only by a sentence of a Court of Judicature. Simultaneously, the Madras Karnams Regulation of 1802 (Madras Regulation XXIX of 1802) was passed to provide for the efficient establishment of the office of a *karnam*, so that authentic information and accounts might be had. This Regulation provided for the establishment of a *karnam* for each village if the revenue was 400 pagodas or more, but it was possible for a *karnam* to be appointed for two or more villages where the revenue was less. The office was hereditary except for proved incapacity of the successor. Lists of *karnams* and of villages under each had to be deposited in the Collectorate. Elaborate provisions were made for the duties of the *karnams*, the accounts and registers they had to maintain, to the accuracy of which the *karnams* were compelled to swear.

In 1894, the Madras Proprietary Estates' Village Services Act, 1894 (II of 1894) was passed to make better provisions for the appointment and remuneration of the *karnams* among other matters. The Act was extended to certain classes of village officers by whatever designation known locally—viz.,

- (1) Village Accountants.
- (2) Heads of Villages.
- (3) Village watchmen or police officers.

On the extension of the Act or any portion thereof to the office of a village-accountant in any estate, section 11 of Regulation XXV of 1802 and Madras Regulation XXIX of 1802 were to cease to be in force. "Estate" was defined to include any permanently settled estate or any portion of permanently settled estate separately registered or any inam village or any portion consisting of one or more villages of any of the estates specified earlier held on a permanent under-tenure. "Village-office" was defined to mean in respect of any estate, an office in such estate to which the Act or any portion thereof was extended and "Village-officer" meant a person holding or discharging the duties of such office. Chapter III of the Act then provided for the imposition of a village service cess, its amount on apportionment and the method and incidents of its levy. This was to provide funds for payment of remuneration to the village servants, who, prior to the Act, were often remunerated by grant of lands. Section 17 then provided :

" 17. If the remuneration of a village-office consists in whole or in part of lands, or assignments of revenue payable in respect of lands, granted or continued in respect of or annexed to such village-office by the State, the State Government may enfranchise the said lands from the condition of service by the imposition of quit-rent under the rules for the time being in force in respect of the enfranchisement of village-service-inams in villages not permanently settled or under such rules as the State Government may lay down in this behalf; such enfranchisement shall take effect from such date as the State Government may notify :

Provided that the said enfranchisement shall be applicable to all lands or assignments as aforesaid even though, at the time this Act comes into force they may not be devoted to the purpose for which they were originally granted; and provided further, that any lands or emoluments derived from lands which may have been granted by the proprietor for the remuneration of village-service and which are still so held or enjoyed may be resumed by the grantor or his representative."

The section dealt with the enfranchisement of two kinds of lands : (a) lands granted by the State to be enfranchised by the State, and (b) lands granted by the proprietor to be enfranchised by the proprietor. Previously, in fixing the *peishkush* of the Zamindar, due regard was given to the expenses of the office of a *karnam*, and they were excluded from the assets of the Zamindari. An adjustment of the *peishkush* was allowed by the Act.

From the above, it will be seen that after the passing of Act (II of 1894) the *karnams* were to be paid in cash and the Act enabled the enfranchisement of lands granted on favourable terms to the *karnams*. The lands granted by the State were to be enfranchised by the State and those granted by the Zamindar by the Zamindar. The learned single Judge was of the view that the lands granted or held by way of remuneration for the performance of the village-office such as that of a *karnam* could only be enfranchised by the State Government and not by the Zamindar, who had nothing to do with such lands. The action of the Zamindar in this case in 1925 to resume the lands and to re-grant them by a *jeoroyti patta* was thus said to be entirely without jurisdiction. It was held that if these lands were originally *Dharmila* inams, they could not be resumed by the Zamindar, nor re-granted, and the learned Judge was of the further view that there was no such thing as a *karnam* service inam.

The words of section 17 of Act II of 1894 quite clearly show that lands could be granted for village service either by the State or by the proprietor. The title of the Act is "Proprietary Estates' Village Service". The words "village service" are used in the Second Proviso to section 17. Much distinction cannot, therefore, be made between village-officers and village servants, as is made in the Madras Hereditary Village-Offices Act, 1895 (III of 1895). We do not think that the Second Proviso is only limited to lands granted by the proprietors to village artisans or village servants such as the astrologers and the purohits. Even in the Hereditary Village-Offices Act, the term "office" is used not only in the title but in connection with artisans and village servants. The gist of section 17 thus was that lands granted for the remuneration of the *karnams* were to be resumed by the State if granted by the State, and by the proprietor, if granted by the proprietor.

The land in question in this case has not been shown to be granted at any time by the State. Resumption by the State under section 17 was thus out of question. The only question is whether it was a *Dharmila* inam, i.e., a personal service inam granted after the settlement or a grant for *Karnikam* service. That the land was held as *Karnikam* service inam on the date of resumption is amply proved by the proceedings themselves. The question is whether it was a *Karnikam* service inam. On this point, the oral evidence has not been considered, and we have thus only the documents filed by the parties.

Of these documents, Exhibits B-37 to B-43, which are the *Dharmila* inam accounts of Nedunuru village for fasli 1290 relating to Palivela Thana need not be considered, because it is impossible to connect them with the suit land. Similarly also, Exhibit A-17 series, the file of assessment receipts showing payment of taxes to Pithapuram Estate, are all after Exhibit A-5, and do not add weight to it. They also concern diverse lands, and cannot be said to clinch the issue. Exhibits A-8 to A-11, A-14 and A-15 are the previous *Kadapas* executed in favour of the appellant similar to Exhibit A-1, on which the suit was based. They are not relevant to decide the controversy, except in so far as there is an admission by the respondent that he has taken these lands on a yearly lease. Exhibits B-4 to B-12 are the assessment receipts from the *jeroyti ryots*. They do not mention the suit land, but the name of Vakkalanka Venkatasubbarayudu is mentioned in them. They show that Venkatasubbarayudu was paying *jeroyti* tax to the Estate from 1888 to 1901, which is the period covered by the receipts. These too cannot be said to help the appellant, because the identity of the lands again is not clear. The remaining documents undoubtedly speak sometimes of the land as *Dharmila* inam and sometimes as held for *Karnikam* service. The documents on which the appellant relies are divided into two parts, those after the *patta*, Exhibit A-5 dated 1st September 1925 or in connection with the grant thereof, and those before the grant of the said *patta*. Exhibit B-1 is of the year 1903, and is a certified extract of the land register of Nedunuru village for the suit land, and there, it is clearly shown that this was a *Dharmila* inam held for *Karnikam* service. Exhibits B-14 and B-15 both of 15th June, 1903 also show the same thing. The first is a certified extract of a statement of Vakkalanka Venkatasubbarayudu before the Deputy Inam Collector, and the land is described as "Baikar Mission in Kanyasuram". The second is a statement of the same person before the Deputy Inam Collector, and the land is described as "Baikar Mission in Kanyasuram".

tions it as a service inam. These documents do not bear out the contentions of the respondent, even though Vakkalanka Venkatasubbarayudu seemed to have objected at the time. In Exhibit B-18, which is another entry from the land registers, the land is shown as *Dharmila* inam for service as *Karnikam*. In Exhibit A-2 of 1920-21, which is a statement of *Dharmila* inams and services from the Pithapuram Estate, the inam is shown "for service", but there is a note :

"There is no need to continue this Inam free of service. This should be resumed and assessed, if no agreement is given. Continue as long as the service is rendered properly.

(Signed)....for Raja."

and underneath, there is another endorsement :

"Immediate steps should be taken to resume his Inam and assess, as they are being paid money."

This shows that by 1920-21 the change in the law under which there was a money payment for *Karnikam* service was taken note of, and the lands were asked to be resumed by the Zamindar under section 17 of Act II of 1894. In Exhibits A-3 and A-4 (1923 and 1924), the Dewan again orders resumption of these lands, and in the latter, notice was ordered to be sent through a *vakil*. This notice was apparently issued in October, 1924, and the reply to it was given by Vakkalanka Venkatasubbarayudu in Exhibit B-34, where he stated that the lands were not *Dharmila Karnikam* service inam. The admission of Vakkalanka Venkatasubbarayudu is used by the respondent as an admission against himself; but it is quite clear that Vakkalanka Venkatasubbarayudu made that statement merely to avert resumption of the lands, which was quite contrary to the facts already stated by us. Indeed, the Pithapuram Estate did not pay attention to it, and took a statement from Venkatasubbarayudu on 1st September 1925 (Exhibit B-35) that he was willing to have a *jeroyti patta*, though he stated that his action was without prejudice to any case that he might file in Court. Venkatasubbarayudu never filed a suit, and accepted Exhibit A-5, the *jeroyti patta* in 1925. In addition to these documents, the appellant relied on Exhibit A-12, an important document of 1904, which is an extract from the Survey and Settlement Register. This land is there shown as held for *karnam* service. He also relied on Exhibit B-25, but that is not a document relating to this land.

From the above, it will appear that right from 1903 to 1925 this land was treated as held on *karnam* service inam liable to be resumed by the Zamindar. The other documents show that it was, in fact, so resumed and a *jeroyti patta* was given, and in all the subsequent documents, it is described as *jeroyti* land.

The other side relies upon some accounts which have been summoned from the Estate. Exhibits B-28 to B-30 are the *Bhooband* accounts of 1834, 1850 and 1851. They relate to some lands which are described as *dumbala* inams in Chalapalli-Nedunuru group. These accounts cannot be connected with the suit land, and no legal inference can be drawn from them. Exhibit B-36 (1906) is the *Jhadta* account of fasli 1316. The land in suit is mentioned, and there is a note :

"Entered as *karnam* service inam but not correct. It is a *Dharmila* inam."

There is no proof why this entry was made in the *Jhadta* account, who wrote it and when, and the entries are contradicted by the action of the Zamindar between 1921 and 1925 under which these lands were, in fact, resumed, which they would not have been if they were *Dharmila* inam. This endorsement was held by the District Munsif not to have been proved. P.W. 1 could not depose to this fact, and we must treat the endorsement as inconclusive. The next is Exhibit B-42 of 1892. That is a *Dharmila* Inam Statement of Nedunuru Palivela Thana. The Palivela Inams according to the remarks column, were granted for ferry service. There is an entry in the name of Vakkalanka Venkatasubbarayudu under the heading "*Shrotriem* or service", and the entry there reads : "*Dharmila* Inam", but the extent of the land and its numbers are missing, and thus, there is no satisfactory evidence that this was the land which was described there. There is also a note to the following effect :

"It is not known when the Inams were granted, by whom they were granted and for what purpose they were granted. No documents are available."

This document does not throw any light upon the controversy, in view of the lack of material to connect it with the suit land. Exhibit B-2 is the *Adangal* Register of Fasli 1333, and the land is shown there as *Dharmila* inam. It is said that this *Adangal* Register was written by the appellant's ancestor, who was the *karnam*. The fact that he was the *karnam* concedes a great deal of the appellant's case. The entry made by the then *karnam* in a register which might not have been accurately maintained, cannot lead to an inference that he made this entry against his own interest. In fact, these people were claiming about that time that they had a *Dharmila* inam, so that it would not be resumed, and it may be that the entry was made merely to support a case. Similarly, Exhibit B-26 of 1920 is another account, and might have been written with the same object. The last document is Exhibit B-28, which is a list of the *dumbala* inams in the Zamindari. There are no numbers of the lands, and there is thus nothing in it to connect the list with the land in suit.

From the above analysis of the documents, it is quite clear that the documents on the side of the appellant established that this was a *Karnikam* service inam, and the action of the Zamindar in resuming it as such, which again has a presumption of correctness attaching to it, clearly established the appellant's case. Much cannot be made of a concession by Counsel that this was a *Dharmila* inam, in the trial Court, because it was a concession on a point of law, and it was withdrawn. Indeed, the central point in the dispute was this, and the concession appears to us to be due to some mistake or possibly ignorance not binding on the client. We are thus of opinion that the decision of the two Courts below which had concurrently held this to be *jeroyti* land after resumption of the *Karnikam* service inam, was correct in the circumstances of the case, and the High Court was not justified in reversing it.

The appeal is, therefore, allowed, the judgment of the High Court set aside, and that of the lower Court restored, with costs throughout.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR, K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

Jagannath Prasad and another

.. *Appellants\**

v.

The State of Uttar Pradesh

.. *Respondent.*

*Penal Code (XLV of 1860), section 471—Charge that accused produced forged invoices before Sales Tax Officer—Sales Tax Officer if a "Court" whose complaint is necessary under section 195, Criminal Procedure Code (V of 1898).*

A Sales Tax Officer is not a Court within the meaning of section 195 of the Criminal Procedure Code and it is not necessary for the Sales Tax Officer to make a complaint against an accused (for an offence under section 471, Penal Code) for having produced forged invoices before the Sales Tax Officer. Proceedings without such a complaint are not without jurisdiction. A person who produced those documents cannot be heard to say that he was required to prove his case by the best evidence and because he was so required he produced forged documents.

Appeal by Special Leave from the Judgment and Order dated the 12th May, 1959, of the Allahabad High Court in Criminal Revision No. 1182 of 1957.

Nur-ud-din Ahmed, Advocate and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. Dadachanji & Co., for Appellants.

G. C. Mathur and C. P. Lal, Advocates, for Respondent.

The Judgment of the Court was delivered by

Kapur, J.—The appellants are father and son carrying on business in vegetable ghee at Aligarh. They along with Romesh, the second son of appellant Jagannath

Prasad were prosecuted under section 14 (d) of the U. P. Sales Tax Act, 1948 (V of 1948), hereinafter called the 'Act' and under section 471 read with section 468 and section 417 of the Indian Penal Code. They were all acquitted of the charge under section 468. Jagannath Prasad was convicted under sections 471 and 417 of the Indian Penal Code and section 14 (d) of the Act and was sentenced to two years' rigorous imprisonment under section 471, to one year rigorous imprisonment and a fine of Rs. 1,000 under section 417 and to a fine of Rs. 1,000 under section 14 (d) of the Act. Bhagwan Das was convicted under section 14 (d) of the Act and sentenced to a fine of Rs. 1,000. Romesh was acquitted. The sentences passed on Jagannath Prasad were concurrent. Their appeal to the Sessions Judge was dismissed and in Revision to the High Court Jagannath Prasad was acquitted of the offence under section 417 of the Indian Penal Code but the other convictions and sentences were upheld. Against this judgment and order of the High Court of Allahabad the appellants have come to this Court by Special Leave.

The facts leading to the appeal are these : In 1950-51, the firm of the appellants purchased vegetable ghee valued at about Rs. 3 lacs from places outside the State of U. P. in the name of four fictitious firms. The firm made its return for that year to the Sales Tax Officer, Aligarh, and did not include the sale proceeds of these transactions on the ground that they had purchased them from these four firms who were supposed to be carrying on business in Hathras, Aligarh, and other places in U. P. By thus not including the proceeds of the sales of these transactions, the firm evaded payment of sales tax for that year on those transactions. The return of sales tax made by the firm was accepted by the Sales Tax Officer with the consequence that the sale of goods covered by those transactions was not taxed. A complaint was made against the Sales Tax Officer in regard to these transactions ; an enquiry was held with the result that the appellants and Romesh were prosecuted and convicted as above stated. In the High Court there was no controversy about the facts *i.e.*, the finding of the Courts below that the appellants' firm purchased vegetable ghee from outside U. P. and did not show the sale proceeds of the sale of those goods on the ground that they had been purchased from inside the State of U. P. when in reality they had been purchased from outside the State, that the statements made by the appellant Jagannath Prasad before the Sales Tax Officer were false and that the bills produced by him before the Sales Tax Officer were forged. The conviction was challenged on grounds of law alone.

Before us five points were raised : (1) that no sales tax was exigible on these transactions under section 3-A of the Act in 1950-51 and liability arose by the amendment of the Act in 1952 which gave retroactive operation to the section and became applicable to sales in dispute and therefore there could be no prosecution under an *ex post facto* amendment ; (2) the trial of the appellants was illegal because of want of complaint by the Sales Tax Officer under section 195 of the Criminal Procedure Code ; (3) there was no offence under section 14 (d) of the Act ; (4) forged invoices were produced by appellant Jagannath Prasad because they were called for by the Sales Tax Officer and therefore it cannot be said that they were used by the appellant and (5) the Sales Tax Officer having accepted the invoices as genuine no prosecution could be entertained in regard to these invoices.

Now the appellants cannot be prosecuted on the basis of any amendment subsequent to the date of the alleged offence committed by them. Both parties are agreed on that and therefore we have to see the Act as it stood on the date when the offence is alleged to have been committed. According to the charge the offence was committed on or about July 16, 1951, when forged invoices were produced by the appellants before the Sales Tax Officer. So what we have to see is the law as it stood on that day. Section 3 of the Act deals with liability to tax under the Act and section 3-A with single point taxation. Under section 3 every dealer was required to pay on his turnover of each assessment year a tax at the rate of three pies a rupee. Thus the tax was payable in regard to all sales but under section 3-A (1) the tax was leviable only at a single point. That section provided:

*Section 3-A.* (1) "Notwithstanding anything contained in section 3, the State Government may, by notification in the Official Gazette, declare that the turnover in respect of any goods or class of goods shall not be liable to tax except at such single point in the series of sales by successive dealers as may be prescribed."

The Government could declare the tax to be payable at a single point but there were two requirements; there had to be a notification in the Official Gazette declaring the point at which the tax was payable and in the series of sales by successive dealers it had to be "as may be prescribed" i.e., as may be prescribed by Rules. Section 3-A was amended in 1952, with retrospective effect but retroactive provision is not applicable to the present proceedings. Under section 3-A a Notification No. 1 (3) was issued on June 8, 1948, declaring that the proceeds of sales of vegetable ghee imported from outside shall not be included in the turnover of the dealer other than the importer himself. The effect of the notification thus was that if a dealer imported vegetable ghee from outside U. P. and sold it he was required to include the sale proceeds in his turnover but the other dealers who bought vegetable ghee from the importer in U. P. and sold it were not so required. The appellants having thus imported the vegetable ghee from outside U. P. were required by the notification to include the proceeds in their turnover and it was to avoid this that they falsely produced forged invoices that they had purchased the vegetable ghee from those fictitious dealers within the State of U. P. and thus if the notification was an effective notification the appellants successfully evaded the payment of sales tax which under the law they were required to pay. But it was agreed that the notification was ineffective in view of the words "as may be prescribed" because that could only be done by Rules and no Rules had been made under section 3-A which made every dealer liable to sales tax if he was an importer from outside U. P. To this extent the contention of the appellants is well founded and therefore under section 3-A merely by notification the Government could not prescribe a single point taxation as was done by the notification but that does not help the appellants very much. Under section 3 every dealer was liable to pay sales tax on every transaction and section 3-A only gave relief in regard to sales at every point and thus prevented multi-point taxation. If the notification under section 3-A was ineffective, as indeed it was, the appellants were required to pay tax on all their sales and in order to escape multi-point taxation they took advantage of an ineffective notification and tried the false plea of the goods having been imported by fictitious persons and their having purchased those goods from those fictitious dealers and in this manner the appellants escaped payment of sales tax under section 3. In other words they tried to take advantage of section 3-A by producing false documents and thereby evaded payment of tax under section 3 which every dealer was required to pay on his turnover. In trying to get the benefit under the ineffective notification issued under section 3-A the appellants evaded payment of tax under section 3 which they were in any case liable to pay. It cannot be said therefore that no offence was committed under section 14 (d) of the Act which provides :—

*Section 14. "Offences and penalties.—Any person who—*

- (a) .....
- (b) .....
- (c) .....

(d) fraudulently evades the payment of any tax due under this Act, shall, without prejudice to this liability under any other law for the time being in force, on conviction by a Magistrate of the first class, be liable to a fine which may extend to one thousand rupees, and where the breach is a continuing breach, to a further fine which may extend to fifty rupees for every day after the first during which the breach continues."

It is no defence to say that the appellants were asked by the Sales Tax Officer to produce invoices. The appellants were trying to get exclusion from their turns over of the sale of goods worth about 3 lacs and had made statements before the Sales Tax Officer in regard to it on 9th July, 1951, and in order to prove that the goods were not required to be included in the turnover the invoices were produced by appellant Jagannath Prasad. When a fact has to be proved before a Court or a tribunal and the Court or the tribunal calls upon the person who is relying upon a

fact to prove it by best evidence it cannot be a defence as to the offence of forgery if that best evidence which, in this case, was the invoices turn out to be forged documents. A person who produced those documents cannot be heard to say that he was required to prove his case by the best evidence and because he was so required he produced forged documents.

It was then submitted that the Sales Tax Officer was a Court within section 195 of the Criminal Procedure Code and in the absence of a complaint in writing by such an Officer no cognizance could be taken of any offence punishable under section 471 of the Indian Penal Code. This, in our opinion, is an equally erroneous submission. The Sales Tax Officers are the instrumentalities of the State for collection of certain taxes. Under the Act and the Rules made thereunder certain Officers are appointed as Sales Tax Officers who have certain duties assigned to them for the imposition and collection of taxes and in the process they have to perform many duties which are of a quasi-judicial nature and certain other duties which are administrative duties. Merely because certain instrumentalities of State employed for the purpose of taxation have, in the discharge of their duties, to perform certain quasi-judicial functions they are not converted into Courts thereby. In a recent judgment of this Court in *Shrimati Ujjam Bhai v. The State of U. P.*<sup>1</sup>, all the opinions were unanimous on this point that taxing authorities are not Courts even though they perform quasi-judicial functions. The following observation of Lord Sankey, L.C., in *Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation*<sup>2</sup>, was quoted with approval :—

“The authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless are not Courts in the strict sense of exercising judicial power.” Lord Sankey also enumerated some negative propositions as to when a tribunal is not a Court. At page 297 his Lordship said :—

“In that connection it may be useful to enumerate some negative propositions on this subject: 1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another body. See *Rex v. Electricity Commissioners*.”<sup>3</sup>

Hidayatullah, J., in *Shrimati Ujjam Bhai's case*<sup>1</sup>, described Sales Tax Authorities thus :—

“The taxing authorities are instrumentalities of the State. They are not a part of the Legislature, nor are they a part of the judiciary. Their functions are the assessment and collection of taxes and in the process of assessing taxes, they follow a pattern of action which is considered judicial. They are not thereby converted into Courts of Civil judicature. They still remain the instrumentalities of the State and are within the definition of ‘State’ in Article 12”.

No doubt the Sales Tax Officers have certain powers which are similar to the powers exercised by Courts but still they are not Courts as understood in section 195 of the Criminal Procedure Code. In sub-section (2) of section 195 it is provided :—

Section 195. (2) “In clauses (b) and (c) of sub-section (1) the term ‘Court’ includes a Civil Revenue or Criminal Court, but does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1877.”

It cannot be said that a Sales Tax Officer is a Revenue Court. Under section 2 (a) of the Act an ‘Assessing Authority’ is defined to mean any person authorised by the State Government to make assessment under the Act and under Rule 2 (h) a ‘Sales Tax Officer’ means :—

“‘Sales Tax Officer’ means a Sales Tax Officer of a circle appointed by the State Government to perform the duties and exercise the powers of an Assessing Authority in such circle.”

Thus under the Act a Sales Tax Officer is only an assessing authority. Under section 7 of the Act, if the Sales Tax Officer, after making such enquiries as he thinks necessary, is satisfied that a return made is correct and complete, he shall assess the tax on the basis thereof and if no return is submitted he can make such enquiries as he considers necessary and then determine the turnover of a dealer. Thus his determination depends upon enquiries he may make and which he may consider

1. W.P. No. 79 of 1959 decided on April 10, 1962.

2. L.R. (1931) A.C. 275 at 283.

3. L.R. (1924) 1 K.B. 171.

necessary. Sections 9, 10 and 11 of the Act deal with Appeals, Revisions and Statement of the Case to the High Court. Under section 13 power is given to a Sales Tax Officer to require the production of all accounts, documents and other information relating to business and accounts and registers shall be open to inspection of the Sales Tax Officer at all reasonable times. He has the power to enter any Office, shop, godown, vehicle or any other place in which business is done which is a power destructive of the Sales Tax Officer being a Court which is a place where justice is administered as between the parties whether the parties are private persons or one of the parties is the State. Under section 23 certain secrecy is attached to documents filed before the Sales Tax Officer and information received by him. Similarly under rule 43 certain power is given to the Sales Tax Officer to calculate turnover when goods are sold for consideration other than money and this is after such enquiry as he considers necessary. All these provisions show that the Sales Tax Officer cannot be equated with a Court. In our opinion therefore the Sales Tax Officer is not a Court. In *Krishna v. Goverdhanaiiah*<sup>1</sup>, it was held that the Income Tax Officer is not a Court within the meaning of section 195 of the Criminal Procedure Code and this view was accepted by this Court in *Shrimati Ujjam Bai's case*<sup>2</sup>. In *Brajnandan Sinha v. Jyoti Narain*<sup>3</sup>, a Commissioner appointed under the Public Enquiries Act, 1950, was held not to be a Court. *Shell Co. of Australia v. Federal Commissioner of Taxation*<sup>4</sup>, was referred to in that case. At page 967 the following Passage from Halsbury's Laws of England, Hailsham Edition, Vol., 8, page 526 was approved :—

"Many bodies are not Courts, although they have to decide questions, and in so doing have to act judicially, in the sense that the proceedings must be conducted with fairness and impartiality, such as assessment committees guardian committees the Court of referee constituted under the Unemployment Insurance Acts to decide claims made on the Insurance funds, the benchers of the Inns of Courts when considering the conduct of one of their members, the General Medical Council when considering questions affecting the position of a medical man."

That passage is now contained in Vol. 9 of the 3rd Edition at page 343.

But it was submitted that the Sales Tax Officer while acting as an Assessing Authority is a Court within the meaning of section 195 (2) of the Criminal Procedure Code because by the amendment of 1923 the definition of the word "Court" was enlarged by substituting the word "includes" in place of the word "means" and the section now reads as has been set out above. Undoubtedly by this change the Legislature did mean to make the definition of the word "Court" wider but that does not enlarge the definition of the words "Revenue Court". The track of decision which was pressed on our attention is based primarily on a Full Bench judgment of the Bombay High Court in *In re Punamchand Maneklal*<sup>5</sup>. In that case an Income-tax Collector was held to be a Revenue Court within the meaning of the word as used in section 195. The learned Chief Justice who gave the judgment of the Court proceeded on the basis that inquiries conducted according to the Forms of Judicial Procedure under Chapter IV of the Income-tax Act were proceedings in a Revenue Court. This was on the ground that under the law as it then stood revenue questions were generally removed from the cognizance of civil Courts and the officers charged with the duty of deciding disputed questions relating to revenue between an individual and the Government would be invested with the functions of a "Revenue Court". This view was followed by the Bombay High Court in *State v. Nemchand Pashvir Patel and others*<sup>6</sup>. After referring to the various powers which were given to the Sales Tax Officers under the Bombay Sales Tax Act that Court proceeded to say that the Sales Tax Officers under the Bombay Sales Tax Act were Revenue Courts because they had jurisdiction to decide questions relating to revenue, are exclusively empowered with the powers which are normally attributes of a Court or a tribunal and are authorised to adjudicate upon a disputed question of law or fact relating to the rights of the citizens. The Madras High Court in *In re R. Nataraja Iyer*<sup>7</sup>, held that a Divisional Officer hearing appeals under the Income-

1. A.I.R. 1954 Mad. 822: (1954) 2 M.L.J. 332.

2. W.P. No. 79 of 1959 decided on April 10, 1962.

3. (1956) S.C.J. 155 : (1955) 2 S.C.R. 955.

4. L.R. (1931) A.C. 275 at 283.

5. I.L.R. 38 Bom. 642 (F.B.).

6. (1956) 7 S.T.C. 404.

7. (1912) I.L.R. 36 Mad. 72 : 23 M.L.J. 393.



tax Act was a Court within the meaning of section 476 of the Criminal Procedure Code but a Tehsildar who was the original assessing authority was not because there was no *lis* before him. There is one passage in the judgment of Sundara Ayyar, J., at page 86 which is of significance. It was said :—

“I may observe that I am prepared to agree with Dr. Swaminathan that mere authority to receive evidence would not make the officer recording it a Court.”

At page 84, it was said that the determination of the assessment in the first instance may not be of a Court although the assessing officer may have the power to record statements. But an appeal against the assessment is dealt with by the Collector in the manner in which an appeal is disposed of by a Civil Court. In this connection reference may be made to the statement of the law contained in the judgment of Venkatarama Ayyar, J., in *Shrivirinder Kumar Satyawadi v. The State of Punjab*<sup>1</sup>. There the distinction between a quasi-judicial tribunal and a Court was given as follows :—

“It may be stated broadly that what distinguished a Court from a quasi-judicial Tribunal is that it is charged with a duty to decide disputes in a judicial manner and declare the rights of parties in a definitive judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it. And it also imports an obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law. When a question therefore arises as to whether an authority created by an Act is a Court as distinguished from a quasi-judicial tribunal, what has to be decided is whether having regard to the provisions of the Act it possesses all the attributes of a Court”.

Dealing with quasi-judicial tribunals it was observed in *Gullapalli Nageswara Rao v. The State of Andhra Pradesh*<sup>2</sup> :—

“The concept of a quasi-judicial act implies that the act is not wholly judicial, it describes only a duty cast on the executive body or authority to conform to the norms of judicial procedure in performing some acts in the exercise of its executive power”.

It is not necessary to refer to other cases because they were decided on their own facts and related to different tribunals. In our opinion a Sales Tax Officer is not a Court within the meaning of section 195 of the Criminal Procedure Code and therefore it was not necessary for a Sale Tax Officer to make a complaint and the proceedings without such a complaint are not without jurisdiction.

In our opinion the appellants were rightly convicted and we therefore dismiss this appeal. The appellant Jagannath Prasad must surrender to his bail bonds.

K.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

[ (Civil Appellate Jurisdiction.) ]

PRESENT:—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, N. RAJAGOPALA AYYANGAR AND T. L. VENKATARAMA AYYAR, JJ.

M/s. Ram Lal Kapur and Sons (P.), Ltd.

.. *Appellant\**

*v.*

Ram Nath and others

.. *Respondents.*

*Practice—Supreme Court—Delay in applying for Special Leave to appeal—No condonation ex parte—Notice to be given to respondent—Revocation of leave—Principles.*

Except in very rare cases, if not invariably, it should be proper that the Supreme Court should adopt as a settled rule that the delay in making an application for Special Leave should not be condoned *ex parte* but that before granting leave in such cases notice should be served on the respondent and the latter afforded an opportunity to resist the grant of leave. Such a course besides being just, would be preferable to having to decide applications for revoking leave on the ground that the delay in making the same was improperly condoned years after the grant of the leave when the Court naturally feels embarrassed by the injustice which would be caused to the appellant if leave were then revoked when he would be deprived of the opportunity of pursuing other remedies he would have had if leave had been refused earlier. The Rules of the Supreme Court should be amended suitably achieve this purpose.

1. (1956) S.C.J. 138 : (1955) 2 S.C.R. 1013, 1018.

2. (1959) S.C.J. 967 : (1959) 2 M.L.J. (S.G.)

\*Civil Appeal No. 476 of 1961.

156 : (1959) 2 An.W.R. (S.G.) 156 : (1959) 1 (Supp.) S.C.R. 319, 353-4.

The appellant had already filed an appeal under the Letters Patent, and it was during the pendency of that appeal that he moved the Supreme Court for Special Leave. There was no by-passing the High Court. There was no suppression of any fact which would have relevance to the granting or withholding of leave, and the exact position as it stood at the time the petition was filed was set out in it. If the delay had not been condoned and leave refused when application therefor was made the appellant would have prosecuted his Letters Patent appeal and he could have obviously come up here if the decision went against him. The grant of Special Leave in the circumstances merely served to shorten the proceedings and this Court acceded to the petition for leave obviously because the appeals in the Supreme Court from judgments in similar cases were getting ready for hearing and there was advantage if the appellant was in a position to intervene in those other appeals. This is not a case in which the leave granted should be revoked.

Appeal by Special Leave from the Judgment and Order dated the 5th January, 1955, of the Punjab High Court (Circuit Bench) at Delhi in Civil Mis. Petition No. 71/D of 1954.

*N. C. Chatterjee*, Senior Advocate (*Hardayal Hardy* and *N. N. Keswani*, Advocates, with him, for Appellant.

*R. S. Narula*, Advocate, for Respondents Nos. 1 to 3.

The Judgment of the Court was delivered by

*Rajagopala Ayyangar, J.*—This is an appeal by Special Leave against a judgment of a learned Single Judge of the Punjab High Court holding that section 7-A of the Delhi and Ajmer Rent Control Act, 1947 (hereinafter called the Act) was unconstitutional as violative of the fundamental right guaranteed by Article 14 of the Constitution.

The first respondent Ram Nath owns a building in Delhi of which, among others, the appellant-company was a tenant. The appellant moved the Rent Controller, Delhi, under section 7-A of the Act for fixation of the fair rent of the portion in its occupation. These proceedings have had a chequered history which it is not material to set out, but suffice it to say that the Rent Controller, Delhi, computed the fair rent for the entire building at Rs. 565 p.m. and the fair rent payable by the appellant at Rs. 146 per month. It is necessary to mention that under the Act the Rent Controller would have had jurisdiction to entertain the appellant's application for the fixation of fair rent and for so fixing it only if the construction of the building in question was completed after 24th March, 1947, but if the construction of the building was completed earlier the ordinary Civil Courts and not the Rent Controller would have had jurisdiction to determine the matter. The date of the completion of the first respondent's building therefore loomed large in the enquiry before the Rent Controller and that authority recorded a finding on this matter adverse to the first respondent in his order.

The landlord-first respondent preferred an appeal against the order of the Rent Controller to the learned District Judge, Delhi, but the appeal was dismissed. Thereafter he moved the High Court of the Punjab under Article 227 of the Constitution challenging the correctness and propriety of every finding by the Rent Controller and of the District Judge on appeal. This petition came on for hearing before a learned single Judge of the High Court. A Division Bench of the High Court had sometime previously held in another batch of cases (*British Medical Stores v. Bhagirath Mal & Ors.*<sup>1</sup>) arising under the Act, that section 7-A was unconstitutional and void and following this decision he allowed the petition of the first respondent and set aside the order of the Rent Controller as without jurisdiction, without considering the other matters which would arise if the section was valid and the Rent Controller had jurisdiction. From this decision of the learned Single Judge, the appellant preferred an appeal under the Letters Patent to a Division Bench.

Meanwhile the judgment in *British Medical Stores v. Bhagirath Mal*<sup>1</sup>, was brought up by way of appeal to this Court, and as the appeal was getting ready to be heard, the appellants applied for and obtained Special Leave to appeal to this Court even during the pendency in the High Court, of the appeal by it under the Letters Patent. The Letters Patent appeal was thereafter withdrawn by the appellant.

1. Civil Appeals Nos. 172 to 186 of 1958 (not yet reported).

The appeal in the British Medical Stores case was heard by this Court and the same was allowed by a judgment dated 2nd August, 1961 and this Court held reversing the judgment of the Punjab High Court that section 7-A of the Act was valid.<sup>1</sup>

It would thus be seen that the only point which the learned Judge considered and on which the Revision Petition of the landlord-first respondent was allowed no longer subsists and hence the appellant is entitled to have the appeal allowed. As the learned Single Judge did not consider the other objections raised by the first respondent to the order of the Controller fixing the standard fair rent payable by the appellant, the appeal has to be remanded to the High for being dealt with according to law.

Before concluding it is necessary to advert to a preliminary objection to the hearing of the appeal raised by learned Counsel for the landlord-respondent. His submission was that the Special Leave which was granted by this Court *ex parte* should be revoked as having been improperly obtained. The facts in relation thereto were these. The judgment of the learned Single Judge to appeal from which the leave was granted was dated 5th January, 1955 and the application to this Court seeking leave was made on 5th January, 1959, *i.e.*, after a lapse of four years. It is obvious that it was an application which had been filed far beyond the period of limitation prescribed by the rules of this Court. Learned Counsel for the respondent urged that there were no sufficient grounds for condoning that long delay and that we should therefore revoke the leave.

We are not disposed to accede to this request for revoking the leave in the peculiar circumstances of this case. Learned Counsel invited our attention to a few decisions in which leave granted *ex parte* was revoked at the stage of the hearing of the appeal on an objection raised by the respondent; but we do not consider that the facts of the present appeal bear any analogy to those in the decisions cited. In the first place, there was no by-passing the High Court, because the appellant had filed an appeal under the Letters Patent and it was during the pendency of that appeal that he moved this Court for leave. Next, there was no suppression of any fact which would have relevance to the granting or withholding of the leave, and the exact position as it stood at the time the petition was filed was set out in it. Thirdly, it is obvious that if the delay had not been condoned and leave refused when application therefor was made in January 1959, the appellant would have prosecuted his Letters Patent Appeal and he could obviously have come up here if the decision went against him. In fact, the grant of Special Leave in the circumstances of this case, merely served to shorten the proceedings, and this Court acceded to the petition for leave obviously because the appeal in this Court from judgments in the case of the British Medical Stores etc., were getting ready for hearing and there was some advantage if the appellant was in a position to intervene in those other appeals. In view of these considerations we are of the opinion that this is not a case in which the leave should be revoked.

Nevertheless, we consider that we should add that, except in very rare cases, if not invariably, it should be proper that this Court should adopt as a settled rule that the delay in making an application for Special Leave should not be condoned *ex parte* but that before granting leave in such cases notice should be served on the respondent and the latter afforded an opportunity to resist the grant of the leave. Such a course besides being just, would be preferable to having to decide applications for revoking leave on the ground that the delay in making the same was improperly condoned years after the grant of the leave when the Court naturally feels embarrassed by the injustice which would be caused to the appellant if leave were then revoked when he would be deprived of the opportunity of pursuing other remedies if leave had been refused earlier. We would suggest that the Rules of the Court should be amended suitably to achieve this purpose.

The result is that the appeal is allowed and the order of the learned Single Judge accepting the Revision Petition under Article 227 preferred by the landlord-first respondent is set aside. The case is remanded to the High Court for considering the petition of the respondent in accordance with law and on the footing that section 7-A of the Rent Control Act is a valid piece of legislation.

It is admitted that the point as regards the constitutionality of section 7-A of the Rent Control Act was not raised by the landlord-respondent, and in the circumstances of the case we direct the parties to bear their own costs in this Court. The costs in the High Court will be as directed by that Court.

V.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—K. C. DAS GUPTA, J. R. MUDHOLKAR AND T. L. VENKATARAMA Aiyar, JJ.

Baleshwar Rai *alias* Nepali Master etc

.. *Appellants\**

*v.*

The State of Bihar (In all the Appeals)

.. *Respondent.*

*Criminal Procedure Code (V of 1898), section 162—Scope—Statement made to a Police Officer—“During the period of investigation and in the course of investigation”—Not synonymous—Letter to Police Officer by accused containing admission as to motive admissible under section 21 of the Evidence Act (I of 1872) not hit by section 162 of the Code.*

The anonymous letter written to the Senior Sub-Inspector of Police by the accused contained the admission that the deceased chaukidar was instrumental in getting one of the associates of the accused arrested in another dacoity case. This admission as to the motive is clearly admissible under section 21 of the Evidence Act.

Section 162 of the Code of Criminal Procedure only bars proof of statements made to an investigating officer during the course of investigation. The section does not say that every statement made during the period of investigation is barred from being proved in evidence. For a statement to come within the purview of section 162 it must not merely be made during the period of investigation but also in the course of investigation. The two things, that is, “the period of investigation” and “course of investigation” are not synonymous. Section 162 is aimed at statements recorded by a Police Officer while investigating into an offence. This is clear from the opening words of section 162. They speak only of statements made to a Police Officer during the course of investigation. This implies that the statement sought to be excluded from evidence must be ascribable to the enquiry conducted by the investigating officer and not one which is *de hors* the enquiry. The letter to the Police Officer is not hit by section 162 of the Code.

Appeals by Special Leave from the Judgment and Order dated the 10th August, 1961, of the Patna High Court in Criminal Appeal No. 152 of 1961 and Death Reference No. 3 of 1961.

*Sushil Kumar Jha, Subodh Kumar Jha and R. C. Prasad, Advocates, for Appellants;*

*G. K. Daphtary, Solicitor-General of India (S. P. Varma, Advocate with him, for Respondents.*

The Judgment of the Court was delivered by

*Mudholkar, J.*—This judgment will govern Criminal Appeals Nos. 177 and 178 also. All these three appeals arise out of the same trial. The learned Additional Sessions Judge, Monghyr, who conducted the trial convicted the appellant, Ramachandra Chaudhary who is appellant in Criminal Appeal No. 177 of 1961 for an offence under section 302 Indian Penal Code. He also convicted Baleshwar Rai *alias* Nepali Master, appellant in this appeal and Jogendra Choudhary, appellant in Criminal Appeal No. 178 of 1961 of an offence under section 302 read with section 34, Indian Penal Code. He sentenced each of the three to death. Their appeals were dismissed by the High Court of Patna, and sentences of death

passed against them were confirmed by it. They have come up before this Court by Special Leave.

The prosecution story is briefly as follows :—

On 17th March, 1959, at about 8.00 P.M., the chaukidars of the village Fateha had assembled, as usual, in the 'crime centre' of the village. Their names are—Anandi Paswan (deceased), Misri Paswan (P.W. 2), Baleshwar Paswan (P.W. 3) and Narain Paswan. Anandi Paswan and Misri Paswan were lying on a chauki. Anandhi Paswan had a 'bhala' and a 'muretha' while Misri Paswan had a 'pharsa' and a 'muretha'. These weapons as well as the shirt of the deceased were kept on the chauki. The other two chaukidars were lying on the ground. The crime centre is housed in the 'dalan' of Tilak Chaudhary (P.W. 6). One other person, Srilal Chaudhary (P.W. 7), the brother of Tilak Chaudhary, was also lying there on a khatia on the north-east of the said 'dalan'. In an adjacent room were P.W. 11 Nathuni Chaudhary *alias* Durga Das and P. W. 12 Ramchander Jha.

According to the prosecution a little before 9.00 P.M., someone from outside called out "Darogaji". On hearing this, the deceased Anandi Paswan and Misri Paswan got up. It was a moonlit night and they saw Ramachandra Chaudhary, Jogendra Chaudhary and another person, who was later identified to be Nepali Master, standing closeby. As soon as they went towards the appellants, Jogendra Chaudhary and Nepali Master caught the deceased while Ramchandra Chaudhary caught Misri Paswan. Both Ramchandra Chaudhary and Jogendra Chaudhary had guns with them which were slung across their shoulders. These three persons then took the deceased and Misri Paswan to the road to the East of the 'dalan', running north to south, and proceeded southward. Neither the deceased nor Misri Paswan raised any cry, apparently because they were threatened that if they did so, they would be shot. When the party reached a place to the west of one Peare Sao's house and to the east of the house of Rampratap Tanti (P.W. 5), the deceased called for Rampratap's help, and freeing himself from the clutches of his captors started running away westward. Upon this Ramchandra Chaudhary let go the hand of Misri Paswan and fired at the deceased. Misri Paswan then ran into the house of Peare Sao and took shelter there. While entering that house, he heard a second gun shot. His presence in the house was detected by Mst. Ajo (P.W. 8), the wife of Peare Sao who forced him to leave the house. Thereafter he came out into the lane and concealed himself behind the door. After the moon had set and it became dark, he went to the house of Fakir Paswan (P.W. 4), which is to the east of the house of Peare Sao, and narrated the occurrence to him. He mentioned Ramchandra and Jogendra as the two persons who had taken part in the incident. In the early hours of the morning he went to the place where gun shots were fired, and found Anandi Paswan, Chaukidar lying dead in a ditch by the side of the road, face downwards. He noticed that Anandi Paswan had received two gun shot wounds on his back. Thereafter he went home and contacted the other Chaukidar, Narain Paswan and Baleswar Paswan. He placed them in charge of the dead body and then went to the Police Station along with Ramdeo, son of the deceased. He lodged the first information report at the Police Station. After recording it, the Junior Sub-Inspector of Police commenced investigation and after completing it submitted a charge-sheet against the three appellants on 15th March, 1959.

It is the prosecution case that the appellants are "veteran criminals" and the Chaukidars used to report about their movements and that this was the motive for the murder. It was further said that the deceased had helped the Dalsingsarai police in arresting one Motia Mushar, who was the ploughman of the appellant Ramchandra, in a dacoity case.

All the appellants denied having participated in the incident. The defence is that a false case has been concocted by the police.

The main evidence against the appellant is that of P.W. 2, Misri Paswan. He has actually named Ramchandra Chaudhary and Jogendra Chaudhary in

the First Information Report. Regarding the third appellant, he stated that he was unknown. Ramachandra and Jogendra have been identified not only by Misri Paswan but also by five other witnesses, Narain Paswan, Rampratap Tanti, Srilal Chaudhary, Nathuni Chaudhury and Ramchander Jha. All these five persons had an opportunity to see the appellants because, it may be recalled, some of them were in the 'dalan' and some in the adjacent room when the appellants came near there and one of them cried out "Darogaji". Their evidence has been accepted as true and adequate not only by the learned Sessions Judge who had an opportunity to see and hear the witnesses depose but also by the High Court. Their evidence cannot be re-appraised in their appeals by Special Leave.

The learned counsel, however, said that in so far as Jogendra Chaudhary is concerned, common intention to commit murder had not been established. The existence of common intention has always to be inferred from facts. Here it has been established that all the three appellants came together. Two of them, Ramchandra and Jogendra had guns with them. The prosecution has established to the satisfaction of the learned Additional Sessions Judge and the High Court that as Anandi Paswan was giving information to the police about the movements of the appellants and had also taken the major part in getting one Motia Mushar arrested in a dacoity case, Ramchandra nursed a grievance against Anandi. The inference, therefore, must be that he had come with the intention of taking revenge on Anandi Paswan by killing him and the other two appellants who accompanied him shared that intention. As the High Court has pointed out, this is made clearer by the statement of Misri Paswan to the effect that Ramchandra said at the time of the incident that 'his (servants) Motia' was taken away forcibly and then Jogendra asked the deceased sarcastically, "Where is your military today?". In the circumstances, therefore, there can be no doubt that common intention to commit murder was established not only with respect to Jogendra but also with respect to Nepali Master who was all along with them.

On behalf of Nepali Master the learned counsel contended that he has been identified at the test identification parade by one witness only and that the other persons did not turn up for identification and, therefore, it is not legally permissible to base the identification by only one person. It is sufficient to say that even the evidence of a single witness can sustain the conviction of an accused person if the Court which saw and heard him depose regards him as a witness of truth. However, in this case, Nepali Master was identified not by one witness only but by two witnesses (P.W. 7) Srilal Chaudhary and (P.W. 9) Dukhi Mahto. It was said that Srilal is an old man of 75 and has a weak eyesight and therefore his evidence should be kept out of account. His evidence has been believed by the learned Sessions Judge as well as by the High Court and we cannot re-assess it.

It was contended before the High Court and is also contended before us that as the test identification was held a long time after his arrest, the evidence of these two witnesses could not be believed. This circumstance was also considered by the High Court and it observed :

"The contention is attractive ; but, in view of Exhibit 6, it is difficult to accept the same."

Exhibit 6 is an anonymous letter written to Senior Sub-Inspector, Kashi Nath (P.W. 22), of which the only portion which has been admitted in evidence reads thus :

"The rascal Anandia Chaukidar spoiled the life of that poor Mushar by instigating the S.I. of Police of Dalsingsarai and subsequently he also spied against us for nothing."

This document along with Exhibit 3, dated 9th June, 1959, which is admittedly in the handriting of Nepali Master, was sent to the Government handwriting expert. Both the documents were examined by him. In his evidence he has stated :

"The Board of Experts consisting of myself, Chatterjee and Srivastava examined these independently and our unanimous opinion was that Exhibit 3, tallied with disputed writings (Exhibit 6)."

This being so, the admission contained in Exhibit 6 as to the motive is clearly admissible under section 21 of the Evidence Act. The High Court was, therefore, right

in holding that Exhibit 6 afforded corroboration to the evidence of (P.W. 7) Srilal Chaudhary and (P.W. 9) Dukhi Mahto.

It is then contended that Exhibit 6 is hit by section 162 of the Criminal Procedure Code because it was received by the Sub-Inspector during the course of the investigation. Section 162 of the Criminal Procedure Code only bars proof of statements made to an investigating officer during the course of investigation. Section 162 does not say that every statement made during the period of investigation is barred from being proved in evidence. For a statement to come within the purview of section 162, it must not merely be made during the period of investigation but also in the course of investigation. The two things, that is, "the period of investigation" and "course of investigation" are not synonymous. Section 162 is aimed at statements recorded by a police officer while investigating into an offence. This is clear from the opening words of section 162. They speak only of statements made to a police officer during the course of investigation. This implies that the statement sought to be excluded from evidence must be ascribable to the enquiry conducted by the investigating officer and not one which is *de hors* the enquiry. A communication like Exhibit 6 will not fall within the ambit of such statements. In this view we hold that the document in question is not hit by section 162 of the Criminal Procedure Code and the High Court was right in admitting it in evidence.

There is no substance in the appeals and they are, therefore, dismissed.

V.S.

*Appeals dismissed.*

## THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—S. K. DAS, J. L. KAPUR, A. K. SARKAR, M. HIDAYATULLAH AND RAGHUBAR DAYAL, JJ.

The State Trading Corporation of India, Ltd., and another  
(In both the Petitions)

.. *Petitioners\**

*v.*

The State of Mysore and another (In both the Petitions)

.. *Respondents.*

*Constitution of India (1950), Articles 269 and 286 (Sixth Amendment) and Central Sales Tax Act (LXXIV of 1956), section 3—Sale of cement under permit—To be supplied in Mysore from factory situate outside the State—Inter-State sale—No sales tax can be levied by the State.*

*Constitution of India (1950), Article 32—Authority assuming jurisdiction by deciding a collateral fact, wrongly—Petition under Article 32 lies.*

As a result of the statutory provisions cement could be purchased only under a permit issued by the Government. The permits in the instant case required supplies to be made from factories situate outside Mysore. These permits were issued to the purchasers and the supplier named in them was the Marketing Company. On receipt of the permit the purchaser placed an order with the Marketing Company and later a firm contract with it was made. Each contract was subject to the terms of the permit to which it expressly referred. The sale could only be under a permit and on the terms contained in it and the contract has to be read subject to it. Since the permit provided that the supply had to be made from one or other factory situate outside Mysore, the contracts must be deemed to have contained a covenant that the goods would be supplied in Mysore from a place situate outside its borders. A sale under such a contract would be clearly an inter-State sale as defined in section 3 (a) of the Central Sales Tax Act and no tax can be levied on such sales under the Constitution.

Where Statute is *intra vires* but the action taken by an Authority is without jurisdiction, a petition under Article 32 of the Constitution would be competent. The Taxing Officer had no jurisdiction to tax inter-State sales, there being a constitutional prohibition against a State taxing them. He could not give himself jurisdiction to do so by deciding a collateral fact wrongly.

[Section 3 of the Central Sales Tax Act had not come into force at the relevant time.]

Petitions under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

R. J. Kolah, Advocate and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., (in both the petitions), for Petitioners.

C. K. Daphtary, Solicitor-General of India (R. Gopalakrishnan and P. D. Menon, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

*Sarkar, J.*—These are two petitions under Article 32 of the Constitution asking for writs to quash certain assessment orders imposing sales tax and for consequential reliefs preventing the levy and collection of that tax. The petitioners allege that the assessment orders are wholly void and therefore affect their fundamental rights under Article 19 (1) (f) and Article 31.

There are two petitioners in each case, the first being the State Trading Corporation of India, Ltd., and the second, the Cement Marketing Company of India, Ltd. There are also two respondents in each petition, the first of whom is the State of Mysore which through one of its officers, the second respondent, passed the assessment orders imposing the tax.

The impugned assessment orders were made on the Marketing Company in respect of certain sales of cement made by it in the year 1957-58. The petitioners say that the Marketing Company made those sales as agent of the Trading Corporation. Whether this is correct or not is not strictly relevant in this case for the Marketing Company does not deny its liability to be taxed as the agent of the Corporation. The only dispute is whether the sales in which the goods were moved from outside the State of Mysore into it were liable to be taxed. The petitioners contend that they were not so liable as they were sales made in the course of inter-State trade, which no law of a State Legislature could tax.

Though the assessment year was one, namely, 1957-58, there were two assessment orders. That was because in that year there were in force in Mysore two Sales Tax Acts, namely, the Mysore Sales Tax Act, 1948 and the Mysore Sales Tax Act, 1957, the latter of which repealed the earlier with effect from October 1, 1957. The disputed sales which took place between April 1, 1957 and September 30, 1957 were taxed under the 1948 Act and those that took place between October 1, 1957 and March 31, 1958, under the 1957 Act. Both the assessment orders are challenged by the petitioners.

The tax was levied under State laws. Now Article 286 (2) of the Constitution as originally framed laid down that except in so far as Parliament by law otherwise provided, a State could not pass a law taxing an inter-State sale or purchase. This provision was deleted by the Constitution (Sixth Amendment) Act, 1956 which came into force on September 11, 1956. The Constitution (Sixth Amendment) Act also amended Article 269, the relevant portion of which after such amendment reads as follows :

*Article 269 (1):* The following duties and taxes shall be levied and collected by the Government of India

.....

(g) taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.....

(3) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce.

The Constitution Amendment Act had also amended the Seventh Schedule by adding Item 92-A to List I and thereby giving the Union the power to tax sales or purchases of goods other than newspapers made in the course of inter-State trade or commerce and by substituting for old Item 54 in List II a new item which gave the States the power to tax all sales or purchases of goods other than newspapers, subject to Entry 92-A of List I. Since this amendment of the Constitution therefore the States cannot tax an inter-State sale or purchase.

On December 21, 1956, Parliament passed the Central Sales Tax Act, section 3 of which defined an inter-State sale. This section came into force on January 5, 1957. The taxing provisions of this Act however came into force much later but with them we are not concerned in these cases.

The whole of the assessment year 1957-58 was after section 3 of the Central Sales Tax Act, 1956, had come into force. During that year, therefore, the State



could not tax a sale which was an inter-State sale as defined in section 3 of the Central Sales Tax Act. That section defined an inter-State sale in two ways, one of which is in these terms :

“A sale or purchase of goods shall be deemed to take place in the course of Inter-State trade or commerce if the sale or purchase—(a) occasions the movement of goods from one State to another.”

The petitioners contend that the disputed sales were of this variety and the respondents, therefore, could not tax them.

The question then is, did the sales occasion the movement of cement from another State into Mysore within the meaning of the definition ? In *Tata Iron and Steel Co., Ltd. v. S. R. Sarkar*<sup>1</sup>, it was held that a sale occasions the movement of goods from one State to another within section 3 (a) of the Central Sales Tax Act, when the movement “is the result of a covenant or incident of the contract of sale”. That the cement concerned in the disputed sales was actually moved from another State into Mysore is not denied. The respondents only contend that the movement was not the result of a covenant in or an incident of the contract of sale.

The result of this appeal will therefore turn on whether the movement of cement from another State into Mysore was the result of a covenant in the contract of sale or an incident of such contract. This question will depend on the contract and in order properly to appreciate the contract the procedure of the sales, as to which there is no dispute, has to be referred to. Now, at the relevant time cement could be purchased only under a permit issued by the Government and on the terms contained in it. This, it seems, was the result of certain statutory provisions. All the sales with which we are concerned were under such permits. Unfortunately the petitioners did not disclose in their petitions any specimen copy of a permit. As however the existence of the permits was not in dispute and had been mentioned in the petitions, the petitioners were allowed at the hearing to produce a specimen copy of a permit which was accepted by the respondents as a correct specimen. It appears from the specimen produced that a cement factory which was required to supply the cement covered by the permit was named in it. We are concerned with sales in which the permits required supplies to be made from factories outside Mysore. These permits were issued to the purchasers and the supplier named in them was the Marketing Company. On receipt of the permit the purchaser placed an order with the Marketing Company and later a firm contract with it was made.

In making the orders of assessment, the Taxing Officer observed that the firm contracts did not provide for any supplies being made from any particular factory and the supplies had actually been made from factories outside the State of Mysore only to suit the convenience of the supplier, the Marketing Company, and not because of any covenant in the contracts. It is true that the written contracts did not themselves contain any covenant that the supply had to be made from any particular factory but it seems to us that the agreement between the parties was not fully set out in them. In any case each contract was subject to the terms of the permit to which it expressly referred. As it is not in dispute that the sale could only be under a permit and on the terms contained in it, a contract has to be read as subject to it. Since the permits with which we are concerned provided that the supply had to be made from one or other factory situate outside Mysore, the contracts must be deemed to have contained a covenant that the goods would be supplied in Mysore from a place situate outside its borders. A sale under such a contract would clearly be an inter-State sale as defined in section 3 (a) of the Central Sales Tax Act. In view of the provisions of the Constitution and the Central Sales Tax Act earlier referred to, a State could not impose a tax on such a sale. Therefore it seems to us that the petitions should succeed.

It was however said that the petitions were incompetent in view of our decision in *Smt. Ujjam Bai v. State of Uttar Pradesh*<sup>2</sup>, inasmuch as the Taxing Officers under the Mysore Acts had jurisdiction to decide whether a particular sale was an inter-

State sale or not and any error committed by them as quasi-judicial tribunals in exercise of such jurisdiction did not offend any fundamental right. But we think that that case is clearly distinguishable. Das, J., there stated that

“if a quasi-judicial authority acts without jurisdiction or wrongly assumes jurisdiction by committing an error as to a collateral fact and the resultant action threatens or violates a fundamental right, the question of enforcement of that right arises and a petition under Article 32 will lie.”

He also said that where a statute is *intra vires* but the action taken is without jurisdiction, then a petition under Article 32 would be competent. That is the case here. There is no dispute that the Taxing Officer had no jurisdiction to tax inter-State sales, there being a constitutional prohibition against a State taxing them. He could not give himself jurisdiction to do so by deciding a collateral fact wrongly. That is what he seems to have done here. Therefore we think the decision in *Ujjam Bai's case*<sup>1</sup>, is not applicable to the present case and the petitions are fully competent.

The result is that the petitions are allowed and we direct that appropriate writs be issued quashing the orders of assessment mentioned in the petitions and restraining the respondents from levying or collecting the tax in respect of sales mentioned in the petitions in which the goods moved from outside into Mysore. There will be no order for costs as the petitioners had omitted to disclose the permits and had not in the petitions stated their case as clearly as it could have been done. As they had been granted some indulgence we think it right to deprive them of the costs of these petitions.

V.S.

*Petitions allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, M. HIDAYATULLAH AND J. C. SHAH. JJ..

Kanji Manji

.. Appellant\*

v.

The Trustees of the Port of Bombay

.. Respondents.

*Landlord and Tenant—Joint Tenancy—Notice to vacate to one tenant—Sufficient.*

*Bombay Rents, Hotel and Lodging House Rates (Control) Act (LVII of 1947), section 4 (1) and (4) (a)—Scope and applicability—Suit by a local authority to eject the assignee—Lessee from land—Act, not applicable—Suit lies in the Civil Court.*

Where the tenancy is joint, a notice to vacate to one of the joint tenants is sufficient and the suit (without impleading the legal representatives of the other tenant for the same reason) was also good.

In a case in which the holder of the land from a local authority was seeking to evict his sub-tenants, it was held by the Bombay High Court that the matter was governed by the Rent Control Act. But the Supreme Court held that sub-clause (1) applied and the suit was not governed by the Rent Control Act. The amendment was enacted to cut down by a definition the operation of the words “any premises belonging to the Government or a local authority,” by excluding only buildings which were occupied by sub-tenants even though the buildings belonged to the Government or continued to belong to it. Clause (b) of sub-section (4) excluded section 15, which prohibited sub-letting by a tenant. That, however, was limited to the case of buildings only, and did not apply to the case of land. In this situation, any action by the Government or the local authority in respect of land falls to be governed by sub-section (1) and not sub-section (4) (a). and sub-section (1) puts the case in relation to land entirely out of the Rent Control Act. The net result, therefore, is that if Government or a local authority wants to evict a person from the land, the provisions of the Rent Control Act do not come in the way. For the same reason, the suit for ejectment does not have to be filed in the Court of Small Causes, as required by the Rent Control Act but in the City Civil Court, as has been done in this case.

At the time of the lease in 1942, the lessees, from whom the appellant claims assignment were given a lease not only of the land but of the buildings. The whole tenor of the agreement shows that the title of the lessees was precarious. It was a monthly tenancy liable to be terminated with a notice under the Transfer of Property Act, and there was only a grace that the lessees, when evicted, might remove buildings within one month of their eviction. This precarious interest was obtained by the assignees by an assignment, and the same thing applies to them. If the original lessees took on lease not only the land but also the buildings, it is not open to their assignees to claim that the

1. Writ Petition No. 79 of 1959 (unreported).

ownership of the Government extended only to the land and not to the buildings. By the admissions in the deed of lease and the various clauses, it is quite clear that these buildings cannot now be described as buildings belonging to Government which were leased out with the land but in respect of which by a concession, the lessees were entitled to remove the buildings within one month after eviction. The suit as laid for vacant possession of the site and in the City Civil Court was competent.

If the appellant cannot evict his sub-tenants so as to be able to remove the buildings, in exercise of the right conferred on him, that is an unfortunate circumstance, which does not serve to entitle him to defeat the rights of the Port Trust Authorities. They are only claiming vacant possession of the site, and under the agreement, if the appellant does not remove the buildings within one month, then they would be entitled to take possession of the land with the buildings, whatever might be the rights of the sub-tenants.

Appeal by Special Leave from the Judgment and Order dated the 24th September, 1959, of the Bombay High Court in F.A. No. 731 of 1959.

*B. Sen*, Senior Advocate (*I. N. Shroff*, Advocate with him), for Appellant.

*M. C. Setalvad*, Attorney-General (*B. Parthasarathi*, Advocate and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him) for Respondents.

The Judgment of the Court was delivered by

*Hidayatullah, J.*—This appeal arises out of a suit tried in the Bombay City Civil Court at Bombay, filed by the respondents, the Trustees of the Port of Bombay, for the ejectment of the appellant, Kanji Manji, and one Rupji Jeraji who had died even before the suit was filed, from a plot situated at Haji Bunder Mazgaon, Sewri Reclamation Estate, Bombay, and for possession of the land. There was a claim for Rs. 10,871-14-0 being the arrears of water charges and property taxes, with which we are not concerned. The suit was decreed by the Bombay City Civil Court, and the appellant was ordered to vacate the suit premises and to deliver vacant possession thereof. An appeal was filed against the decree in the High Court of Judicature at Bombay, but it was dismissed summarily on September 24, 1959. The High Court also refused an application for a certificate, but the appellant applied for Special Leave, and having obtained it, has filed the present appeal.

In 1924, the Trustees of the Port of Bombay granted a lease of the said land to five persons, who were trading in partnership under the name and style of Mancherji Vadilal & Company. This lease was for a term of 10 years commencing from December 14, 1923. For the first six months, the conventional rent of pepper corn, if demanded, was payable, and thereafter for the remainder of the term, a monthly rent of Rs. 633-5-4 was payable on the first day of every month. The lessees were also to pay all rates, taxes, assessments, etc. One of the covenants of the lease was that the lessees would, at their own expense and during the first six months period, construct upon the said piece of land, buildings for use as bullock stables and offices according to the specifications given to them by the said Trustees and to be approved by them. It was provided, *inter alia*, that upon the expiration of the term, if the lessees had observed and performed all the covenants, they would be at liberty, at their own expense, to remove the buildings erected by them upon the demised premises on condition that the removal would be completed within three months after the expiration of the term. During this period of three months, the lessees were to pay the monthly rent and also to pay all rates and taxes etc., and if they failed to remove the buildings within the period of three calendar months from the expiration of the term and within like period to fill up all excavations and to level up and restore the land, the right to remove the buildings would stand determined, and the buildings would belong to the Trustees, who would be entitled to remove them and to clear, level and restore the land and recover the costs from the lessees.

It is not clear from the record as to what happened actually after the expiry of the term. But on August 11, 1942, the Trustees of the Port of Bombay granted to Moreswar Narayan Dhotre and Dinshaw Rustumji Ogra, carrying on business under the name and style of Messrs. Dinshaw Rustum & Company and their

respective heirs, executors, administrators and assigns, a monthly tenancy of the land together with the buildings standing thereon and all the rights, easements and appurtenances belonging to the premises on payment of monthly rent of Rs. 300, clear of all deductions, on the first day of each calendar month and payment of all rates, taxes, etc. The lessees covenanted not to add to, or alter the said buildings and conveniences, etc., without previous consent, in writing, of the Trustees and to maintain the property in good repair at their own cost. They further agreed :

“to peacefully leave and yield up the demised premises together with all buildings thereon a prepared and kept at the expiration or sooner determination of the tenancy hereby created or in the event of the tenants becoming entitled to remove the buildings standing on the demised land at the expiration or sooner determination of the tenancy hereby created pursuant to the proviso in that behalf hereafter contained to peaceably leave and yield up the demised land cleared and levelled to the satisfaction in all respects of the Trustees.”

The provisos, *inter alia*, include the following covenants binding the lessees :

“(2) Either party to these presents may terminate the tenancy hereby created by giving to the other of them one calendar month's notice in writing to expire on the 1st day of any calendar month,

(4) The tenants may during the period of notice for determination of tenancy hereby created in accordance with Proviso No. 2 hereinbefore contained remove such buildings as have been standing upon the demised land provided that the tenants shall have paid all rent hereby reserved up to the determination of this tenancy and shall have performed and observed all the covenants on the part of the tenants and the conditions herein contained or referred to.”

On February 28, 1947, Moreshwar Narayan Dhotre and Dinshaw Rustomji Ogra assigned their rights in the lease to Rupji Jeraji and Kanji Manji, who according to the deed of assignment (Exhibit D) paid Rs. 22,250 to the assignors, and this assignment appears to have been accepted by the lessors. On January 25, 1956, the Trustees of the Port of Bombay sent a notice to Rupji Jeraji and Kanji Manji requiring them to vacate the premises and deliver vacant and peaceful possession of the land on February 29, 1956. This notice was not complied with, and the suit was filed for their ejectment, as stated already. In the plaint, the first relief claimed was that

“the defendant be ordered and decreed to forthwith deliver vacant and peaceful possession of the demised premises situate at Mazgaon Sewri Reclamation Estate and more particularly described in Exhibit A hereto.”

Exhibit A mentioned the following :

“All that piece or parcel of land situate at Haji Bunder, Mazgaon Sewri Reclamation Estate, Bombay, admeasuring 5,066 6/9 square yards or thereabouts bearing Cadastral Survey No. 272/145 of Parcel Sewree Division.”

The suit, as stated, was filed against both Rupji Jeraji and Kanji Manji, but later, the plaint was amended by striking out the name of Rupji Jeraji, who had died much earlier.

The appellant, as defendant, raised a number of pleas. His main contention was that the notice dated January 25, 1956 was invalid, inasmuch as it had been served only upon one of the lessees (Kanji Manji) and not upon the heirs and legal representatives of Rupji Jeraji. He also contended that the suit was bad for non-joinder of the heirs and legal representatives of Rupji Jeraji, who were necessary parties. He raised a plea of jurisdiction, alleging that the suit had to be filed in the Court of Small Causes, Bombay, inasmuch as it was governed by the Bombay Rents, Hotel and Lodging Houses Rates (Control) Act, 1947. He further claimed the protection of section 4, sub-section (4) (a) of this Act which, he said, applied to him and not sub-section (1) of the same section. He contended that, in view of the prohibition contained in the Act, he could not evict his sub-tenants, and that the contract that he must deliver vacant possession was impossible of performance and the said impossibility rendered the claim of the plaintiffs incompetent.

All these pleas were found against the appellant. It was held that the tenancy was a joint tenancy, that a notice to one of the joint tenants was sufficient, and that the suit also was not bad for non-joinder of the legal representatives of Rupji Jeraji. The trial Judge held that the present agreement was enforceable, inasmuch as this case was governed by sub-section (1) and not sub-section (4) (a) of section 4 of the Act. For the same reason, the trial Judge also held that the suit was properly

laid in the Bombay City Civil Court at Bombay. The same contentions were raised before us, and we shall deal with them in the same order.

The argument about notice need not detain us long. By the deed of assignment dated 28th February, 1947, the tenants took the premises as joint tenants. The exact words of the assignment were that

"the Assignors do and each of them doth hereby assign and assure with the Assignees as Joint Tenants."

The deed of assignment was approved and accepted by the Trustees of the Port of Bombay, and Rupji Jeraj and the appellant must be regarded as joint tenants. The trial Judge, therefore, rightly held them to be so. Once it is held that the tenancy was joint, a notice to one of the joint tenants was sufficient, and the suit for the same reason was also good. Mr. B. Sen, in arguing the case of the appellant, did not seek to urge the opposite. In our opinion, the notice and the frame of the suit were, proper, and this argument has no merit.

The real controversy in this case centres round the applicability of the Bombay Rents, Hotel and Lodging Houses Rates (Control) Act, 1947 (shortly called, the Rent Control Act in the judgment) to the present suit, and from that also arises the question of the jurisdiction of the Bombay City Civil Court. The latter argument about the jurisdiction of the Court can only arise, if the Rent Control Act applies to the present facts. We shall, therefore, consider these two points together.

It must not be overlooked that the suit was for eviction from the land only. Under the Rent Control Act, the word "premises" is defined by section 5 (8), *inter alia*, as follows :

" 'Premises' means—

(a) any land not being used for agricultural purposes."

The Act, prior to its amendment in 1953 by the Bombay Act IV of 1953, provided by section 4 (1) as follows :

"This Act shall not apply to any premises belonging to the Government or a local authority or apply as against the Government to any tenancy or other like relationship created by a grant from the Government in respect of premises taken on lease or requisitioned by the Government ; but it shall apply in respect of premises let to the Government or a local authority."

This sub-section was considered by the Bombay High Court in a case, which was brought up in appeal to this Court by Special Leave. The judgment of this Court is reported in *Bhatia Co-operative Housing Society Ltd. v. D. C. Patel*<sup>1</sup>. In that case, building sites were auctioned in 1908 by the City Improvement Trust, Bombay. One of the conditions of the sale was that the bidder should construct a building, on the site, of a certain value and according to a plan approved by the City Improvement Trust. One Sitaram Laxman was the highest bidder, and he constructed a building, as agreed. He was then granted a lease of the land together with the building for 999 years. Subsequently in 1925, the Bombay Municipality succeeded the City Improvement Trust, and the Bhatia Co-operative Housing Society Ltd., acquired the lessee's interest. A suit was filed by the Co-operative Society against its own tenants in the Bombay City Civil Court. The plea was that the suit ought to have been filed in the Court of Small Causes, as required by the Rent Control Act. The plaintiff relied upon sub-section (1) of section 4 to show that the Act did not apply to such a suit. This contention of the plaintiff was accepted by the trial Judge, who decreed the claim. The Bombay, High Court, however, on appeal, held that sub-section (1) of section 4 did not apply, and that as between the Co-operative Society and its sub-tenants, the suit was governed by the Rent Control Act and ought to go before the Court of Small Causes. The High Court, therefore, ordered that the plaint be returned for presentation to the proper Court.

1. (1952) S.C.J. 642 : (1953) S.C.R. 185.

This Court, on appeal by Special Leave, reversed the decision of the High Court, and restored that of the trial Judge. This Court pointed out that sub-section (1) of section 4 had three parts, *viz.*,

"(1) this Act shall not apply to premises belonging to the Government or a local authority ;  
(2) this Act shall not apply as against the Government to any tenancy or other like relationship created by grant from the Government in respect of premises taken on lease or requisitioned by the Government ; and

(3) this Act shall apply in respect of premises let out to the Government or a local authority."

This Court further held that the first part of the sub-section mentioned as part No. (1) above had no reference to any tenancy or other like relationship as in the latter part, and was general in character. In framing it in that way, the intention was obviously different, and it was to exempt premises of a particular type from the operation of the Act altogether, and the exemption attached to the premises. Reasons were given by this Court why it thought that this exemption was general and the immunity absolute. Into these reasons we are not now required to go. As between the Bombay Municipality and the lessee, it was held that the land and the buildings belonged to the former as owner and not to the lessee. This Court, therefore, observed at page 196 :

"The truth is that the lessor after the building was erected became the owner of it and all the time thereafter the demised premises which include the building have belonged to him subject to the right of enjoyment of the lessee in terms of the lease."

The Act was thus held not to apply to such suits, and the order of the High Court was reversed.

At first, an Ordinance and later, an Act were passed to nullify the effect of this ruling by the addition of sub-section (4) (a). That sub-section now reads as follows :

"(4) (a) The expression "premises belonging to the Government or a local authority" in sub-section (1) shall, notwithstanding anything contained in the said sub-section or in any judgment, decree or order of a Court, not include a building erected on any land held by any person from the Government or a local authority under an agreement, lease or other grant, although having regard to the provisions of such agreement, lease or grant the building so erected may belong or continue to belong to the government or the local authority, as the case may be; and

(b) notwithstanding anything contained in section 15, such person shall be entitled to create a tenancy in respect of such building or a part thereof."

The amendment achieved two different things. It enabled the lessee of the particular kind of building described in clause (a) to create sub-tenancies in spite of the ban against sub-tenancies contained in section 15. It also excluded from the operation of sub-section (1) the buildings specified in clause (a) of that sub-section. The amendment said nothing about the relationship of the Government or the local authority, on the one hand, and the lessee, on the other, in respect of the land. The word "premises" in sub-section (1) could mean the land or the buildings or both. Sub-section (4) (a) dealt only with the buildings, and did not deal with the land, because it used the word "buildings" and not the more general word "premises". The import of sub-section (4) (a) of section 4 was thus limited to buildings, and did not extend to land. The sub-section, however, was drafted somewhat inartistically, and the obscurity of the language presents some difficulty. The trial Judge followed a decision of the Bombay High Court reported in *Ram Bhagwandas v. Bombay Corporation*<sup>1</sup>. In that case, one Khudabakh Irani had taken lease of certain plots some 30 years back, and constructed some structures upon the open plot, and rented them out as tenements. In 1947, Irani sold them to one Tyaballi. In 1951, the Municipal Corporation filed a suit to eject Tyaballi from the plots, any by a consent decree, Tyaballi agreed to deliver up vacant and peaceful possession of the plots clear of all structures. Tyaballi failed to remove the structures, and the Municipal Corporation sought to execute the decree. The tenants thereupon filed a suit under Order 21, rule 103 of the Civil Procedure Code against the Muni-

cial Corporation, but the suit was dismissed. In the appeal which was filed in the High Court, it was conceded that the Municipal Corporation was the owner of the plots in question, but protection was claimed on the basis of sub-section (4) (a) of section 4 of the Rent Control Act. Chagla, C.J., in dealing with the history of the Amending Act, pointed out that the Legislature was seeking to protect by that sub-section tenants who occupied buildings put up on land belonging to a local authority if the buildings occupied by them were constructed under an agreement under which the lessee was under an obligation to construct buildings. He pointed out that the protection of sub-section (4) (a) was to buildings and not to land, and that the phrase "under an agreement, lease or other grant" modified not only "held by any person from Government or local authority" but also "erected on any land." He, therefore, held that the words "erected on any land held by any person from a local authority" were descriptive of the building and did not emphasise the point of time when the building was erected. By that phrase, what was emphasised was

"that the nature of the building must be such as to satisfy the test that it was erected on land held by a person from a local authority and the test must be applied at the time when the protection is sought."

In this case, it is contended, as it was contended in the Bombay High Court, that so long as a building was erected under an agreement with Government or a local authority, the benefit of sub-section (4) (a) of section 4 would be available, no matter how many hands the property might have changed. This argument was considered by the learned Chief Justice, and was rejected.

In our opinion, though the section is far from clear, the meaning given by the learned Chief Justice is the only possible meaning, regard being had to the circumstances in which this sub-section came to be enacted. Those circumstances were : In a case in which the holder of the land from a local authority was seeking to evict his sub-tenants, it was held by the Bombay High Court that the matter was governed by the Rent Control Act. This Court held that sub-section (1) applied and the suit was not governed by the Rent Control Act. The amendment was enacted to cut down by a definition the operation of the words "any premises belonging to the Government or a local authority" by excluding only buildings which were occupied by sub-tenants even though the buildings belonged to the Government or continued to belong to it. Clause (b) of sub-section (4) excluded also section 15, which prohibited sub-letting by a tenant. That, however, was limited to the case of buildings only, and did not apply to the case of land. In this situation, any action by the Government or the local authority in respect of lands falls to be governed by sub-section (1) and not sub-section (4) (a), and sub-section (1) puts the case in relation to land entirely out of the Rent Control Act. The net result, therefore, is that if Government or a local authority wants to evict a person from the land, the provisions of the Rent Control Act do not come in the way. For the same reason, the suit for ejectment does not have to be filed in the Court of Small Causes, as required by the Rent Control Act but in the City Civil Court, as has been done in this case.

There is one more reason in this case for reaching the same conclusion, because at the time of the lease in 1942, the lessees, from whom the appellant claims assignment, were given a lease not only of the land but of the buildings. The whole tenor of the agreement shows that the title of the lessees was precarious. It was a monthly tenancy liable to be terminated with a notice under the Transfer of Property Act, and there was only a grace that the lessees, when evicted, might remove buildings within one month of their eviction. This precarious interest was obtained by the assignees by an assignment, and the same thing applies to them. If the original lessees took on lease not only the land but also the buildings, it is not open to their assignees to claim that the ownership of the Government extended only to the land and not to the buildings. By the admissions in the deed of lease and the various clauses, it is quite clear that these buildings cannot now be described as buildings constructed under an agreement with the Government, but rather as buildings, belonging to Government which were leased out with the land but in respect of which by a concession, the lessees were entitled to remove the buildings

within one month after eviction. In our opinion, the suit as laid for vacant possession of the site and in the City Civil Court was competent.

It was contended that the contract was incapable of being performed, because at least between the present appellant and his sub-tenants the provisions of the Rent Control Act would apply, and he would not be able to evict them in his turn. It was, therefore, argued that this impossibility on the part of the appellant to fulfil his obligations to deliver vacant possession rendered that portion of the lease deed unenforceable and void. It is to be noticed that the appellant does not claim that by reason of the impossibility the whole of the lease deed becomes void, because if he did so, the suit of the Port Trust Authorities would be perfectly justified without any more. He only seeks to show that that portion of the deed dealing with delivery of vacant possession has become impossible of performance. Such a situation had also arisen in the case of the Bombay High Court in *Ram Bhagwandas v. Bombay Corporation*<sup>1</sup>, and the assignee of the lessee was unable to deliver vacant possession. Whether or not the Port Trust Authorities would be able hereafter to evict the sub-tenants of the appellant is a matter, on which we need not express any opinion. If the appellant cannot evict his sub-tenants so as to be able to remove the buildings, in exercise of the right conferred on him, that is an unfortunate circumstance, which does not serve to entitle him to defeat the rights of the Port Trust Authorities. They are only claiming vacant possession of the site, and under the agreement, if the appellant does not remove the buildings within one month, then they would be entitled to take possession of the land with the buildings, whatever might be the rights of the sub-tenants, and as to which, as we have pointed out already, we say nothing.

In our opinion, the appeal must fail, and is dismissed; but in the circumstances of the case, we do not make any order about costs.

V.S.

*Appeal dismissed;*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

Suraj Ahir and others

.. *Appellants\**

*v.*

Prithinath Singh and others

.. *Respondents.*

*Bihar Land Reforms Act (XXX of 1950), section 3—Notification taking over estate—Effect—Right to recover possession from person holding over after redemption of mortgage—If vests in State.*

The plaintiffs sued the defendant for recovery of possession of the disputed lands and mesne profits as the family of the defendants did not have any raiyati interest in the disputed lands except rehan interest under the rehan deed dated 3rd July, 1906, and that, subsequent to the redemption of that deed in 1943 they had no right to remain in possession and occupation of the disputed lands.

*Held* : On the date of the vesting under Notification under section 3 (1) of the Bihar Land Reforms Act, 1950, the defendants were not in possession as mortgagees. It may be as trespassers or in any other capacity. The land in suit did not come within clause (c) of section 6 of the Bihar Land Reforms Act. As the lands were not in the khas possession of the plaintiffs at the relevant date it could not be deemed to be settled with the plaintiffs by the State in accordance with the provisions of section 6 of the Act. In the absence of any such settlement, no rights over the land in suit remained in the plaintiff after the date of vesting, all their rights having vested in the State by virtue of subsection (1) of section 3 of the Act. The plaintiffs lost their right to recover possession from the defendants, even if they were trespassers, on their estate vesting in the State and thereafter they had no subsisting right to recover possession from the defendants. The right to possession now vests in the State and the plaintiffs suit must be dismissed.

Appeal from the Judgment and Decree dated the 28th January, 1958, of the Patna High Court in Appeal from Original Decree No. 143 of 1948.

*B. K. Saran and K. L. Mehta*, Advocates, for Appellants.

*R. K. Garg, D. P. Singh, S. C. Aggarwal and M. K. Ramamurthy*, Advocates of *M/s. Ramamurthy & Co.*, for Respondents.

1. A.I.R. 1956 Bom. 364.

\*Civil Appeal No. 533 of 1960.

4th May, 1962.



The Judgment of the Court was delivered by

*Raghubar Dayal, J.*—This appeal, on a certificate granted by the High Court of Judicature at Patna, arises in the following circumstances :

The plaintiffs-respondents sued the appellants for the recovery of possession of the disputed lands and mesne profits as the family of the defendants did not have any raiyati interest in the disputed lands except rehan interest under the rehan deed dated July 3, 1906, and that, subsequent to the redemption of that deed, they had no right to remain in possession and occupation of the disputed lands.

The plaintiffs alleged that Pranpat Bhagat and others held eight annas share of milkiat interest in village Sevathra, pargana Nonaur, tauzi No. 3879 and that the other eight annas share was held by Kunj Bihari Bhagat and others. These persons also held Khudkast lands in the village and that such lands were treated as kasht lands. In 1906 Ram Autar Bhagat, one of the members of the joint family of Pranpat Bhagat, executed the mortgage deed with respect to 15 bighas of land out of 16 bighas of kasht lands, to Sheo Dehin Ahir, on behalf of his joint family. The defendants entered into possession on the basis of that mortgage deed, they having had no connection with the land mortgaged prior to the execution of the mortgage deed.

Later on, in 1912, Ram Lal Bhagat and Munni Bhagat, of Pranpat's family, executed another mortgage deed with respect of their entire milkiat interest in favour of Jatan Ahir and Ram Saran Ahir who also belonged to the family of Sheo Dehin Ahir. They then got into possession of the fresh land which had been mortgaged.

Ram Lal Bhagat and others sold their milkiat share together with the kasht lands to the plaintiffs in 1915. The plaintiffs entered into possession of the milkiat property and subsequently redeemed the mortgage deeds in 1943. The plaintiffs also purchased four annas' share belonging to the branch of Kunj Bihari Bhagat. The other four annas' share of that branch was purchased by Raja Singh who then sold it to Ram Ekbal Singh, impleaded as defendant No. 6 in the plaint. The defendants, however did not make over possession of the land in suit after the mortgage deeds had been redeemed and hence the suit was instituted for a declaration and recovery of possession.

The defendants 1 to 5 did not admit the allegations made by the plaintiffs and stated the real state of affairs to be that the disputed lands were never the bakasht lands of the proprietors of the village and were really the raiyati qaimi kasht lands of the defendants, that the plaintiffs never purchased the disputed lands, that the disputed lands, were the raiyati kasht lands of Ram Autar Bhagat only, who let out the disputed lands in rehan under different rehan deeds alleging them to be raiyati kasht lands, and who had earlier treated it as his exclusive raiyati kasht lands, and that, ultimately, Ram Autar Bhagat sold the disputed lands to the defendants and got their names entered as qaimi raiyati kashtkars. It was further alleged that the defendants had acquired title to the land in suit by virtue of adverse possession.

The trial Court found that the plaintiffs had no subsisting title to the lands in suit as those lands were not sold to the plaintiffs who had purchased the milkiat interest including the bakasht and zerat lands, that the suit was barred by adverse possession also and that it was barred by limitation. It therefore dismissed the suit.

On appeal, the High Court held that the plaintiff did purchase the land in suit and that the defendants were in possession only as mortgagees and that, after the redemption of the mortgage, they had no right to continue in possession. It therefore allowed the appeal and decreed the plaintiff's suit. The defendants have now filed this appeal.

Learned counsel for the appellants has urged five points :

(1) The record of rights supported the case of the defendants that they were the qaimi raiyats and that the High Court wrongly construed them.

(2) The sale deed of 1915 in favour of the respondents did not include the land in suit.

(3) Even if the plaintiffs respondents acquired right to the land in suit by purchase, they are estopped from taking any action against the defendants-appellants who had been in possession for long.

(4) The suit is barred by limitation as the defendants had perfected their title by adverse possession and the plaintiffs had not been in possession within limitation.

(5) The plaintiffs-respondents had no subsisting title to evict the appellants in view of the provisions of the Bihar Land Reforms Act, 1950 (Bihar Act XXX of 1950).

The case set up by the defendants with respect to their acquiring the qaimi raiyati kasht rights, in their written statement, has been disbelieved by the Courts below and, we think, rightly. It follows that the defendants were in possession of the land in suit only as mortgagees as held by the Court below and that they had no right to possession after the mortgage had been redeemed.

By the sale deed dated 5th October, 1915, Ram Lal Bhagat and others sold the property described thus in the sale deed :

" 8 (eight) annas ancestral milkiat interest, out of Tauzi No. 3879, in mauza Sewathra, pergana Nanaur, thana Pito, district Shahabad, Sub-registry office Jagdishpur, the Sadar Jama whereof is Rs. 190 which has been in possession and occupation of us, the executants without copartnership and interference by anybody together with all the present Zamindari rights appertaining thereto, without excluding any interest and profit, together with Zirat lands which have been recorded in the survey papers in the names of us, the executants as bakasht (lands) and new and old parti lands, aam and khas Ghairmazrua lands, baharsi dihi, house of the tenants ground rent, ahar, pond, reservoir, tank, orchard, fruit-bearing and non-fruit bearing trees and bamboo-clumps that is the entire lands and profit (derived from) zamindari below and above the surface existing or which may be derived in future without excluding anything."

They emphasized the extent of the sale property further by saving :

"We, the executants, gave up and relinquished our respective possession and occupation of vended property today. The entire interest excluding only the chaukidar chakran (service) land which has been let out in settlement with us, the executants is being sold. The chaukidari land only is not being sound (sic)."

It is clear therefore, as held by the High Court, that the land in suit which is included in the milkiat share was not excepted from sale. The only property excluded from sale was the chaukidari chakran land.

The long possession of the appellants therefore does not estop the respondents from recovering possession from them. The suit was instituted within 12 years of the redemption of the mortgage deed and it is not therefore barred by limitation.

The only other question to determine is whether the plaintiffs-respondents cannot recover possession from the appellants in view of the provisions of the Bihar Land Reforms Act, 1950 (Act XXX of 1950), hereinafter called the Act, which came into force during the pendency of the appeal in the High Court. The trial Court dismissed the suit on 8th March, 1948. The High Court allowed the appeal on 28th January, 1958. The Act came into force on 25th September, 1950.

Sub-section (1) of section 3 of the Act empowered the State Government to declare by Notification that the estates or tenures of a proprietor or tenure-holder specified in the Notification have passed to and become vested in the State. Such vesting took place on 1st January, 1955. It is contended for the appellants that the respondents ceased to have any proprietary right in the land in suit when their estate vested in the State and therefore they had no right to recover possession from them.

Section 4 of the Act mentions the consequences which follow on the publication of the Notification under sub-section (1) of section 3. According to section 4 (a),

such estate or tenure including the interests of the proprietor or tenure-holder in the various objects mentioned therein shall, with effect from the date of vesting, vest absolutely in the State free from all encumbrances, and such proprietor or tenure-holder shall cease to have any interest in such estate or tenure other than the interest expressly saved by or under the provisions of the Act. This makes it absolutely clear that after the vesting of the estate, no interest other than that expressly saved by or under the provisions of the Act remained in the respondents. The right to recover possession from the trespasser also got vested in the State. Sub-clause (f) of section 4 provides that the Collector shall take charge of such estate or tenure and of all interests vested in the State under the section.

In this connection reference may be made to the decision of this Court in *Haji S. K. Subhan v. Madhorao*<sup>1</sup>, which dealt with a similar question in the context of the provisions of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (M. P. Act No. 1 of 1951).

We have now to consider whether any interest in the land in suit was expressly saved by or under the provision of the Act in favour of the respondents.

Section 6 of the Act provides *inter alia* that on and from the date of vesting, all lands used for agricultural purposes which were in khas possession of a proprietor or tenure-holder on the date of vesting shall be deemed to be settled by the State with such proprietor or tenure-holder as the case may be and such proprietor or tenure-holder shall be entitled to retain possession thereof and hold them as a raiyat under the State having occupancy rights in respect of such lands subject to the payment of such fair and equitable rent as may be determined by the Collector. The lands coming within this section included lands used for agricultural purposes forming the subject matter of a subsisting mortgage on the redemption of which the intermediary is entitled to recover khas possession thereof. It follows that such lands, though not in the actual khas possession of the proprietor on the date of vesting would also be deemed to be settled with the proprietor, who would retain their possession as raiyat under the State.

According to section 2 (k) of the Act,

“‘khas possession’ used with reference to the possession of a proprietor or tenure-holder of any land used for agricultural or horticultural purposes means the possession of such proprietor or tenure-holder by cultivating such land or carrying on horticultural operations thereon himself with his own stock or by his own servants or by hired labour or with hired stock.”

On the date of vesting, the respondents were not in khas possession of the land in suit as they were not in possession in any of the manners mentioned in this definition.

Section 6 does not really enlarge the scope of the expression ‘khas possession’ but includes lands covered by clauses (a) (b) and (c) of sub-section (1) among the lands which can be deemed to be settled by the State with the proprietor. Clause (c) originally was :

“lands used for agricultural or horticultural purposes and in the possession of a mortgagee which immediately before the execution of the mortgage bond were in khas possession of such proprietor or tenure-holder.”

This clause was substituted by another clause by section 6 of the Bihar Land Reforms (Amendment) Act, 1959 (Act XVI of 1959) and under that section the substituted clause shall be deemed always to have been substituted, that is to say, is to be deemed to have been in the original Act from the very beginning. The substituted clause (c) reads :

“(c) lands used for agricultural or horticultural purposes forming the subject matter of a subsisting mortgage on the redemption of which the intermediary is entitled to recover khas possession thereof.”

It is therefore necessary for the respondents, to get advantage of the provisions of this clause, that there be a subsisting mortgage on the date of vesting and that the

land included in the subsisting mortgage be such that on the redemption of the mortgage the respondents be entitled to recover khas possession thereof. No mortgage subsisted on the date of vesting and therefore the benefit of this clause cannot be taken by the respondents. The land in suit does not come within the provisions of clause (c) or any other clause of sub-section (1) of section 6 of the Act. This point was raised in the High Court which observed as follows in this connection :

" In the first place the defendants were in possession as mortgagees and, even section 6 of the Bihar Land Reforms Act provides that the possession of the mortgagee is the possession of the mortgagor even for the purpose of construing the meaning of Khas possession of the intermediary over the land which may be deemed to be settled with him by virtue of section 6 of the Act. The defendants' possession being the mortgagees' possession, the case is covered by the terms of section 6 itself. Apart from it it has been held in the case of *Brij Nandan Singh v. Jamuna Prasad Sahu and another*<sup>1</sup>, by a Division Bench of this Court that the words 'Khas possession' include subsisting title to possession as well and any proprietor, whose right to get khas possession of the land is not barred by any provision of law, will have a right to recover possession and the State of Bihar shall treat him as Raiyat with occupancy, right, and not the trespassers. The contention of the learned Advocate General must fail in terms of the above decision."

On the date of vesting, the appellants were not in possession as mortgagees. The mortgages had been redeemed in 1943. Thereafter, the possession of the appellants was not as mortgagees. It may be as trespassers or in any other capacity. The land in suit, therefore, did not come within clause (c) of section 6 of the Act as it stood when the High Court delivered the judgment.

Reliance was placed by the High Court on the case reported as *Brij Nandan Singh v. Jamuna Prasad*<sup>1</sup>, for the construction put on the expression 'khas possession' to include subsisting title to possession as well, and therefore for holding that any proprietor, whose right to get khas possession of the land is not barred by any provision of law, will have a right to recover possession and that the State of Bihar shall treat him as a raiyat, with occupancy right and not as a trespasser. We do not agree with this view when the definition of 'khas possession' means the possession of a proprietor or tenure-holder either by cultivating such land himself with his own stock or by his own servants or by hired labour or with hired stock. The mere fact that a proprietor had a subsisting title to possession over certain land on the date of vesting would not make that land under his 'khas possession'.

It is clear therefore that the land in suit cannot be deemed to be settled with the respondents by the State in accordance with the provisions of section 6 of the Act. In the absence of any such settlement, no rights over the land in suit remained in the respondents after the date of vesting, all their rights having vested in the State by virtue of sub-section (1) of section 3 of the Act.

We are therefore of opinion that the respondents lost their right to recover possession from the appellants, even if they were trespassers, on their estate vesting in the State, by virtue of sections 3 and 4 of the Act and that therefore, thereafter, they had no subsisting right to recover possession from the appellants. The right to possession now vests in the State. The respondents being no more entitled to recover possession of the land in suit the decree of the High Court has to be set aside. We, accordingly, allow the appeal, set aside the decree of the Court below and restore the decree of the trial Court, though for reasons other than those given by that Court in its judgment. In the circumstances of the case, we order the parties to bear their own costs.

K.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

PRESENT:—S. K. DAS, A. K. SARKAR AND M. HIDAYATULLAH, JJ.

P. J. P. Thomas

.. Appellant\*

v.

The Commissioner of Income-tax, Calcutta

.. Respondent.

*Income-tax Act (XI of 1922), section 16 (3) (a) (iii)—Transfer of assets—Wife's dividend income—Shares transferred prior to marriage—Inclusion in husband's assessment—Validity—Transfer in consideration, or contemplation, of marriage—When takes effect—Date of transfer or date of marriage.*

A shareholder in a company transferred his shares to a person with whom he was already engaged to be married. The marriage took place later, and the company thereafter effected the transfer in the share register. Dividends were subsequently paid on the shares to the wife, but they were assessed to tax as the husband's income. The High Court, on Reference, upheld the assessments on the basis of section 16 (3) (a) (iii) of the Income-tax Act, 1922. On appeal by the husband

*Held*, that section 16 (3) (a) (iii) creates an "artificial" income and must be strictly construed.

The object of the section is not just the principle of aggregation. All income enjoyed by the wife is not to be included in the income of the husband. It aims at foiling an individual's attempt to avoid or reduce the incidence of tax by transferring his assets to the wife. English decisions on the subject are not therefore in point.

The words "*wife*" and "*husband*" should be given their natural meaning and should not be interpreted in an archaic or secondary sense.

Under section 16 (3) (a) (iii) the relationship of husband and wife must subsist not only at the time of the accrual of the income, but the relationship must also subsist when the transfer is made, in order to fulfil the condition that the transfer is "directly or indirectly to the wife by the husband".

Whether the transfer of shares in the present case be in consideration of a promise to marry or be a gift subject to the subsequent condition of marriage, the transfer takes effect immediately and is not postponed to the date of the marriage.

Appeals from the Judgment and Order dated 28th February, 1961 of the Calcutta High Court in Income Tax Reference No. 49 of 1958.

*Sachin Chaudhury*, Senior Advocate (*D. N. Mukherjee* and *B. N. Ghosh*, Advocates, with him) for Appellant.

*K. N. Rajagopal Sastri*, Senior Advocate (*R. N. Sachthey*, Advocate, with him) for the Respondent.

The Judgment of the Court was delivered by

*S. K. Das, J.*—These are four appeals on certificates granted by the High Court of Calcutta under section 66-A (2) of the Indian Income-tax Act, 1922. The appeals are from the decision of the High Court, dated February 28, 1961 in Income-tax Reference No. 49 of 1956.

We may first state the relevant facts. One P. J. P. Thomas is the appellant before us. He was the assessee before the taxing authorities. He held 750 'A' shares in J. Thomas & Co., Ltd., of 8 Mission Row, Calcutta. The assessee entered into an engagement to marry one Mrs. Judith Knight, stated to be a divorcee, and the engagement was announced in certain newspapers on September 3, 1947. On December 10, 1947 the assessee and Mrs. Knight presented to the Company an application to transfer the said 750 'A' shares to Mrs. Judith Knight. A transfer deed of that date stated:

"I, Philip John Plasket Thomas of 8, Mission Row, Calcutta, in consideration of my forthcoming marriage with Judith Knight of 35, Ridgeway, Kingsbury, London (hereinafter called the said transferee) do hereby transfer to the said transferee the 750 'A' shares numbered 1-750 standing in my name in the books of J. Thomas & Co., Ltd., to hold to the said transferee..... Executors, Administrators and Assigns, subject to the several conditions on which I hold the same

at the time of the execution thereof. And I the said transferee do hereby agree to take the said shares subject to the same conditions."

On December 15, 1947 the Company transferred the shares to Mrs. Judith Knight and registered her as the owner of the shares. On December 18, 1947 the marriage was solemnised. On January 26, 1948 the fact of marriage was communicated to the Company and the name of the shareholder was changed in the books of the company to Mrs. Judith Thomas. It is undisputed that during the relevant periods the shares stood registered in the name of the assessee's wife and when the income in question arose to her she was the wife of the assessee. The four accounting years with which the assessments were concerned were those ending respectively on April 30, 1948, April 30, 1949, April 30, 1950 and April 30, 1951. The four assessment years were 1949-50, 1950-51, 1951-52 and 1952-53. It appears that for the years 1949-50 and 1950-51 assessments of P. J. P. Thomas which had by then been already completed were re-opened under section 34 of the Indian Income-tax Act, 1922 and the dividends of Rs. 97,091 and Rs. 78,272 as grossed up and paid to Mrs. Judith Thomas during the accounting years ending April 30, 1948 and April 30, 1949 were re-assessed in the hands of P. J. P. Thomas. For the assessment years 1951-52 and 1952-1953, the dividends paid by the company to Mrs. Judith Thomas during the accounting periods ending April 30, 1950 and April 30, 1951 were held by the Income-tax Officer to be includible in the total income of P. J. P. Thomas under section 16 (3) (b) of the Act and accordingly orders were passed including the sums of Rs. 1,00,000 and Rs. 16,385 being the grossed up dividends for the two years respectively in the total income of P. J. P. Thomas.

Against the said assessment orders the assessee preferred appeals to the Appellate Assistant Commissioner. By a common order dated May 11, 1955 the Appellate Assistant Commissioner confirmed the orders of the Income-tax Officer holding that not only the provisions of section 16 (3) (b) but also the provisions of section 16 (3) (a) (iii) of the Act applied in these cases. Against the order of the Appellate Assistant Commissioner the assessee preferred four appeals to the Appellate Tribunal and contended (1) that he transferred the shares to Mrs. Judith Knight when she was not his wife, (2) that the transfer of shares was absolute at the time when it was made and no condition was attached to the transfer, and (3) that the transfer was for adequate consideration. On these grounds the assessee contended that the provisions of section 16 (3) of the Act were not attracted to the cases in question. The Appellate Tribunal by a consolidated order dated April 4, 1956 disagreed with the view of the Income-tax Officer and the Appellate Assistant Commissioner that the provisions of section 16 (3) (b) applied, but it held that the cases fell within section 16 (3) (a) (iii) of the Act, because the transfer became effective only after the marriage. It further held that the transfer could also be construed as a revocable transfer within the meaning of section 16 (1) (c) of the Act. Therefore the Appellate Tribunal dismissed the four appeals.

The assessee then made four applications for referring two questions of law arising out of the Tribunal's order to the High Court. These questions were :

1. In the facts and circumstances of these cases, whether the dividends paid by J. Thomas & Co., Ltd., to Mrs. Judith Thomas, grossed up to the sums of Rs. 97,091, Rs. 78,272, Rs. 1,00,000 and Rs. 16,385 respectively for the four years in question could be included in the income of Mr. P. J. P. Thomas and be taxed in his hands under the provisions of section 16 (3) (a) (iii) of the Indian Income-tax Act ?

2. In the facts and circumstances of these cases, whether the dividends referred to above could be included in the total income of Mr. P. J. P. Thomas under the provisions of section 16 (1) (c) of the Indian Income-tax Act ?

The Tribunal accepted these applications and referred the aforesaid two questions to the High Court. By its decision dated February 28, 1961 the High Court answered the first question against the assessee and the second question in his favour. The assessee then moved the High Court for a certificate of fitness under section 66-A.

(2) of the Act and having obtained such certificate has preferred the present appeals to this Court. The appeals relate only to the correctness or otherwise of the answer given by the High Court to the first question. As the Department has filed no appeal as to the answer given by the High Court to the second question, it is unnecessary for us to consider the correctness or otherwise of that answer.

The answer to the first question depends on the determination of two points : (1) what, on its proper interpretation, is the true scope and effect of section 16 (3) (a) (iii) of the Act, and (2) whether the transfer made by the assessee in favour of Mrs. Knight took effect only from the date of the marriage between the assessee and Mrs. Knight. A third point as to adequate consideration for the transfer was also gone into by the High Court, but in the view which we have taken of the first two points involved in the question it is unnecessary to decide the point of adequate consideration.

Before we proceed to a consideration of the question, it is necessary to set out the relevant provisions of law. Section 16 so far as it is relevant reads :

"16. *Exemptions and exclusions in determining the total income.....*

(1) \* \* \* \* \*

(2) \* \* \* \* \*

(3) In computing the total income of any individual for the purpose of assessment, there shall be included.....

(a) so much of the income of a wife or minor child of such individual as arises directly or indirectly.....

(i) from the membership of the wife in a firm of which her husband is a partner ;

(ii) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner ;

(iii) from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart ; or

(iv) from assets transferred directly or indirectly to the minor child, not being a married daughter, by such individual (otherwise than for adequate consideration) ;

(b) \* \* \* \* \*

Sub-section (3) of section 16 of the Act was introduced in 1937. For the purpose of its application it is immaterial whether the partnership was formed before or after 1937 and whether the transfer was effected before or after that date. However, the sub-section deals only with income arising after its introduction. It clearly aims at foiling an individual's attempt to avoid or reduce the incidence of tax by transferring his assets to his wife or minor child, or admitting his wife as a partner or admitting his minor child to the benefits of partnership, in a firm in which such individual is a partner. It creates an artificial income and must be strictly construed (see *Bhogilal Laherchand v. Commissioner of Income-tax*<sup>1</sup>). Clauses (a) (i) and (a) (ii) of the sub-section provide that in computing the total income of an individual there should be included the income arising directly or indirectly to his wife from her share as a partner or to his minor child from the admission to the benefits of partnership, in a firm of which such individual is a partner. We are not directly concerned with clauses (a) (i) and (a) (ii). We are concerned with clause (a) (iii). Under that clause the income arising from assets transferred by an individual to his wife has to be included in the transferor's total income. There are two exceptions to this rule, viz., (1) where the transfer is for adequate consideration, or (2) where it is in connection with an agreement to live apart. The second exception has no bearing on the cases before us.

The first and principal point which has been urged before us on behalf of the appellant is this. It is pointed out that at the time the transfer of shares was made by the assessee to Mrs. Judith Knight the latter was not the wife of the former and therefore clause (a) (iii) which talks of "assets transferred directly or indirectly to

1. (1954) 25 I.T.R. 523 : 56 Bom. L.R. 718 : I.L.R. (1954) Bom. 1093: A.I.R. 1955 Bom. 16.

the wife by the husband" has no application, apart altogether from any question of adequate consideration. This argument on behalf of the appellant was advanced before the High Court also. The High Court sought to meet it in the following way. Mukharji, J., who gave the leading judgment said that in order to determine whether a particular case came under clause (a) (iii) or not, the relevant point of time was the time of computation of the total income of the individual for the purpose of assessment and the section did not limit any particular time as to when the transfer of assets should take place. He then observed :

"It appears to me that as the addition of the wife's income to the husband's income under this sub-section is made, the relevant time of the relationship between husband and wife which has to be considered by the taxing authorities is the time of computing of the total income of the individual for the purpose of assessment. That is how I read the opening words of section 16 (3) of the Act : 'In computing the total income of any individual for the purpose of assessment'."

Bose, J., expressed a slightly different view. He said that the material consideration under section 16 (3) (a) (iii) was whether the transferee was actually the wife of the assessee during the relevant accounting period when the income from the assets transferred to her accrued. In effect both the learned Judges held that for the application of clause (a) (iii) it was not necessary that the relationship of husband and wife must subsist at the time when the transfer of the assets is made ; according to Mukharji, J., the crucial date to determine the relationship is the date when the taxing authorities are computing the total income of the husband and according to Bose, J., the crucial time is the time when the income accrues to the wife. It must also be stated in fairness to Mukharji, J., that he did not accept the view that the words 'husband' and 'wife' in clause (a) (iii) included prospective husband and prospective wife. He accepted the view that the words 'husband' and 'wife' must mean legal husband and legal wife. Even so, he expressed the view that on a true construction of section 16 (3) (a) (iii) the time when the relationship has to be construed is the time when the computation of the total income of the husband is made.

Learned counsel for the appellant has very strongly contended before us that the view expressed by the learned Judges of the High Court as to the proper interpretation of clause (a) (iii) is not correct. On a plain reading of sub-section (3) of section 16 it seems clear to us that at the time when the income accrues, it must be the income of the wife of that individual whose total income is to be computed for the purpose of assessment: this seems to follow clearly from clause (a) of sub-section (3). Therefore in a sense it is right to say that the relationship of husband and wife must subsist at the time of the accrual of the income ; otherwise the income will not be the income of the wife, for the word 'wife' predicates a marital relationship. The matter does not however end there, When we go to sub-clause (iii) we find that only so much of the income of the wife as arises directly or indirectly from assets transferred directly or indirectly to the wife by the husband shall be included in the total income of the husband. Therefore, sub-clause (iii) predicates a further condition, the condition being that the income must be from such assets as have been transferred directly or indirectly to the wife by the husband. The condition must be fulfilled before sub-clause (iii) is attracted to a case. It is clear that all income of the wife from all her assets is not includible in the income of the husband. Thus on a proper reading of section 16 (3) (a) (iii) it seems clear enough that the relationship of husband and wife must also subsist when the transfer of assets is made in order to fulfil the condition that the transfer is 'directly or indirectly to the wife by the husband.'

Learned counsel for the respondent has contended before us that the transfer mentioned in section 16 (3) (a) (iii) need not necessarily be post-nuptial and he has argued that the main object of the provision is the principle of aggregation, that is, the inclusion of the income of the wife in the income of the husband, because of the influence which the husband exercises over the wife. He has also pointed out that sub-clause (i) which refers to the membership of the wife in a firm of which her husband is a partner is indicative of the object of the provision because it does not talk of any assets being brought into the firm by the wife. He has further argued that in sub-clause (iii) the word 'wife' is merely descriptive and means the woman



referred to in clause (a) and the word 'husband' has reference merely to the individual whose total income is to be computed for the purpose of assessment. In support of this argument he has relied on the expression "such individual" occurring in sub-section (3) (a).

We are unable to accept these arguments as correct. It is indeed true that all the four sub-clauses of clause (a) must be harmoniously read as this Court observed in *Commissioner of Income-tax v. Sodra Devi*<sup>1</sup>, but we see no disharmony between sub-clause (i) and sub-clause (iii) on the interpretation which we are putting. Sub-clause (i) talks only of the membership of the wife in a firm of which her husband is a partner; it has no reference to assets at all. Sub-clause (iii) however talks of assets and qualifies the word "assets" by the adjectival clause "transferred directly or indirectly to the wife by the husband." We fail to see how any disharmony results from giving full effect to the adjectival clause in sub-clause (iii). Nor do we see why the words 'husband' and 'wife' should be taken in the archaic sense contended for by the learned counsel for the respondent. In *In re: Smalley. Smalley v. Scotton*<sup>2</sup>, decision on which learned counsel for the respondent relies, the facts were these. A testator by his will gave all his property to "my wife E.A.S." The testator left a lawful wife M.A.S. and children by her and contributed to their support, but about five years before his death had contracted a bigamous marriage with a widow E.A.M. who lived with him and was known as E.A.S. and believed she was and was reputed to be, his wife. The will was produced by E.A.M. It was held that the will taken in connection with the surrounding circumstances, indicated that the testator intended to benefit E.A.M., she being in a secondary sense and by repute his wife. The rules of construction which were followed in that case were those laid down by Lord Abinger in *Doe v. Hiscocks*<sup>3</sup>. Lord Abinger said :

"The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained, without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements:..... All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate, and often necessary evidence, to enable us to understand the meaning and application of his words."

We are dealing here with a Statute and the Statute must be construed in a manner which carries out the intention of the Legislature. The intention of the Legislature must be gathered from the words of the Statute itself. If the words are unambiguous or plain, they will indicate the intention with which the Statute was passed and the object to be obtained by it. There is nothing in sub-section (3) of section 16 which would indicate that the word 'wife' or the word 'husband' must not be taken in their primary sense which is clearly indicative of a marital relationship. Nor are we satisfied that the object of the Legislature is just the principle of aggregation. We have said earlier that sub-section (3) of section 16 clearly aims at foiling an individual's attempt to avoid or reduce the incidence of tax by transferring his assets to the wife or minor child or admitting his wife as a partner or admitting his minor child to the benefits of partnership, in a firm in which such individual is a partner. This object does not require that the word 'wife' or the word 'husband' should be interpreted in an archaic or secondary sense.

Learned counsel for the respondent has drawn our attention to certain English decisions, particularly the decision of the House of Lords in *Lord Vestey's Executors and Vestey v. Commissioners of Inland Revenue*<sup>4</sup>. One of the questions which was considered in that decision was whether for the purpose of either section 18 of the Finance Act, 1936 (in England) or section 38 of the Finance Act, 1938 (in England) "wife" included a "widow". Their Lordships had to consider the earlier decision

1. (1958) S.C.J. 1 : (1958) 1 M.L.J. (S.C.)  
1 : (1958) An W.R. (S.C.) 1 : 32 I.T.R. 615 at  
623.

2. L.R. (1929) 2 Ch. 112.

3. (1839) 5 M. & W. 363, 367.

4. (1949) 1 All E.R. 1108 : 31 T.C. 1, 80.

of the Court of Appeal in *Commissioners of Inland Revenue v. Gaunt*<sup>1</sup>, which held that the one word included the other. Their Lordships ultimately held, over-ruling the decision in *Gaunt's case*<sup>1</sup>, that the word "wife" did not include "widow." The English decisions proceeded on the footing that in England it is a principle of Income Tax Law, embodied in rule 16 of the General Rules, that for Income Tax purposes husband and wife living together are one. Lord Morton said:

"I think that the treatment of husband and wife by the Legislature for Income Tax purposes rests on the view that any income enjoyed by one spouse is a benefit to the other spouse. It is not surprising, therefore, that in the sections now under consideration a benefit to the wife of the settlor is treated as being a benefit to the settlor, but it seems to me unlikely that this principle is being extended by these sections to the widow of the settlor."

Now, it is quite clear to us that the treatment of husband and wife in the Indian Income-tax Act, 1922 does not rest on the view that any income enjoyed by one spouse is a benefit to the other spouse: for sub-section (3) of section 16 makes it quite clear that all income enjoyed by the wife is not to be included in the income of the husband and only such of the wife's income as comes within the sub-section is to be included in the income of the husband. We therefore think that the English decisions are not in point and there are no reasons why the word 'wife' or the word 'husband' should not be given its true natural meaning.

This brings us to the second question, namely, whether the transfer of shares made by the assessee in favour of Mrs. Judith Knight on December 10, 1947 was to take effect only from the date of their marriage. It is admitted that on December 10, 1947, the assessee and Mrs. Knight were not married. It is also admitted that they were engaged to be married and the engagement was announced on September 3, 1947. The transfer deed which we have earlier quoted contained no words of postponement. On the contrary, it contained words which indicated that the transfer took effect immediately. Learned counsel for the respondent has rightly pointed out that the expression in the transfer deed "in consideration of my forthcoming marriage", can have very little meaning as a real consideration, because on September 3, 1947 the parties had mutually promised to marry each other; therefore the promise to marry had been made earlier than December 10, 1947. Learned counsel for the respondent has argued before us that the transfer of shares was really a gift made to Mrs. Knight in contemplation of the forthcoming marriage and the gift was subject to a condition subsequent, namely, that of marriage which if not performed would put an end to the gift. This does not however advance the case of the respondent in any way. A gift may be made subject to conditions, either precedent or subsequent. A condition precedent is one to be performed before the gift takes effect; a condition subsequent is one to be performed after the gift had taken effect, and, if the condition is unfulfilled will put an end to the gift. But if the gift had already taken effect on December 10, 1947 and the condition subsequent has been later fulfilled, then the gift is effective as from December 10, 1947 when the assessee and Mrs. Knight were not husband and wife. That being the position, sub-clause (iii) of section 16 (3) (a) will not be attracted to the case as the transfer of the shares was not made by the husband to his wife.

We were also addressed on the question as to the circumstances in which a gift to an intended wife or husband may be recovered when the marriage does not take place through the fault of either of the two parties. We do not think that the question falls for decision in the present case. From whatever point of view we look at the transfer of shares in the present case, whether it be in consideration of a promise to marry or be a gift subject to the subsequent condition of marriage, the transfer takes effect immediately and is not postponed to the date of marriage. If that be the true position, as we hold it to be, then sub-clause (iii) of section 16 (3) (a) is not attracted to these cases, apart altogether from any question as to whether there was adequate consideration for the transfer within the meaning of that sub-clause.

For the reasons given above we allow the appeals and answer the question referred to the High Court in favour of the assessee. The appellant will be entitled to his costs in this Court as also in the High Court ; there will be one hearing fee.

V.B.

*Appeals allowed.*

# THE SUPREME COURT OF INDIA.

PRESENT :—S. K. DAS, A. K. SARKAR AND M. HIDAYATULLAH, JJ.

The Commissioner of Income-tax, Madras

*Appellant\**

v.

G. M. Kothari, Madras (dead) and after him his legal representative and wife Mrs. Rama Kothari

*Respondents.*

*Income-tax Act, (XI of 1922), section 16 (3) (a) (iii)—Transfer of assets—Purchase money for joint acquisition of house—Equivalent gifts by father to daughter-in-law and by son to mother—Inter-connection, but no reciprocal consideration, between gifts—Inclusion of mother's income in father's assessment—Validity.*

A firm consisting of C and his two sons D and H as partners, agreed to purchase a house for Rs. 90,000. The sale deed was taken in the name of Mrs. C, Mrs. D and H, with equal shares. The firm paid the entire purchase consideration to the vendor, but Mrs. C and Mrs. D issued cheques to the firm in respect of their respective shares of purchase money. The firm paid Mrs. C Rs. 7,000 and Rs. 3,000 the amounts being debited to partner D as birthday and *Devali* gifts to his mother Mrs. C. The firm also paid, at about the same time, Rs. 30,000 to Mrs. D, debited to partner C as his *Devali* gift to his daughter-in-law Mrs. D. It was found that Mrs. C's birthday occurred, not at the time of the gift, but early in the year and that *Devali* presents of similar substantial amounts had never before been made by C to Mrs. D. On these facts, Mrs. C's income from the share of the house was assessed under section 16 (3) (a) (iii) of the Income-tax Act 1922 as part of the individual income of C. The High Court on a case stated, held that there was no indirect transfer of assets by C to Mrs. C and that the assessment was bad in law. On appeal by the Commissioner of Income-tax,—

*Held*, that section 16 (3) (a) (iii) of the Income-tax Act, 1922 takes into account not only transference of assets made directly, but also made indirectly. It is impossible to state what sorts of transfers are covered by the word "indirectly", because such transfers may be made in different ways.

The section says that the assets must be those of the husband, but it does not mean that the same assets should reach the wife. Indirect transfers can be made by substituting the assets of another person who has benefited to the same or nearly the same extent from assets transferred. A chain of transfers, if not comprehended by the word "indirectly", would easily defeat the object of the law.

If two transfers are inter-connected and are parts of the same transaction in such a way that it can be said that the circuitous method is a device to evade the implications of section 16 (3) (a) (iii) the case will fall within the section. It is not necessary that there should be consideration in the technical sense between the two transfers.

[On the facts of the instant case, an intimate connection between the two transactions, though *prima facie* separate, was clearly established and, the device being palpable, they attracted the words of section 16 (2) (a) (iii).]

*G. M. Kothari v. C.I.T. Madras (1958) 2 M.L.J. 399, reversed.*

Appeals from the Judgment and Order dated 25th March, 1958, of the Madras High Court in Case Referred No. 12 of 1954.<sup>1</sup>

K. N. Rajagopal Sastri, Senior Advocate (R. N. Sachthy, Advocate with him), for Appellant.

R. Gopalakrishnan, Advocate, for Respondents.

The Judgment of the Court was delivered by

*Hidayatullah, J.*—The High Court of Madras in a Reference under section 66 (1) of the Indian Income tax Act, answered in the negative the following question :—

"Whether there was material for the Appellate Tribunal to hold that the income arising to Mrs. C. M. Kothari and Mrs. D. C. Kothari from the property arose indirectly out of the assets transferred indirectly by their husbands so as to attract the provisions of section 16 (3) (a) (iii)."

In our opinion, these appeals by the Commissioner of Income-tax, Madras, must be allowed.

Messrs. Kothari and Sons is a firm of stock brokers. In 1947, the firm consisted of C. M. Kothari and his two sons, D. C. Kothari and H. C. Kothari. Their respective shares were 6:5:5. On October 7, 1947, the firm entered into an agreement for the purchase of a house in Sterling Road, Madras, for Rs. 90,000, and the same day paid an advance of Rs. 5,000. This sum was debited in the books of the firm to the accounts of the three partners as follows :—

	Rs.
C. M. Kothari	.. 1,800
D. C. Kothari	.. 1,600
H. C. Kothari	.. 1,600
	<hr/>
Total ..	Rs. 5,000

The transaction was completed on October, 24, 1947. The sale deed, however, was taken in the names of Mrs. C. M. Kothari, Mrs. D. C. Kothari and H. C. Kothari. The balance of the consideration was paid to the vendors by the firm. Each of the two ladies paid to the firm a cheque of Rs. 28,333-5-4. Mrs. C. M. Kothari further paid a cheque of Rs. 1,800 and Mrs. D. C. Kothari paid another cheque of Rs. 1,600. Thus, the two ladies paid one-third share of Rs. 85,000 and the amounts which were respectively paid by their husbands as part of the earnest money. H. C. Kothari was debited with a further sum of Rs. 28,333-5-4. In this way, Mrs. C. M. Kothari paid Rs. 200 more than the other two, because her husband had previously paid Rs. 200 more than his sons. The share of the three vendees was, however, shown to be one-third each.

The ladies issued the cheques on their accounts into which were paid by the firm certain amounts by cheques. Into Mrs. C. M. Kothari's account was paid an amount of Rs. 27,000 which was debited on October 24, 1947, to D. C. Kothari. It was stated to be a birthday gift by him to his mother. On November 13, 1947, another amount of Rs. 3,000 was paid into Mrs. C. M. Kothari's account which was debited to the account of D. C. Kothari as a gift by him to his mother for *Diwali*. Similarly, on November, 13, 1947, Mrs. D. C. Kothari's account with the Bank was credited with a sum of Rs. 30,000 by a cheque issued by the firm. This was debited to the account of C. M. Kothari and was shown as a gift by him to his daughter-in-law. In this way, both the ladies received from the firm Rs. 30,000 which was the exact one-third share of the consideration of Rs. 90,000, but the amount was not paid by their respective husbands, but by the son in one case, and the father-in-law, in the other.

In the assessment years 1948-49, 1950-51 and 1951-52, the Income-tax Officer assessed the income from the one-third share of the house received by Mrs. C. M. Kothari as the income of her husband. Similarly, in the four assessment years 1948-49 to 1951-52, the income of Mrs. D. C. Kothari from this house was assessed as the income of her husband. This was on the ground that because of the inter-change of the money in the family, either the purchases were made by the donors *benami* in the names of the donees, or alternatively, from assets transferred indirectly by the husband to the wife in each case. The Income-tax Officer pointed out that the birth-day of Mrs. C. M. Kothari had taken place earlier in the year and there was no occasion to give a birth-day present to her several months later and on a date coinciding with the purchase of this property. The Income-tax Officer also found that in the past, the father-in-law had never given such a big present to his daughter-in-law on *Diwali*, and this time there was no special circumstance to justify it. The appeals of the assessee to the Appellate Assistant Commissioner failed as also those filed before the Tribunal. The Tribunal, however, did not hold that the transaction was *benami*, but confirmed the other finding that the two ladies had acquired their share in the house out of assets of the husbands indirectly transferred to them. The

Tribunal, however, stated a case for the opinion of the High Court, and the High Court answered the question in the negative.

As the question whether the two transactions were *benami* does not fall to be considered, the only question that survives is whether this case is covered by section 16 (3) (a) (iii). This section reads as follows :—

“16. (3) In computing the total income of any individual for the purpose of assessment, there shall be included—

(a) so much of the income of a wife.....of such individual as arises directly or indirectly—

(iii) from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart ;”

The section takes into account not only transference of assets made directly but also made indirectly. It is impossible to state here what sorts of transfers are covered by the word ‘indirectly’, because such transfers may be made in different ways..

It is argued that the first requisite of the section is that the assets must be those of the husband and that is not the case here. It is true that the section says that the assets must be those of the husband, but it does not mean that the same assets should reach the wife. It may be that the assets in the course of being transferred, may be changed deliberately into assets of a like value of another person, as has happened in the present case. A chain of transfers, if not comprehended by the word ‘indirectly’, would easily defeat the object of the law which is to tax the income of the wife in the hands of the husband, if the income of the wife arises to her from assets transferred by the husband. The present case is an admirable instance of how indirect transfers can be made by substituting the assets of another person who has benefited to the same or nearly the same extent from assets transferred to him by the husband.

It is next contended that even if chain transactions be included, then, unless there is consideration for the transfer by the husband, each transfer must be regarded as independent, and in the present case, the Department has not proved that the transfers by the son to the mother and by the father-in-law to his daughter-in-law were made as consideration for each other. We do not agree. It is not necessary that there should be consideration in the technical sense. If the two transfers are inter-connected and are parts of the same transaction in such a way that it can be said that the circuitous method has been adopted as a device to evade implications of this section, the case will fall within the section. In this case, the device is palpable and the two transfers are so intimately connected that they cannot but be regarded as parts of a single transaction. It has not been successfully explained why the father-in-law made such a big gift to his daughter-in-law on the occasion of *Diwali* and why the son made a belated gift, equally big, to his mother on the occasion of her birth-day which took place several months before. These two gifts match each other as regards the amount. The High Court overlooked the clear implication of these facts as also the implication of the fact that though the three purchasers were to get one-third share each, Mrs. C.M. Kothari paid Rs. 200 more than the other two and that each of the ladies re-paid the share of earnest money borne by their respective husbands. An intimate connection between the two transactions, which were *prima facie* separate, is thus clearly established and they attract the words of the section, namely, “transferred directly or indirectly to the wife.”

In our opinion, the High Court was in error in ignoring these pertinent matters.. The High Court also overlooked the fact that the purchase of the house at first was intended to be in the names of the three partners of the firm. No evidence was tendered why there was a sudden change. It is difficult to see why the ladies were named as the vendees if they did not have sufficient funds of their own. They could only buy the property if some one gave them the money. It is reasonable to infer from the facts that before the respective husbands paid the amounts, they looked up the law and found that the income of the property would still be regarded as their own income if they transferred any assets to their wives. They hit upon

the expedient that the son should transfer the assets to his mother, and the father-in-law, to the daughter-in-law, obviously failing to appreciate that the word 'indirectly' is meant to cover such tricks.

The appeals must, therefore, succeed. The answer of the High Court is vacated, and the question, answered in the affirmative. The respondent shall bear the costs of these appeals as also the costs in the High Court, one hearing fee.

V.B.

*Appeals allowed.*

### THE SUPREME COURT OF INDIA.

PRESENT :—S.K. DAS, A.K. SARKAR AND M. HIDAYATULLAH, JJ.

V. D. Talwar (dead) and after him his heirs and legal representatives

*Appellants\**

The Commissioner of Income-tax, Bihar

*Respondent.*

*Income-tax Act (XI of 1922), section 7 (1), Explanation 2 (before amendment by Finance Act 1955).*

*Capital or revenue receipts—Test—Salary in lieu of notice—Whether compensation for loss of employment.*

The assessee was appointed General Manager of a company for a term of five years, subject to termination of service by the company on 12 calendar months notice in writing or payment of salary in lieu of notice. The assessee joined service on 1st May, 1946, but his services were terminated on 13th August, 1947 without notice. The notice pay for 12 months amounted to Rs. 25,200 but the company paid the assessee Rs. 18,096-1-0 after deducting tax of Rs. 7,103-15-0. The assessee claimed a refund of tax on the score that the amount was a capital and not a revenue receipt, being compensation for loss of employment. The claim was rejected by the Income-tax Officer, whose decision was restored by the Tribunal on appeal from the decision of the Appellate Assistant Commissioner, and was also approved by the High Court on Reference. On appeal by the assessee,

*Held*, that the amount paid is taxable under section 7 of the Income-tax Act, 1922, and is not compensation for loss of employment within the meaning of *Explanation 2* thereto.

The true position is that the assessee received twelve months' salary in respect of his office, though he did not do any work for the period. It cannot be said that the sum paid to him was in consideration of surrender by him of his rights in respect of his office.

Appeal by Special Leave from the Judgment and Decree dated 22nd November, 1960 of the Patna High Court in Miscellaneous Judicial Case No. 740 of 1958.

*A.V. Viswanatha Sastri*, Senior Advocate (*M.S. Narasimhan*, Advocate with him), for Appellants.

*Gopal Singh* and *R.N. Sachthey*, Advocates, for Respondent.

The Judgment of the Court was delivered by

*S.K. Das J.*—V.D. Talwar, who was the assessee before the taxing authorities and whose legal representatives on his death are the appellants before us, was employed as the General Manager of Messrs. J.K. Iron and Steel Company, Ltd., Kanpur. The terms of his employment, as agreed upon by the assessee and the company, were incorporated in an appointment letter dated 7th February, 1946. A formal memorandum of agreement was also executed between the parties on 9th February, 1946. The assessee actually joined the service of the company on 1st May, 1946. According to the service agreement the pay of the assessee was fixed at Rs. 2,000 per month with an increment of Rs. 100 per annum subject to certain deductions for income-tax, absence of duty etc., which need not be set out in detail for the purpose of this case. According to the agreement, the period of service was for five years. Clauses (5) and (6) of the appointment letter read—

"(5) Period of agreement of service to be five years.

(6) Termination of service if within five years to be on notice of twelve months on either side or salary in lieu thereof."

Clause (1) of the memorandum of the agreement dated February 9, 1946 said that the employee shall serve the employer faithfully and diligently for a term of five years from the date he joins, and clause (21) read as follows :

"If during the currency of this agreement, the employee desires to leave the services of the employers for any reasons whatsoever, he shall be at liberty to terminate the agreement by giving twelve calendar months' notice in writing, only after repaying to the employer joining money and all expenses if they have been allowed to the employee, and the employers shall have full power to take all necessary steps in order to enforce such payment. The employers may terminate the service of the employee by giving twelve calendar months' notice in writing or (in the case of breach of any of the terms or conditions contained herein at any time without any notice) or paying any salary in lieu thereof."

We have stated earlier that the assessee joined his post as General Manager on May 1, 1946. The services of the assessee were however terminated with effect from August 31, 1947. It is the admitted case of the parties that the services of the assessee were not terminated for any default or misconduct on the part of the assessee, but the services were terminated because the company did not want to continue the assessee in their employment. It is also the admitted case that no notice of twelve months for the termination of the service was given by the company to the assessee as required by the contract. In lieu of the notice, the company paid to the assessee on September 12, 1947 a sum of Rs. 18,096-1-0, which was the amount computed as salary for twelve months after deduction of income-tax at the source. The company calculated the salary for the twelve months at Rs. 25,200 and deducted therefrom the sum of Rs. 7,103-15-0 as income-tax. The assessee gave a stamped receipt to the company for having received Rs. 18,096-1-0 "in full and final settlement of all his claims and dues against the employer company."

In making the assessment for the year 1948-1949, the Income-tax Officer held that the sum of Rs. 25,200 was a revenue receipt of the assessee liable to be taxed under the Indian Income-tax Act, 1922, and rejected the claim of the assessee that the said sum was compensation for loss of employment and the tax amounting to Rs. 7,103-15-0 should be refunded to him. The assessee took an appeal to the Appellate Assistant Commissioner who held that the sum of Rs. 25,200 though calculated on the basis of twelve times his monthly salary was nothing but compensation for the loss of service and was therefore not taxable as income in the shape of salaries. Then, there was an appeal to the Income-tax Appellate Tribunal which reversed the finding of the Appellate Assistant Commissioner and held that the amount of Rs. 25,200 paid to the assessee was really salary in lieu of twelve months' notice and, therefore, the amount was liable to be taxed under the Indian Income-tax Act, 1922. Under section 66 (1) of the Income-tax Act, the Income-tax Appellate Tribunal referred the following question of law for the opinion of the High Court :

"Whether the sum of Rs. 25,200 received by the assessee during the previous year was the revenue income of the assessee liable to tax under the Income-tax Act ?"

By its judgment and order dated November 22, 1960 the High Court answered the question against the assessee. The assessee then obtained Special Leave from this Court, in pursuance whereof the present appeal has been brought to this Court.

The short question before us is, whether the sum of Rs. 25,200 received by the assessee in the circumstances stated above was a revenue income liable to tax under the Indian Income-tax Act or a capital receipt not liable to tax under the said Act.

We think that the view taken by the High Court is correct. In *Henry (H.M. Inspector of Taxes) v. Arthur Foster* and *Henry (H.M. Inspector of Taxes) v. Joseph Foster*<sup>1</sup>, Romer, L.J. said :

" 'Compensation for loss of office' is a well-known term and it means a payment to the holder of an office as compensation for being deprived of profit to which as between himself and his employer he would, but for an act of deprivation by his employer or some third party such as the Legislature, have been entitled."

This Court accepted the same meaning in *The Commissioner of Income-tax, Bombay City I, Bombay v. E.D. Sheppard, Bombay*<sup>2</sup>, and said that the emphasis was on the act of deprivation which may or may not give rise to any liability at law. Now,

1. (1931) 16 T.C. 605 at 634.

I.T.J. 460.

2. Since reported (1963) 1 S.C.J. 671 : (1963) 1

in the present case it is quite clear that the two terms in clauses (5) and (6) of the appointment letter and clauses (1) and (21) of the memorandum of agreement must be read together, and, so read, the true position that emerges is that the contract of service provided that V.D. Talwar could serve either for five years at a monthly salary mentioned therein or, if the company so elected, for a shorter period upon the terms mentioned in clause (21). If the terms of clause (21) were complied with, then it could not be said that V.D. Talwar had surrendered any rights under the contract or had been deprived of any such rights. The Court of Appeal dealt with the afore-said two cases *Henry (H.M. Inspector of Taxes v. Arthur Foster)* and *Henry (H. M. Inspector of Taxes) v. Joseph Foster*<sup>1</sup> along with a third case, *Hunter (H. M. Inspector of Taxes v. Dewhurst*<sup>2</sup>. It came to the same conclusion in all the three cases, though the facts were a little different in the third case where the respondent desired to retire from active management of the company, but his co-directors wished to be able still to consult him and it was agreed that he should resign the office of Chairman, receive as "Compensation" a lump sum in lieu of the provision under Article 109, waiving any future claim under that article and remain on the Board of the company at a reduced rate of remuneration. The decision in this third case was taken to the House of Lords.<sup>3</sup> Lord Dunedin pointed out that assuming that the view of the Court of Appeal in the *Foster cases*<sup>1</sup> was right on consideration of how the question stood upon the sole consideration of the rights arising under Article 109, a different question arose in the case of *Dewhurst*; because *Dewhurst* was not paid in terms of Article 109, but entered into a new bargain in pursuance of which he was paid £10,000 in consideration, not of ceasing to be a director, for he did not cease, but of giving up his potential claims under Article 109. His Lordship said that this payment for giving up potential claims under Article 109 was not income. This was a feature which distinguished *Hunter (H.M. Inspector of Taxes) v. Dewhurst*,<sup>2</sup> from the two *Foster cases*<sup>1</sup> and it brought into relief the distinction between the two classes of cases, one in which there is deprivation of rights under the agreement and this would fall under compensation and the other in which there is no such deprivation. Perhaps Sir Raymond Evershed, M.R. (as he then was) had this distinction in mind when in *Henley v. Murray (H.M. Inspector of Taxes)*<sup>4</sup> he said that there were two kinds of cases which fell for consideration under this head : one in which the right of one party to call upon the other for performance of the terms of agreement may be modified or indeed wholly given up, still the corresponding right to acquire payment either of the whole sum or some less figure is preserved and is still payable under the contract, and the other is where the contract itself goes altogether and some sum becomes payable for the consideration of the total abandonment of all the contractual rights which the other party had under the contract. In one class of cases the contract persists and the amount is payable under the contract and in the other class of cases there is total abandonment of all contractual rights, and what is paid is in consideration of that abandonment. The present case in our opinion comes under the first of these two classes.

Now, the High Court has rightly pointed out that the principle which will apply in a case like this is that laid down in *Dale (H.M. Inspector of Taxes) v. De Soissons*.<sup>5</sup> There, the respondent was employed as assistant to the managing director of a company, his remuneration consisting of a fixed salary of £3,000 per annum and a commission calculated on profits. Under the terms of his service agreement, the respondent's appointment was to be for three years from January 1, 1945 but the company was entitled to terminate the agreement at December 31, 1945 or December 31, 1946 and pay £10,000 or £6,000 respectively, as compensation for loss of office. The company terminated the agreement at December 31, 1945 and paid £10,000 to the respondent. It was held that the payment was not compensation for loss of office. Roxburgh, J. who dealt with the case in the first instance, pointed out that the agreement of service must be read as a whole and so read the agreement provided that the respondent's employment was to be for three more:

1. (1931) 16 T.C. 605 at 634.  
 2. (1932) 16 T.C. 605 : 146 L.T. 510.  
 3. 16 T.C. 637 (H.L.).

4. (1950) 1 All E.R. 908 : 31 T.C. 351.  
 5. (1951) 1 All E.R. 912 : 32 T.C. 118.



years unless curtailed under clause (4) or clause (5) and that he was to receive as a profit for his employment the payments provided by the agreement including the payment provided by clause (5); therefore the respondent had never any right to be employed for three more years and had no legal claim which would justify compensation. He then said that the respondent surrendered no rights under the agreement and got exactly what he was entitled to get under his contract of employment.

Here the position is exactly the same. It is true that under one of the clauses of the agreement of service V.D. Talwar was to serve for five years; but under another term of the same agreement it was provided that the employer might terminate the service of V.D. Talwar by giving twelve calendar months' notice in writing or paying any salary in lieu thereof. The expression "any salary" must be construed in the context of the appointment letter which said that if Mr. V.D. Talwar's service was to be terminated within five years he would be entitled to a notice of twelve months or salary in lieu thereof. No notice for the termination of service was given to him in the present case, but he was given twelve months' salary. He therefore got exactly what he was entitled to under the terms of his employment and he was not deprived of any rights under the contract of service. There being no deprivation of his rights under the contract the payment cannot be said to be "compensation for loss of office" within the meaning of that expression. Jenkins, L.J. observed in *Henley v. Murray*<sup>1</sup>:

"As the many cases on the topic show, it is often very difficult to determine the character of a payment made to the holder of an office when his tenure of the office is determined or the terms on which he holds it are altered, and the question in each case is, whether, on the facts of the case, the lump sum paid is in the nature of remuneration or profits in respect of the office or is in the nature of a sum paid in consideration of the surrender by the recipient of his rights in respect of the office."

In the present case, if V.D. Talwar had been served with a notice for the termination of his service, he would have worked for twelve months and got his salary and thereafter his service would have come to an end. Instead of giving him a notice the company paid him twelve months' salary in lieu thereof. The true position is that he received twelve months' salary in respect of his office though he did not do any work for that period. By no stretch of imagination can it be said that the sum paid to him was in consideration of the surrender by the recipient of his rights in respect of the office. It is worthy of note here that in *Henley v. Murray*<sup>1</sup>, their Lordships came to the conclusion that what was paid to the appellant in that case was paid in consideration of his surrendering his right to serve on and be remunerated down to the end of his contractual engagement, for in that case the appellant had the right to continue in service till March 31, 1944 and his service was terminable by three months' notice only after that date. He however resigned at the request of the Board of Directors on an earlier date, namely, September 2, 1943. Therefore, the principle laid down in *Henley v. Murray*<sup>1</sup>, is not the principle which is applicable in the present case.

Learned counsel for the appellant has then relied on *Duff (H.M. Inspector of Taxes) v. Barlow*<sup>2</sup>. That was also a case where the parties agreed that the arrangement arrived at between them should subsist up to 1945 though no exact percentage of the remuneration payable was fixed. The arrangement however was brought to an end prematurely in November 1937 and in consideration of his premature termination some remuneration was paid for services up to November 1937 and a sum of £4,000 was paid as compensation for the loss of the employee's right to future remuneration under the earlier agreement of 1935. In these circumstances it was held that the sum of £4,000 was received by the respondent in that case not under the contract of employment nor as remuneration for services rendered or to be rendered, but as compensation for giving up a right to remuneration. We are unable to see how that decision is of any help to the appellant in the present case. It seems clear to us that in the present case the appellant has surrendered in rights under the contract; what has been paid to him has been paid under the terms of contract

and as salary which he would have earned if twelve months' notice had been given to him. As no notice was given he was treated as though he was in service and entitled to salary for twelve months and that was what was paid to him. It is difficult to see how such payment can be treated as compensation for loss of office.

The present case is similar to the two cases of *Henry v. Arthur Foster* and *Henry v. Joseph Foster*<sup>1</sup> and different from the case of *Hunter v. Dewhurst*.<sup>2</sup> In the first two cases the respondents were directors of a limited company. They had no written contracts of service with the company but Article 109 of the company's articles provided that in the event of any director who held office for not less than five years, dying or resigning or ceasing to hold office for any cause other than misconduct, bankruptcy, lunacy or incompetence, the company should pay to him or his representatives by way of compensation for loss of office a sum equal to the total remuneration received by him in the preceding five years. The respondents resigned office as director in these two cases and received from the company as "compensation" a payment calculated in accordance with Article 109. It was held by the Court of Appeal that the payment constituted a profit of the office of director and was properly assessable to income-tax. Lord Hanworth, M.R. said at page 629:

"Now it is argued that those sums which became payable under the terms recorded in Article 109 were compensation for the loss of office. Is that the substance of the matter? When a man has died he is not compensated for the loss of his life; if he resigns voluntarily, why should he be paid compensation for the loss of his office? It would seem as if those words were put in view of the possibility thereunder of escaping the charge to tax; but, as I have said, we have got to look at the substance of the matter, and the substance of this payment is this: It is contemplated as a part of the remuneration of the director payable to him, and estimated according to his service during a certain time, and in addition to the amount paid to him under clause 104, there shall be estimated a sum which is to fall to be paid to him under clause 109."

Lawrence, L.J., said at page 632:

"In my judgment, the determining factor in the present case is that the payment to the respondent whatever the parties may have chosen to call it was a payment which the company had contracted to make to him as part of his remuneration for his services as a director. It is true that payment of this part of his remuneration was deferred until his death or retirement or cesser of office, and that in the articles it is called "compensation for loss of office." It is, however, a sum agreed to be paid in consideration of the respondent accepting and serving in the office of director, and consequently is a sum paid by way of remuneration for his services as director."

It seems to us that the same principle should apply in the present case. What has been paid to the appellant is his salary in lieu of notice. If that is the true position, then the amount paid is taxable under section 7 of the Indian Income-tax Act, 1922. It is not compensation for loss of employment within the meaning of *Explanation 2* thereto.

For the reasons given above we think that the High Court correctly answered the question. The appeal fails and is dismissed with costs.

V.B.

*Appeal dismissed.*

1. (1931) 16 T. C. 605 at 634.

2. (1932) 16 T. C. 605; 146 L. T. 510.

## THE SUPREME COURT OF INDIA.

PRESENT :—J. K. DAS, A. K. SARKAR AND M. HIDAYATULLAH, JJ.

Sreelekha Banerjee and others

.. Appellants<sup>a</sup>v.  
Commissioner of Income-tax, Bihar and Orissa

.. Respondents.

*Income-tax Act (XI of 1922), sections 23 and 34—Income—Undisclosed sources—High Denomination notes—Assessment—Burden of proof—Whether different for re-assessments.*

If there is an entry in the account books of the assessee which shows the receipt of a sum or conversion of high denomination notes tendered for conversion by the assessee himself, it is necessary for the assessee to establish, if asked, what the source of that money is and to prove that it does not bear the nature of income. The Department is not at this stage required to prove anything. It can ask the assessee to bring any books account or other documents or evidence pertinent to the explanation if one is furnished, and examine the evidence and the explanation. If the explanation shows that the receipt was not of an income nature, the Department cannot act unreasonably and reject that explanation to hold that it was income. If, however, the explanation is unconvincing and one which deserves to be rejected, the Department can reject it and draw the inference that the amount represents income either from the sources already disclosed by the assessee or from some undisclosed source. The Department does not then proceed on no evidence, because the fact that there was receipt of money, is itself evidence against the assessee. The very words "an undisclosed source" show that the disclosure must come from the assessee and not from the Department.

In cases of high denomination notes, where the business and the state of accounts and dealings of the assessee justify a reasonable inference that he might have for convenience kept the whole or a part of a particular sum in high denomination notes, the assessee *prima facie* discharges his initial burden when he proves the balance and that it might reasonably have been kept in high denomination notes. Before the Department rejects such evidence, it must either show an inherent weakness in the explanation or rebut it by putting to the assessee some information or evidence which it has in its possession. The Department cannot, merely rejecting unreasonably a good explanation, convert good proof into no proof.

Proceedings under section 34 of the Income-tax Act, 1922 can only be commenced under the conditions prescribed in that section, but when the proceedings are validly commenced, there is no difference between an ordinary assessment and an additional assessment under section 34, and the same rule as to burden of proof governs the additional assessment.

Appeal by Special Leave from the Judgment and Decree dated 24th September, 1959, of the Patna High Court in Miscellaneous Judicial Case No. 318 of 1957.

A. V. Viswanatha Sastri, Senior Advocate (P.K. Chatterjee, Advocate with him), for Appellants.

K. N. Rajagopal Sastri, Senior Advocate, (R. N. Sachthy, Advocate with him), for Respondents.

The Judgment of the Court was delivered by

*Hidayatullah, J.*—This is an assessee's appeal by Special Leave of this Court against an order of the High Court of Patna, answering in favour of the Department, the question.

"whether in the circumstances of the case the amount of Rs. 51,000 being the value of high denomination notes encashed by the assessee, has been validly taxed as profits from some undisclosed business."

The original assessee, Rai Bhadur H. P. Banerjee is dead. His son, who was substituted in his place, also died during the pendency of the proceedings in the High Court. The present appeal has been filed by the widow of the son and other legal representatives.

Banerjee was the owner of several collieries in the Jharia Coal fields in the State of Bihar, and was also a contractor for raising coal. This matter relates to the assessment year 1946-47. For that year, Banerjee was assessed on an income of Rs. 1,28,738. The assessment was then reopened under section 34 of the Indian Income-tax Act, and was enhanced, but subsequently on appeal, it was reduced to a sum a little below the original assessment. The present assessment was made on a second re-opening of the case under section 34 in the following circumstances :

On January 22, 1946, Banerjee encashed high denomination notes of the value of Rs. 51,000. In his application under the Ordinance<sup>1</sup> which demonetised high

\* Civil Appeal No. 486 of 1962.

denomination notes, Banerjee gave the reason for the possession of the notes as follows :—

“I am engaged in business as colliery proprietor, contractor under Messrs. Kilburn & Co., in the name and style of H. P. Banerjee & Son and also under the State Rly. Bokarao, Swang, Hazaribagh district in the name of Jharia Dhanbad Coal & Mica Mining Co..... For conducting the business and payment to labour I have to pay every week between 30/40 thousand. As I did not get payment for work done every week I had to keep large sum of money to meet emergency..... It is neither profit nor part of profit—it is my floating capital for purpose of conducting business. It is not an excess of profit.”

He stated that he had accounts with (1) Imperial Bank of India, (2) Nath Bank Ltd., Jharia, and (3) Central Bank of India Ltd., Bhowanipore Branch, but added that he did not remember exactly from which Bank the notes came into his possession as his transactions were frequent. The notice which was issued to him under section 34 of the Income-tax Act, was not questioned on any of the grounds which are usual in such cases. Banerjee's explanation was not accepted. The Income-tax Officer pointed out that although his business was large and the withdrawals from the various banks were large and frequent he had not maintained a central account showing withdrawals from the banks and remittances made to his various businesses, and that none of the books maintained by the assessee and produced by him, contained a bank account. The Income-tax Officer found a discrepancy of nearly Rs. 50,000 in the statements filed by the assessee. He, accordingly, treated the high denomination notes as profits from some undisclosed source and assessed them as assessable income. Banerjee appealed to the Appellate Assistant Commissioner and further to the Tribunal. Both the authorities upheld the order of the Income-tax Officer. The assessee demanded a case which was refused, but the High Court directed a Statement of the Case on the question already quoted. The High Court decided the question against the assessee, and hence this appeal.

The contention of the appellants is that since the Department had issued a notice under section 34 of the Income-tax Act, it was incumbent on the Department to establish that the amount in question was income which had escaped assessment. The appellants also contended that even if the assessee was required to prove the source of the high denomination notes, he had sufficiently proved it by showing that he had large amounts on hand, which were held for convenience in high denomination notes. The appellants thus submit that the burden, if any, upon the assessee was discharged in the case, and the evidence being un rebutted, the additional assessment could not be made. The appellants rely upon *Kanpur Steel Co., Ltd. v. C.I.T.*<sup>1</sup>, where, according to the appellants, the Allahabad High Court explained the nature of burden of proof in the way contended for by the appellants. They claim that the *Allahabad case*<sup>1</sup> applies to the facts here and point out that the said ruling was considered and approved by this Court in *Lalchand Bhagat Ambica Ram v. Commissioner of Income-tax, Bihar and Orissa*<sup>2</sup>. Other cases have been cited on behalf of the Department.

The cases involving the encashment of high denomination notes are quite numerous. In some of them, the explanation tendered by the tax-payer has been accepted, and in some, it has been rejected. The manner in which evidence brought on behalf of the tax-payer should be viewed, has, of course, depended on the facts of each case. In those cases in which the assessee proved that he had on the relevant date a large sum of money sufficient to cover the number of notes encashed, this Court and the High Courts, in the absence of something which showed that the explanation was inherently improbable, accepted the explanation that the assessee held the amount or a part of it in high denomination notes. In other words, in such cases, the assessee was held *prima facie* to have discharged the burden which was upon him. Where the assessee was unable to prove that in his normal business or otherwise, he was possessed of so much cash, it was held that the assessee started under a cloud and must dispel that cloud to the reasonable satisfaction of the assessing authorities, and that if he did not, then, the Department was free to reject his explanation and to hold that the amount represented income from some undisclosed source.

The case which is strongly relied upon by the assessee is *Kanpur Steel Co., Ltd. v. C.I.T.*<sup>1</sup> In that case, 32 notes of Rs. 1,000 were encashed. It was claimed that they were part of the cash balance of the company which amounted to Rs. 34,000 odd. The Income-tax Officer examined the entries regarding sales preceding the encashment of the notes and found that those sales brought in sums under Rs. 1,000 and could not have resulted in the accumulation of so many high denomination notes. The Tribunal then came to the conclusion that Rs. 7,000 only could have been held in high denomination notes. On a Reference, the Allahabad High Court held that the burden lay upon the Department to prove that Rs. 32,000 was suppressed income and there was no burden on the assessee to show whence he got the notes, because until demonetization, there was no idea that possession of high denomination notes would have to be explained. The High Court also found that the explanation was fairly satisfactory, because big notes might have been received even in small transactions and change taken, and that the High Court could not make a conjecture how many notes could or could not have accumulated. It is contended before us that the burden in such cases lies as stated by the Allahabad High Court.

On the other hand, in *Manindranath Das v. Commissioner of Income-tax, Bihar and Orissa*<sup>2</sup>, the tax-payer had encashed notes of the value of Rs. 28,000, which he contended were his accumulated savings. His explanation was accepted in respect of Rs. 15,000, because 15 notes could be traced to a bank, but was rejected in respect of the balance. The Patna High Court pointed out that if an assessee received an amount in the year of account, it was for him to show that the amount so received did not bear the character of income, and the tax-payer in the case had failed to prove this fact in respect of the remaining notes. The Patna case finds support in *A. Govindaraju Mudaliar v. Commissioner of Income-tax, Hyderabad*<sup>3</sup>, where it is laid down by this Court that if an assessee fails to prove satisfactorily the source and nature of an amount received by him during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipts are of an assessable nature. In that case, the explanation of the assessee in respect of the amounts shown as credits for him in the account books of a firm of which he was a partner, was rejected as untrue. It was held that it was open to the Income-tax Officer and the Appellate Tribunal to hold that the amounts represented the concealed income of the assessee.

From the last two cases, it is plain that if there is receipt of an amount in the accounting year, it is incumbent in the first instance upon the assessee to show that it does not bear the character of income. If he fails to do this, the Income-tax Officer may hold that it represents income of the assessee either from the sources he has disclosed or from some undisclosed source.

In applying this principle to the cases of encashment of high denomination notes, there is some difficulty when the assessee has books of account which are accepted and in which there is a cash balance sufficient to cover the amount of high denomination notes. Each case must depend upon its own peculiar facts. A few illustrative cases may be noticed, because they show some differences in the approach to the problem. In *Chunilal Ticamchand Coal Co., Ltd. v. Commissioner of Income-tax, Bihar and Orissa*<sup>4</sup>, high denomination notes of the value of Rs. 68,000 were encashed. Evidence showed that the assessee was in the habit of keeping large sums which he kept intact for emergencies and meeting the current needs from withdrawals from the banks. This explanation was supported by receipts and disbursements in the books of account. The explanation was rejected as to a part because the accounts did not mention the high denomination notes and further because such notes were hardly needed to pay wages to labourers. The Tribunal, however, held that the explanation might be true as to a part and accepted it in respect of Rs. 35,000, rejecting it in respect of Rs. 33,000. The Patna High Court

1. 32 I.T.R. 56.

2. A.I.R. 1954 Pat. 610 : 27 I.T.R. 522.

3. (1958) 34 I.T.R. 807.

4. (1955) 27 I.T.R. 602.

held that the explanation which was held to be reasonable as to a part must be good for the whole, because there was no material on which it could be held that the balance constituted income from some undisclosed source to distinguish the case about the part rejected from the part accepted.

In *Mehta Parikh & Co. v. Commissioner of Income-tax, Bombay*<sup>1</sup>, high denomination notes of the value of Rs. 61,000 were encashed. The explanation was that they were part of the cash balance on hand. The accounts disclosed that in order to sustain the explanation, it would have to be presumed that the entire balance on January 1, 1946, was held in 18 notes of Rs. 1,000 each and that all receipts upto January 18, 1946, when the notes were encashed, were also in high denomination notes. The affidavits of persons who stated that they had paid amounts in Rs. 1,000 notes were not accepted. The Tribunal accepted the explanation as to Rs. 31,000 only. This Court held that if the account books were accepted and the deponents were not cross-examined on their affidavits, the rejection of the explanation as to a part proceeded only on surmise and the finding that Rs. 30,000 were income from some undisclosed source was based on no evidence. It may be pointed out that Venkatarama Ayyar, J., in that case, chose to rest his decision on the second ground only, treating the decision as involving an error of law. But in *Sovachand Baid v. Commissioner of Income-tax*<sup>2</sup>, high denomination notes of the value of Rs. 2,28,000 were encashed. The assessee stated that he had inherited that amount from his father in 1942, and produced account books from 1926 to 1942. He did not produce earlier account books. The Tribunal found that the books were such as could be written at any time and did not contain full dealings even between 1926 and 1942, and there were no entries showing that any amount as such was received from business. The Tribunal, however, held that Rs. 1,28,000 only was income from some undisclosed source. The assessee's appeal in this Court was dismissed, because the rejection of the account books was held to be reasonable in the circumstances of the case. This Court observed that the partial rejection of the explanation by the Tribunal must be treated as a concession rather than a reasoned conclusion.

We now come to *Lalchand Bhagat's case*<sup>3</sup>, which is strongly relied upon, particularly, as it has cited the *Allahabad case*,<sup>4</sup> so it is said, with complete approval. It is therefore, necessary to examine it closely to see if there is such an approval. In that case, 291 high denomination notes of the value of Rs. 2,91,000 were encashed. The assessee was maintaining for a long time past two accounts: one was known as "Almirah Account", and the other, "Rokar Account." On the date the notes were encashed there was a balance of Rs. 2,81,397 in the almirah account and Rs. 29,284 in the rokar account. These two amounts between them were sufficient to cover the encashed notes. The explanation was that for the purposes of the business which was distributed in many branches, a large amount of ready cash of the assessee was admittedly extensive and the almirah account had also existed for several years. Except in the previous year in which the high denomination notes were encashed, even the numbers of the high denomination notes used to be shown in the almirah account. The explanation was rejected on the ground that those were the days of emergency and the assessee, as a grain dealer, could have secretly made money by smuggling grain, and that he had once been prosecuted, though acquitted. It was also said that the area where he did his business was notorious for smuggling and also that he had speculated in the year and might easily have made profits, though he had returned a loss from speculation. Emphasis was also laid upon the fact that in the year of account, the numbers of the high denomination notes were written subsequently. The Tribunal accepted the two books of account as genuine and also that there was a balance of Rs. 3,10,681 with the assessee. Before the Tribunal, it was explained that in the year of account the numbers of the high denomination notes were inserted in the almirah account out of nervousness owing to the demonetization of the notes. The Tribunal accepted the explanation with

1. (1956) S.C.J. 678.

2. A.I.R. 1959 S.C. 59.

3. (1960) S.C.J. 292.

4. 32 I.T.R. 56.

regard to Rs. 1,50,000 and rejected it with regard to Rs. 1,41,000. No reasons were given for distinguishing the good part of the explanation from the bad.

This Court examined the reasons and held that except for the insertion of the numbers of notes in the book, none of the other reasons had any probative value and that they were mere conjectures and surmises. This Court pointed out that if the explanation for the interpolations was good for the acceptance of the explanation as to Rs. 1,50,000, it must be held to be good also for the balance, because there was nothing to distinguish between the two parts. This Court, therefore, pointed out that the main question about Rs. 1,41,100 was whether there was any material to justify a different conclusion in respect of that amount and pointed to the following facts. The assessee had established the need for keeping a large sum on hand and had proved the almirah account as a genuine account. The almirah account contained the numbers of the high denomination notes in the years previous to the year relative to the assessment. In that year, the numbers were inserted subsequently and this was the only substantial point against the assessee. This Court also pointed out that there were statements of banks and accounts of the branches and of *beoparis*, showing that large amounts were received by the assessee, which made up the amount in the almirah account. Between February 6, 1945 and January 11, 1946, when the notes were encashed, sums above Rs. 1,000 received by the assessee aggregated to as much as rupees five lakhs. As the almirah account was not questioned by the Tribunal at all, and out of that amount, more than half was held to be in the shape of high denomination notes, this Court posed the following question :—

“Was there any material on record which would legitimately lead the Tribunal to come to the conclusion that the nature of the source from which the appellant derived the remaining 141 high denomination notes of Rs. 1,000 remained unexplained?”

The Court, therefore, concluded :

“If the entries in the books of account in regard to the balance in the *Rokar* and the balance in the Almirah were held to be genuine logically enough there was no escape from the conclusion that the appellant had offered reasonable explanation as to the source of the 291 high denomination notes of Rs. 1,000 each which it had encashed on January 19, 1946”.

The case of the assessee was thus accepted *in toto*. This Court did not hold that the assessee need not prove anything.

As we have said earlier, the burden of proof must depend on the facts of the case. One such fact may be the existence of a large floating cash balance on hand, and taken with other facts, may be sufficient to show that the high denomination notes constituted the whole or part of that balance. In the *Allahabad case*<sup>1</sup>, such a balance was proved and was accepted as to a part by the Tribunal. The High Court held that the explanation was good for the whole of the amount of the notes. No doubt, this Court, in referring to that case, summarised the reasons, but it pointed out that it was not open to the Tribunal to make a guess as to the number of high denomination notes which could be accepted, and cited the *Allahabad case*<sup>1</sup> and some others in that connection.

It seems to us that the correct approach to questions of this kind is this. If there is an entry in the account books of the assessee which shows the receipt of a sum or conversion of high denomination notes tendered for conversion by the assessee himself, it is necessary for the assessee to establish, if asked, what the source of that money is and to prove that it does not bear the nature of income. The Department is not at this stage required to prove anything. It can ask the assessee to bring any books of account or other documents or evidence pertinent to the explanation if one is furnished, and examine the evidence and the explanation. If the explanation shows that the receipt was not of an income nature, the Department cannot act unreasonably and reject that explanation to hold that it was income. If, however, the explanation is unconvincing and one which deserves to be rejected, the Department can reject it and draw the inference that the amount represents income either from the sources already disclosed by the assessee or from some undisclosed source. The Department does not then proceed on no evidence, because the fact that there was receipt of money, is itself evidence against the assessee. There is thus *prima*

*facie* evidence against the assessee which he fails to rebut, and being un rebutted, that evidence can be used against him by holding that it was a receipt of an income nature. The very words "an undisclosed source" show that the disclosure must come from the assessee and not from the Department.

In cases of high denomination notes, where the business and the state of accounts and dealings of the assessee justify a reasonable inference that he might have for convenience kept the whole or a part of a particular sum in high denomination notes, the assessee *prima facie* discharges his initial burden when he proves the balance and that it might reasonably have been kept in high denomination notes. Before the Department rejects such evidence, it must either show an inherent weakness in the explanation or rebut it by putting to the assessee some information or evidence which it has in its possession. The Department cannot by merely rejecting unreasonably a good explanation, convert good proof into no proof. It is within the range of these principles that such cases have to be decided. We do not think that the Allahabad view puts no burden upon the assessee and throws the entire burden on the Department. The case itself does not bear this out. If it does, then, it is not the right view.

In the present case, the assessee claimed that the high denomination notes were a part of the cash balance at the head office. The Income-tax Officer found that at first the cash on hand was said to be Rs. 1,62,022, but on scrutiny, it was found to be wrong. Indeed, the assessee himself corrected it before the Appellate Assistant Commissioner and stated there that the balance was Rs. 1,21,875. Ordinarily, this would have *prima facie* proved that the assessee might have kept a portion of this balance in high denomination notes. But the assessee failed to prove this balance, as books of the assessee did not contain entries in respect of banks. Though cash used to be received from banks and sent to the various places where works were carried on and *vice versa*, no central account of such transfers was disclosed. There was also no account of personal expenses of the assessee and he had failed to prove why such large sums were kept on hand in one place when at each of the places where work was carried on, there were banks with which he had accounts. The Appellate Assistant Commissioner also went into the question and found that on the same day when the high denomination notes were encashed, a sum of Rs. 45,000 was drawn by cheque. The next remittance immediately afterwards was of Rs. 16,000 to Bokaro, but Rs. 17,000 were withdrawn a few days before to meet this expense. A withdrawal of Rs. 8,000 was made a day later and Rs. 20,000 were withdrawn ten days later to finance the business. It appears that the money on hand (Rs. 45,000) was not touched at all, but on January 30, 1946, a further sum of Rs. 6,005 was withdrawn and not utilized, which made up the sum of Rs. 51,000 for which the high denomination notes were encashed.

On these facts, the Tribunal came to the conclusion that the high denomination notes represented not the cash balance but some other money which remained unexplained, and the Tribunal treated it as income from some undisclosed source. The High Court held on the above facts and circumstances that there were materials to show that Rs. 51,000 did not form part of the cash balance, and the source of money not having been satisfactorily proved, the Department was justified in holding it to be assessable income of the assessee from some undisclosed source. In this conclusion, the High Court was justified, regard being had to the principles we have explained above.

The argument that as this was a case under section 34 of the Income-tax Act, it cast a special burden on the Department to show that this income had escaped earlier, need not detain us. No doubt, proceedings under section 34 can only be commenced under the conditions prescribed in the section, but when the proceedings are validly commenced, there is no difference between an ordinary assessment and an additional assessment under section 34, and the same rule as to burden of proof governs the additional assessment.

In our opinion, this appeal has no substance ; it fails and is dismissed with costs.



## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT :—S. K. DAS, A. K. SARKAR AND M. HIDAYATULLAH, JJ.

Prabhoo

.. Appellant\*

v.

The State of Uttar Pradesh

.. Respondent.

*Evidence Act (I of 1872), sections 25, 26 and 27—Scope—Incriminating statement made to Police Officer—If admissible.*

A prosecution witness deposed that a little before the recovery of the axe and blood stained clothes the Sub-Inspector of Police took the accused person into custody and interrogated him ; then the accused gave out that the axe with which the murder had been committed and his blood stained shirt and dhoti were in the house and the accused was prepared to produce them.

*Held :* These statements were incriminating statements made to a Police Officer and were hit by sections 25 and 26 of the Evidence Act. The statement that the axe was one with which the murder had been committed was not a statement which led to any discovery within the meaning of section 27 of the Evidence Act. Nor was the alleged statement of the accused that the blood stained shirt and dhoti belonged to him a statement which led to any discovery within the meaning of section 27. Section 27 provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

Appeal by Special Leave from the Judgment and Order dated the 12th September, 1961, of the Allahabad High Court (Lucknow Bench) at Lucknow in Criminal Appeal No. 494 of 1961.

*Nurruddin Ahmad*, Advocate (at State expense), for Appellant.

*G. C. Mathur* and *C. P. Lal*, Advocates, for Respondent.

The Judgment of the Court was delivered by

*S. K. Das, J.*—The learned Sessions Judge of Rae Bareilly tried the appellant Prabhoo on a charge of murdering his own uncle and found him guilty of the offence and sentenced him to death. There were an appeal to the High Court and the usual reference for confirmation of the sentence of death. The High Court dealt with the appeal and reference by one judgment. It accepted the reference, dismissed the appeal and confirmed the conviction and sentence. The appellant then asked for and obtained Special Leave of this Court to appeal from the judgment and order of the High Court. The present appeal has come to us in pursuance of the leave granted by this Court.

Shortly stated the case against the appellant was this. Bhagwan Ahir, step-brother of the appellant's father Budhai, was a resident of village Bandi in the district of Rae Bareilly. The appellant and his father Budhai lived in another village called Gulariya at a distance of about two or three miles from Bandi. Bhagwan had about four *bighas* of pasture land and seven *bighas* of cultivated land. He had no male issue. He had several daughters who were all married and resided at the places of their respective husbands. Bhagwan was old, near about 80 years of age according to the evidence of Maiku, and had no male member in the family to help him with his cultivation. Budhai, it appears, did not reside in village Gulariya all the year round, but was engaged in some job at Burdwan in Bengal. Some four years before the date on which Bhagwan was said to have been murdered the appellant and his mother came to reside with Bhagwan. The idea was that the appellant would be able to help Bhagwan with his cultivation. The appellant did not, however, render much assistance to Bhagwan and the prosecution case was that after about a year of their stay, Bhagwan turned them out of the house. The appellant and his mother then went back to village Gulariya. The prosecution case further was that about a month and a half before the murder of Bhagwan the appellant and his father came to Bhagwan and the appellant's father asked Bhagwan to transfer some of his land to the appellant. Bhagwan said that he had

already kept the appellant with him for a year and had found that he was of no assistance. He, therefore, refused to give any land to the appellant. Bhagwan, it appears, had some grand-daughters and one of them called Kumari Sarju aged about five years was staying with him. Bhagwan said that he would give his lands to his grand-daughter Sarju.

On the night between March 19 and 20, 1961 Bhagwan was sleeping in front of his house on a cot with his grand-daughter. One Maiku (P.W. 1) was sleeping at a short distance from Bhagwan's house. Maiku was a neighbour of Bhagwan. At about midnight Maiku heard some noise and called out to Bhagwan. There was no response. Maiku then heard the sound of shoes as though somebody was running away from the place. Maiku called out certain other persons and went near the place where Bhagwan was lying on his cot. It was found that Bhagwan had a large number of injuries on the head and neck, most of the injuries being of an incised nature. Bhagwan was already dead. The little girl Sarju though stained with blood which flowed from the body of Bhagwan was not herself injured. She was soundly sleeping on the cot and was not awake when Bhagwan was killed. Maiku gave an information to the Police Station of what he had heard and seen, the distance of the Police Station being about eight miles from village Bandi. The information which Maiku gave did not disclose the name of any accused person because Maiku had not seen who had killed Bhagwan.

On the information given by Maiku the local police started investigation and when the dead body of Bhagwan was brought back to the village after the post-mortem examination for cremation, the appellant, it is stated, came to one Brij Lal (P.W. 2) of village Bandi. This was on the third day after the murder. The appellant made certain enquiries from Brij Lal which roused the latter's suspicion. The Sub-Inspector of Police was then in the village and he was informed of the presence of the appellant. The appellant was then interrogated and the case of the prosecution was that the appellant made certain statements and produced from his house a *kulhari*, a shirt and a dhoti. These were found to be blood stained and subsequent examination by the Chemical Analyst and the Serologist disclosed that they were stained with human blood. This recovery of the blood stained *kulhari* (axe) and the blood stained shirt and dhoti was made, according to the prosecution case, on 22nd March, 1961 in the presence of two witnesses, Lal Bahadur Singh and Wali Mohammad.

It would appear from what we have stated above that the case against the appellant rested on the evidence relating to motive furnished by what happened about a month and a half before the occurrence when the appellant and his father asked for some land from the deceased, and the recovery of the blood stained axe and blood stained shirt and dhoti from the house of the appellant. The appellant denied that he and his father had asked for any land from the deceased a month and a half prior to the occurrence. The appellant also denied that he had produced any blood stained axe or blood stained shirt and dhoti from his house, or had handed them over to the Sub-Inspector of Police. He denied that the clothes or the axe belonged to him. His defence was that he was living with his father in Burdwan and came back to the village on 21st March, 1961. He said that the case against him was brought out of enmity.

Learned Counsel for the appellant has taken us through the evidence in the case and has submitted that apart from raising some suspicion against the appellant and his father, the evidence given by the prosecution does not establish beyond any reasonable doubt that the appellant was the murderer. He has further submitted that certain statements alleged to have been made by the appellant to the Sub-Inspector of Police in connection with the recovery of the blood stained axe and blood stained shirt and dhoti were inadmissible and the Courts below were wrong in relying on them. He has contended that if those statements are excluded from consideration, then the evidence which remains is insufficient to support the conviction of the appellant. We think that these contentions are correct and must be upheld.

There can be no doubt that Bhagwan was murdered on the night in question. The post-mortem examination disclosed that he had sustained as many as thirteen injuries, eleven of which were incised wounds on different parts of the body. The injuries inflicted on the head and face had cut through skull bones and the doctor who held the post-mortem examination was of the opinion that Bhagwan had died as a result of fractures of the skull bones and haemorrhage and shock. There can therefore, be no doubt that Bhagwan was murdered. It is equally clear that nobody saw who killed Bhagwan. The evidence of Maiku (P.W. 1) shows clearly enough that neither he nor other persons whom he called saw the appellant. The grand child who was sleeping with Bhagwan was also fast asleep and did not even awake when the injuries were inflicted on Bhagwan. Bhagwan might or might not have raised shouts when the injuries were caused to him. The evidence of Maiku does not disclose that he heard any other sound excepting the sound of movement of steps of a person wearing shoes.

We are satisfied that the evidence as to motive is satisfactory. Both Maiku (P.W. 1) and Brij Lal (P.W. 2) have stated about the motive. The appellant and his mother stayed with Bhagwan about four years ago in order to render assistance to Bhagwan in his cultivation. The appellant did not, however, do any work and was turned out. This is proved by the evidence of Maiku and Brij Lal. The evidence of the aforesaid two witnesses also establishes that the appellant and his father came to Bhagwan about a month and a half before the occurrence and asked for some land. Bhagwan refused to give any land to the appellant. We think that this motive has been established even though it would influence both the appellant and his father.

The main difficulty in the case is that the evidence regarding the recovery of blood stained axe and blood stained shirt and dhoti is not very satisfactory and the Courts below were wrong in admitting certain statements alleged to have been made by the appellant in connection with that recovery. According to the recovery memo. the two witnesses who were present when the aforesaid articles were produced by the appellant were Lal Bahadur Singh and Wali Mohammad. Lal Bahadur Singh was examined as prosecution witness No. 4. He did give evidence about the production of blood stained articles from his house by the appellant. The witness said that the appellant produced the articles from a tub on the eastern side of the house. The witness did not, however, say that the appellant made any statements relating to the recovery. Wali Mohammad was not examined at all. One other witness Debi Baksh Singh was examined as prosecution witness No. 3. This witness said that a little before the recovery the Sub-Inspector of Police took the appellant into custody and interrogated him; then the appellant gave out that the axe with which the murder had been committed and his blood stained shirt and dhoti were in the house and the appellant was prepared to produce them. These statements to which Debi Baksh (P.W. 3) deposed were not admissible in evidence. They were incriminating statements made to a Police Officer and were hit by sections 25 and 26 of the Indian Evidence Act. The statement that the axe was one with which the murder had been committed was not a statement which led to any discovery within the meaning of section 27 of the Evidence Act. Nor was the alleged statement of the appellant that the blood stained shirt and dhoti belonged to him a statement which led to any discovery within the meaning of section 27. Section 27 provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved. In *Pulukuri Kotayya v. King Emperor*<sup>1</sup>, the Privy Council considered the true interpretation of section 27 and said :

"It is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge

of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant." (page 77).

We are, therefore, of the opinion that the Courts below were wrong in admitting in evidence the alleged statement of the appellant that the axe had been used to commit murder or the statement that the blood stained shirt and dhoti were his. If these statements are excluded and we think that they must be excluded, then the only evidence which remains is that the appellant produced from the house a blood stained axe and some blood stained clothes. The prosecution gave no evidence to establish whether the axe belonged to the appellant or the blood stained clothes were his.

Therefore, the question before us is this. Is the production of the blood stained axe and clothes read in the light of the evidence regarding motive sufficient to lead to the conclusion that the appellant must be the murderer? It is well-settled that circumstantial evidence must be such as to lead to a conclusion which on any reasonable hypothesis is consistent only with the guilt of the accused person and not with his innocence. The motive alleged in this case would operate not only on the appellant but on his father as well. From the mere production of the blood stained articles by the appellant one cannot come to the conclusion that the appellant committed the murder. Even if somebody else had committed the murder and the blood stained articles had been kept in the house, the appellant might produce the blood stained articles when interrogated by the Sub-Inspector of Police. It cannot be said that the fact of production is consistent only with the guilt of the appellant and inconsistent with his innocence. We are of the opinion that the chain of circumstantial evidence is not complete in this case and the prosecution has unfortunately left missing links, probably because the prosecution adopted the shortcut of ascribing certain statements to the appellant which were clearly inadmissible.

Learned Counsel for the respondent has submitted to us that in *State of U. P. v. Deoman Upadhyaya*<sup>1</sup>, this Court accepted as sufficient evidence the production of a blood stained weapon. We are unable to agree. The circumstantial chain in that case did not depend merely on the production of the *gandasa*, but on other circumstances as well. The Court held in that case that the circumstantial chain was complete and the decision did not proceed merely on the production of a blood stained weapon.

For the reasons given above we would allow the appeal and set aside the conviction and sentence passed against the appellant. The Appellant must now be released forthwith.

K.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Maharaj Jagat Bahadur Singh

.. Appellant\*

v.

Badri Parshad Seth

.. Respondent.

*East Punjab Urban Rent Restriction Act (III of 1946), section 15 (5)—Revision—Scope of jurisdiction—Section 13 (3) (a) (iii)—Scope.*

The scope of sub-section (5) of section 15 of the East Punjab Urban Rent Restriction Act (III of 1946) is not the same as the scope of section 115, Code of Civil Procedure. The scope of section 15 (5) of the Act is wider and is not confined to questions of jurisdiction only.

Having regard to the scheme and purpose of the East Punjab Urban Rent Restriction Act it is abundantly clear that clause (iii) of section 13 (3) (a) of the Act is attracted only when the building work is such that the landlord requires that the building be vacated by the tenant in order to carry out the work ; in other words, the repairs needed are so extensive and fundamental in character that they cannot be carried out if the tenant remains in possession. Then only it can be said that the landlord requires the building to carry out the building work. Such small work as white-washing or filling up the gap in the door way will not come under section 13 (3) (a) (iii) of the Act.

Appeal by Special Leave from the Judgment and Order, dated the 21st May, 1958, of Punjab High Court in Revision Application No. 27 of 1958.

*M. C. Setalvad*, Attorney-General for India (*S. N. Andley, Rameshwar Nath & P. L. Vohra*, Advocates of *M/s. Rajinder Narain & Co.*, with him), for Appellant.

*H. N. Sanyal*, Additional Solicitor-General of India (*I. N. Shroff*, Advocate with him), for Respondent.

The Judgment of the Court was delivered by

*S. K. Das, J.*—This is an appeal by Special Leave from the judgment and order of a learned Single Judge of the Punjab High Court, dated 21st May, 1958, in Civil Revision Application No. 27 of 1958 of that Court. By that order the learned Single Judge dismissed an application in revision made by the appellant herein in the following circumstances.

The appellant, Maharaj Jagat Bahadur Singh, is the owner of the premises known as Ranzor Hall in Simla. The respondent, Badri Prasad Seth, is in occupation of the premises as a tenant and is running a cinema therein which is known as Rivoli theatre or Rivoli cinema. The correspondence between the parties shows that on or about 12th April, 1956, the Executive Engineer, Simla, Provincial Division, inspected the cinema building on behalf of the Licensing Authority, namely, Deputy Commissioner, Simla, and noted six defects, one of which was, to use the words of the Executive Engineer, "the righthand pillar of the screen has cracked and has gone out of plumb". The existence of these defects was communicated to the respondent and also to the Municipal Committee, Simla. The respondent in his turn communicated the existence of these defects to the appellant by a letter, dated 17th April, 1956. In that letter the respondent suggested to the appellant that the defect in the pillar should be removed before the beginning of June, 1956, when the rains were likely to commence. The respondent removed the other defects which were of a minor nature ; but getting no reply from the appellant, he again wrote to him on 17th September, 1956 and asked him to take early steps to repair the pillar to avoid any mishap. The respondent also intimated to the appellant that the cost of repairs to the pillar was likely to be in the neighbourhood of Rs. 5,000. The appellant took no action in the matter for some time. On 24th September, 1956, the East Punjab Urban Rent Restriction Act, 1949 (East Punjab Act III of 1949) (hereinafter referred to as the Act) was amended and a clause was inserted in section 13 (3) (a) thereof which entitled the landlord to apply to the Rent Controller for an order directing the tenant to put the landlord in possession in the case of

any building if he required it to carry out any building work at the instance of the Government or local authority or any Improvement Trust under some improvement or development scheme or if the building had become unsafe or unfit for human habitation. On 9th April, 1956, the appellant wrote to the President, Simla Municipal Committee, asking him to get the pillar in the Ranzor Hall inspected by the Executive Engineer in order to have his opinion whether the pillar was really in a dangerous condition and required any action on the part of the Municipal Committee under section 116 of the Punjab Municipal Act, 1911 (Punjab Act III of 1911). On 30th October, 1956, the Secretary, Municipal Committee, Simla, wrote to the respondent about the defect in respect of the righthand pillar of the screen and required the respondent by means of a notice to do the repairs within fifteen days of the receipt of the notice. The Secretary issued the notice purporting to act under sections 113 and 114 of the Punjab Municipal Act, 1911. It appears that the Municipal Committee had the pillar inspected again in November, 1956, by the Executive Engineer, Simla Central Division. This time the Executive Engineer suggested that the two end walls (pillars) supporting the beams for the screen were cracked and therefore must be replaced by thicker walls. The Municipal Committee considered this report and came to the conclusion that as a precautionary measure what was necessary was to fill the doorway in the pillar with masonry so that the whole might become a solid block. On 11th April, 1957, the Municipal Committee wrote to the appellant asking the latter to fill the doorway with masonry so that the whole pillar might become a solid block. This was in modification of the earlier notice which had suggested more extensive repairs to the pillar. But before 11th April, 1957, when the new notice from the Municipal Committee was received, the appellant had already made an application on 1st December, 1956, under section 13 of the Act praying for an order from the Controller directing the respondent to put the appellant in possession of the property on the ground that the appellant required the building for replacing the end walls supporting the beams of the screen by thicker walls. This application was contested by the respondent mainly on the ground that the appellant's claim was not *bona fide* and that the appellant did not really require the building to be vacated for the purpose of making the repairs to the pillar in question.

The Rent Controller came to the conclusion that the case was fully covered by clause (iii) of section 13 (3) (a) of the Act inasmuch as on the evidence on the record it was established that the appellant required the building to carry out the necessary building work which the Municipal Committee, Simla, had directed to be done. There was an appeal from the order of the Rent Controller to the District Judge who was the relevant appellate authority under section 15 of the Act. The learned District Judge came to the conclusion that the notices under sections 113 and 114 of the Punjab Municipal Act, 1911, had been manipulated by the landlord after the amendment made in section 13 of the Act on 24th September, 1956, and that the appellant did not *bona fide* require the building for carrying out the repairs in question. The learned District Judge pointed out that on 11th April, 1957, the Municipal Committee had asked the landlord to fill the doorway with masonry so that the whole might become a solid block and though the Municipal Committee had modified its earlier requirement of thicker walls by means of a notice after the filing of the application by the appellant, it was open to the Court to take into consideration facts which had come into existence after the filing of the application. He also pointed out that the evidence of the Executive Engineer, Central P.W.D., showed that he inspected the building on 8th June, 1957, in compliance with the directions of the Court and was satisfied that the pillar had been satisfactorily repaired. In this view of the matter the learned District Judge allowed the appeal and dismissed the application.

Then, there was an application in revision under section 15 (5) of the Act to the High Court. This application was dealt with by K. L. Gosain, J., who wrongly proceeded on the footing that the application in revision was one under section 115, Code of Civil Procedure. Though the learned Judge said that he had gone through

the evidence and agreed with the findings arrived at by the District Judge, he came to the conclusion that as no question of jurisdiction was involved within the meaning of section 115, Code of Civil Procedure, he saw no reasons to interfere and dismissed the application in revision. The present appeal is directed against this order of the learned Single Judge.

The learned Attorney-General who appeared on behalf of the appellant has rightly pointed out that the learned Judge of the High Court was in error in disposing of the case as though the application in revision made to the High Court was an application under section 115, Code of Civil Procedure. The application was really an application under section 15 (5) of the Act which is in these terms :

“ 15. (5) The High Court may, at any time, on the application of any aggrieved party or on its own motion, call for and examine the records relating to any order passed or proceedings taken under this Act for the purpose of satisfying itself as to the legality or propriety of such order or proceedings and may pass such order in relation thereto as it may deem fit.”

It is manifest that the scope of sub-section (5) of section 15 of the Act is not the same as the scope of section 115, Code of Civil Procedure. The learned Attorney-General has submitted, rightly in our opinion, that the scope of sub-section (5) of section 15 of the Act is wider and is not confined to questions of jurisdiction only.

But even if the learned Judge of the High Court was in error in treating the application as one under section 115, Code of Civil Procedure, the fact still remains that he affirmed the findings of the learned District Judge and one of these findings was that the landlord did not *require* the building to carry out the repair work which was suggested by the Municipal Committee. The Municipal Committee had suggested a very simple work of repair, namely, filling up of the doorway in the pillar so that the pillar might be one solid wall to support the screen. It has not been seriously disputed before us that such repairs could be easily carried out without the necessity of asking the respondent to vacate the building. As a matter of fact the learned District Judge has pointed out that the Executive Engineer, Central P.W.D., had, subsequent to the application, examined the pillar and found that the repair work had already been done by the respondent.

The learned Attorney-General has contended that the learned District Judge was in error in holding that the appellant had manipulated the notices under sections 113 and 114 of the Punjab Municipal Act. We think it unnecessary to go into that question because the relevant provision in section 13 (3) (a) of the Act makes it quite clear that the landlord is entitled to an order from the Controller directing the tenant to put the landlord in possession of the building only when the landlord requires it to carry out any building work, etc. The relevant provision reads as follows :

“ 13. (1) A tenant in possession of a building or rented land shall not be evicted therefrom .....except in accordance with the provisions of this section,.....

(2) .....

(3) (a) A landlord may apply to the Controller for an order directing the tenant to put the landlord in possession—

(i) .....

(ii) .....

(iii) in the case of any building or rented land if he requires it to carry out any building work at the instance of the Government or local authority or any Improvement Trust under some improvement or development scheme or if it has become unsafe or unfit for human habitation.

.....”

We emphasise the word “requires” in the provision. Having regard to the scheme and purpose of the legislation it is abundantly clear that clause (iii) of section 13 (3) (a) of the Act is attracted only when the building work is such that the landlord requires that the building be vacated by the tenant in order to carry out

the work ; in other words, the repairs needed are so extensive and fundamental in character that they cannot be carried out if the tenant remains in possession. Then only it can be said that the landlord requires the building to carry out the building work. We think that it is absurd to suggest that any such small work as white-washing, or filling up the gap in the doorway as in the present case, comes within clause (iii) of section 13 (3) (a) of the Act.

The learned Attorney-General has argued that the learned District Judge wrongly took into consideration facts which had come into existence after the filing of the application under section 13 of the Act. Here again we think that having regard to the scheme and purpose of the legislation it was open to the learned District Judge to take into consideration such facts as existed at the time when the order for vacation was to come into effect. Section 13 (3) (b) says that the Controller shall, if he is satisfied that the claim of the landlord is *bona fide*, make an order directing the tenant to put the landlord in possession of the building on such date as may be specified by the Controller. In the present case the Controller made the order in July, 1957 and directed the building to be vacated by 25th September, 1957. But long before that date, namely, on 8th June, 1957, the Executive Engineer, Central P.W.D., had inspected the building and found that the pillar had been repaired satisfactorily. The Controller did not accept the testimony of the Executive Engineer and the learned District Judge pointed out that the testimony of the Executive Engineer had been rejected by the Controller on very insufficient grounds. It was open to the learned District Judge to take into consideration the testimony of the Executive Engineer and having regard to that testimony, the learned District Judge rightly came to the conclusion that clause (iii) of section 13 (3) (a) of the Act was not attracted to the case.

For these reasons we have come to the conclusion that there is no merit in the appeal which is accordingly dismissed with costs.

K. S.

*Appeal dismissed..*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. C. DAS GUPTA, J. R. MUDHOLKAR AND T. L. VENKATARAMA AYYAR, JJ.

Padma Vithoba Chakkayya

.. *Appellant\**

v.

Mohd. Multani and another

.. *Respondents.*

*Adverse possession—Usufructuary mortgage—Subsequent transaction under which mortgagee is to hold the property as owner and not mortgagee inoperative in law—If starts adverse possession—Possession if can become adverse under an arrangement entered into by a minor.*

When a person gets into possession of properties as mortgagee, he cannot by any unilateral act or declaration of his prescribe for title by adverse possession against the mortgagor, because in law his possession is that of the mortgagor. But if the mortgagor and mortgagee subsequently enter into a transaction under which the mortgagee is to hold the properties thereafter not as a mortgagee but as owner that would be sufficient to start adverse possession against the mortgagor if the transaction is for any reason found to be inoperative under the law.

*Karnam Kanda Swami v. Chinnabba*, I.L.R. 44 Mad. 253 : 40 M.L.J. 105, relied on.

A minor is in law incapable of giving consent and there being no consent there could be no change in the character of possession of the mortgagee.

Appeal by Special Leave from the Judgment and Decree, dated the 11th. February, 1954, of the former Hyderabad High Court in Second Appeal Suit No. 476/4 of 1354 Fasli.

Gopal Singh and R. S. Narula, Advocates, for Appellant.

A. Ranganatham Chetty, Senior Advocate (A. V. Rangam, Miss A. Vedavalli and P. C. Agarwala, Advocates, with him), for Respondent No. 1.



The Judgment of the Court was delivered by

*Venkatarama Aiyar, J.*—This is an appeal by Special Leave against the judgment of the High Court of Hyderabad whereby it affirmed the judgment of the Court of the Additional District Judge of Adilabad dismissing the suit of the appellant. The facts are that there was a joint family consisting of one Chakkayya and his younger brother Rajanna. Chakkayya died in year 1923 leaving behind the appellant hisson who it is said was at that time a minor a few months old. On 21st, December, 1923, Rama Rao, the second defendant, sold the lands, which are the subject-matter of the suit to Rajanna. It appears that as there was some difficulty in Rajanna getting possession of the properties which were stated to have been usufructuarily mortgaged to the first defendant, the transaction of sale was cancelled and the same was endorsed on the sale deed. Thereafter the second defendant executed a fresh sale deed in favour of the first defendant and the latter has ever since continued in possession. The appellant filed the present suit on 14th February, 1943, for recovery of possession of these properties from the first defendant on the allegations that the first defendant was in management of the properties belonging to the joint family of Chakkayya and Rajanna and himself, that the sale deed in favour of Rajanna, dated 21st December, 1923, vested title to the suit properties in the joint family, that the first defendant had entered on the management of these properties also as manager on behalf of the joint family, that Rajanna died in 1930 as a minor, that the first defendant was discharged from the management, in 1933, that he had not surrendered possession of the suit properties to the family, but was setting up a title to them in himself on the basis of a sale deed executed by the second defendant subsequent to the sale deed, dated 21st December, 1923, in favour of Rajanna, but that the said sale deed could confer no title on him, as the second defendant had sold the lands previously to Rajanna, and had no title which he could thereafter convey. It was further alleged that the plaintiff became a major some time in June, 1940 and that the suit for possession was within three years of his attaining majority and not barred by limitation. The first defendant contested the suit. He pleaded that he was merely a jawan or servant in the service of the family, that he was not in management of the joint family properties, that the suit lands had been usufructuarily mortgaged to him in 1916 for Rs. 800 long before they were sold to Rajanna in 1923, that the sale in favour of Rajanna had been cancelled with his consent he having been paid back the consideration, that it was thereafter that the second defendant sold the properties to him, and that he had therefore acquired a good title to them, and that further as he had been in possession of the properties thereafter for over the statutory period in assertion of a title as owner, he had acquired title to them by prescription and that the suit was barred by limitation. He denied that Rajanna was a minor at the relevant dates as stated in the plaint. On these pleadings the District Munsiff framed the following issues :—

(1) Whether according to the suit (plaint), the suit lands have been sold by defendant No.2 in favour of Padma Rajjana through registered sale deed, dated 17th Bahman 1334-F. (corresponding to 21st December, 1923) ?

(2) Whether as stated by the plaintiff in his suit, the family of the plaintiff and Padma Rajjana was joint ? And whether on account of the death of the said Rajjana, the plaintiff is entitled to the suit lands ?

(3) Whether the defendant No. 2 has executed the sale deed, dated 3rd Farwardi 1334-F. (corresponding to 4th February, 1925-A.D.) and what is its legal effect on the sale deed, dated 17th Bahman 1334-F. (corresponding to 21st December, 1923) ?

(4) Whether at the time of the execution of the sale deed, dated 3rd Farwardi 1334-F. (21st December, 1923) the plaintiff was minor ? And whether this suit is within limitation ?

(5) To what relief are the parties entitled to ?

The learned District Munsiff, Nirmal, who tried the suit held that as the endorsement of cancellation of the sale deed in favour of Rajanna was unregistered, no title passed to the second defendant by reason of that endorsement and that accordingly the sale by him in favour of the first defendant conferred no title on him and further that the suit had been instituted within three years of the plaintiff's attaining

majority and that it was in time and so he decreed the suit. Against this Judgment and decree there was an appeal by the respondents to the Additional District Court of Adilabad, which held that the plaintiff had not established that he had attained majority within three years of the suit and on that finding the appeal was allowed. The appellant took the matter in Second Appeal to the High Court of Hyderabad which agreeing with the District Judge, held that the suit was instituted more than three years after the plaintiff had attained majority and dismissed the appeal. It is against this Judgment that the present appeal by Special Leave has been filed.

The first contention that is urged on behalf of the appellant is that the finding that the plaintiff had attained majority more than three years prior to the suit was erroneous. But there are concurrent findings on what is a question of fact, and we see no sufficient reason to differ from them.

The contention strongly urged by Mr. Gopal Singh in support of the appeal is that the first defendant had been put in management of all the properties belonging to the plaintiff's family and that having entered into the possession of the suit lands as manager on behalf of the family, it was not open to him to set up a title by adverse possession, unless he first surrendered possession of the properties. On this point the learned Judges of the High Court held that there was no satisfactory proof that the first defendant had been in management of the properties as agent of the plaintiff and his family. The contention of the appellant is that there is a large body of evidence in support of the allegations in the plaint that the first defendant was not a mere servant but a manager of the properties, that he had not gone into the box, and denied them and that under the circumstances it must be held that he entered into possession of the properties as manager and it was not competent for him to set up a claim by adverse possession.

The respondent argues that he was merely a jawan in the service of the family of appellant and that he had nothing to do with the management of the properties and that as there was no evidence worth the name in support of the allegations in the plaint, there was no need for him to enter into the box and give evidence that he was not in management of the lands. If the fate of this appeal turned on a determination of this question, we should, on the materials before us, feel considerable difficulty in agreeing with the decision of the learned Judges. The failure of the first defendant to go into the box would have been sufficient to shift the burden of proving that he was not the manager on to him vide *Murgesam Pillai v. Gnana Sambandha Pandara Sannadhi*<sup>1</sup> and *Guruswami Nadan v. Gopalaswami Odayar*<sup>2</sup>.

But then it is pointed out by the respondent that the suit lands had come into his possession under a usufructuary mortgage executed by the second defendant in 1916, that there was no allegation that this mortgage was obtained by him while he was the manager of the family properties or on behalf of the family, and that when once his possession has been traced to the usufructuary mortgage of 1916, there could be no question thereafter of his having entered into possession of the properties as manager on behalf of the family. Before us the appellant did not dispute the truth of the usufructuary mortgage in favour of the first respondent nor did he contend that in taking that mortgage the first defendant acted on behalf of the family. Such a contention would be untenable as at that time Chakkayya the father of the plaintiff and the manager of the joint family was alive. That being so the question whether the first defendant is precluded as manager from acquiring title by adverse possession does not arise for decision because he entered into possession of the properties in his own right as usufructuary mortgagee.

On the finding reached above that the first defendant entered into possession of the properties as usufructuary mortgagee in 1916, the question is what are the rights of the appellant. On the basis of the sale deed by the second defendant in favour of Rajanna he would be entitled to redeem the mortgage. But the present suit is not one for redemption of the mortgage but for ejectment, and that by itself

1. (1917) 32 M.L.J. 369 : L.R. 44 I.A. 98 : I.L.R. 40 Mad. 402.

2. (1919) 36 M.L.J. 568 : I.L.R. 42 Mad. 629.

would be a ground for dismissal of the suit. But in view of the fact that this litigation had long been pending, we consider it desirable to decide the rights of the parties on the footing that it is a suit to redeem the usufructuary mortgage without driving the parties to a separate action. We have now to consider the defence of the first defendant to the suit, treating it as one for redemption. Now the contention of Mr. Ranganathan Chetty for the respondent is that he had been in possession of the properties as owner ever since 1923, when the second defendant sold them to him, that he had thereby acquired a prescriptive title to them, and that the right of the appellant to redeem was thereby extinguished. It is not disputed that when a person gets into possession of properties as mortgagee, he cannot by any unilateral act or declaration of his prescribe for a title by adverse possession against the mortgagor, because in law his possession is that of the mortgagor. But what is contended is that if the mortgagor and mortgagee subsequently enter into a transaction under which the mortgagee is to hold the properties thereafter not as a mortgagee but as owner that would be sufficient to start adverse possession against the mortgagor if the transaction is for any reason inoperative under the law. This contention, in our opinion, is well founded. Though there was at one time a body of judicial opinion that when a person enters into possession as a mortgagee he cannot under any circumstances acquire a title by prescription against the owner, the law is now fairly well-settled that he can do so where there is a change in the character of his possession under an agreement with the owner, vide *Karnam Kanda Sami v. Chinmabba*<sup>1</sup>. Now the question is was there such an arrangement? The contention of the respondent is that the agreement between Rajanna and the two defendants under which Rajanna received back the sale consideration and made an endorsement cancelling the sale followed, as part of the transaction, by the sale of the properties by the second defendant to the first defendant would be sufficient to start adverse possession.

The endorsement of cancellation on the back of the sale deed in favour of Rajanna dated 21st December, 1923, has been held, as already stated, to be inadmissible in evidence as it is not registered. The result of it is only that there was no retransfer of title by Rajanna to the second defendant, and the family would in consequence continue to be the owner, and that is why the appellant is entitled to redeem. But the endorsement, taken along with the sale deed by the second defendant in favour of the first defendant is admissible in evidence to show the character of possession of the latter, vide *Varada Pillai v. Jeevarathnammal*<sup>2</sup>. And that was clearly adverse to the owners. The answer of the appellant to this contention is that Rajanna himself was a minor at the time when this arrangement is stated to have taken place and that in consequence no title by adverse possession can be founded on it. We agree that if Rajanna was a minor when he entered into this arrangement that would not operate to alter the character of the possession of the first defendant as mortgagee. The respondent contended that there could be adverse possession against a minor in certain circumstances, and relied on the decision in *Sitharama Raju v. Subba Raju*<sup>3</sup>, in support of this position. That is not questioned, but the point for decision is whether possession lawful at the inception can become adverse under an arrangement entered into by a minor. Now a minor is in law incapable of giving consent, and there being no consent, there could be no change in the character of possession, which can only be by consent, and not by any unilateral act. Therefore the crucial point for determination is whether at the time of the cancellation of the sale deed, dated 21st December, 1923, Rajanna was a minor or major. According to the respondent he was a major and there is evidence also on record in support of this contention. According to the appellant Rajanna was a minor at that time and he died a minor in 1930. On this disputed question of fact there has been neither an issue framed nor evidence adduced. Under the circumstances we think it desirable that the matter should be remanded to the

1. (1920) 40 M.L.J. 105 : I.L.R. 44 Mad. 273. 3. (1921) 42 M.L.J. 262 : I.L.R. 45. Mad-  
2. (1919) 38 M.L.J. 313 : L.R. 46 I.A. 285 : 361.  
I L.R. 43 Mad. 244.

Court of District Munsiff for a fresh inquiry on this question. The plaintiff should on remand be required to suitably amend the plaint so as to convert the suit into one for redemption of the usufructuary mortgage of the year 1916. The first defendant will then file his written statement in answer thereto. An issue will be framed whether Rajanna was a major at the time when the sale deed was cancelled. If it is held that he was a major then the possession of the first defendant thereafter would be adverse and on the findings given by the Courts below, the suit will have to be dismissed as barred by limitation. But if it is held that Rajanna was then a minor, then there would be no question of adverse possession and the plaintiff would be entitled to redeem the mortgage. The decree of the lower Court is accordingly set aside and the matter remanded to the Court of the District Munsiff for fresh disposal as stated above. Costs incurred throughout in all the Courts will abide the result.

K. S.

*Decree set aside and matter remanded.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR, K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

'The Kalyan Peoples' Co-operative Bank, Ltd. (in both the Appeals) .. *Appellant\**

*v.*

Dulhanbibi Aqual Aminsahab Patil and others (in both the Appeals) .. *Respondents.*

*Evidence Act (I of 1872)—Mode of proof is a question of procedure—Evidence taken in a previous judicial proceeding—Admissible in a subsequent proceeding by consent of parties.*

*Constitution of India (1950), Article 227—Petition under—Power to interfere—Error apparent on face of record.*

Normally it would have been wrong and indeed illegal for a Tribunal to act on evidence not taken before it. The position is however different when the parties expressly or impliedly agree that some evidence not taken before the Tribunal should be treated as evidence and taken into consideration. It is settled law that question of mode of proof is a question of procedure and is capable of being waived and therefore evidence taken in a previous judicial proceeding can be made admissible in a subsequent proceeding by consent of parties. This applies to proceedings of a civil nature. While what is not relevant under the Evidence Act cannot in proceedings to which Evidence Act applies, be made relevant by consent of parties, relevant evidence can be brought on the record for consideration of the Court or the Tribunal without following the regular mode, if parties agree. The Tribunal was clearly wrong in thinking otherwise and the error cannot but be considered to be an error apparent on the face of the record and as such the High Court had not only the power but the duty to interfere with the Tribunal's order.

Appeals by Special Leave from the Judgment and Order, dated the 17th July, 1956, of the Bombay High Court in Special Civil Applications Nos. 580 and 581 of 1956.

A. V. Viswanatha Sastri, Senior Advocate (B. R. Nayak and Naunit Lal, <sup>1</sup>Advocates, with him), for Appellant.

Abdurrahman Adam Omer, Advocate and S. N. Andley, Rameshwar Nath and P. L. Vohra, Advocates of M/s. Rajender Narain & Co., for Respondents Nos. 1 and 3 to 6.

The Judgment of the Court was delivered by

Das Gupta, J.—Disputes having arisen between the appellant, a Co-operative Bank and one Amin Saheb Patil, who had taken loans from the Bank and Kutubuddin Mohemad Ajim Kazi, who had stood surety in respect of the loans they were referred to arbitration in two references under section 54 of the Bombay Co-operative Societies Act, 1925. The Board of Arbitrators originally consisted of Mr. L. V. Phadke, Mr. G. K. Phadke and Mr. Trilockekar. After the Board had several meetings and recorded some evidence Mr. Trilockekar who was the nominee of the borrower, Amin Saheb, retired. Thereafter the Board was reconstituted with Mr. Kotwal as the new nominee of the borrower. This Board

\* C.As. Nos. 555 and 556 of 1960.

also recorded some evidence but after sometime Mr. Kotwal also retired. There was a fresh constitution of the Board with the other two members as before and Mr. M. D. Thakur as the nominee of the borrower. Further evidence was recorded by the Board thus constituted and finally the Board gave its awards in the matters on March 14, 1955.

Dissatisfied with these awards Amin Saheb filed two revision applications before the Bombay Co-operative Tribunal. Apart from certain objections on the merits of the awards a preliminary objection was taken before the Tribunal as regards the legality of the awards on the ground that the Board as last constituted had acted on evidence not recorded before it. The Tribunal accepted this preliminary objection, set aside the awards and remanded the cases to the Assistant Registrar for a re-hearing.

Shortly after this Amin Saheb died but his heirs and legal representatives made two applications to the Bombay High Court under Article 227 of the Constitution against the Tribunal's decision. The High Court held that the Tribunal had erred in thinking that the Board of Arbitrators had acted illegally in acting on the evidence recorded by the previous Boards when this was done with the full knowledge of the parties and without any objection on either side. Accordingly, they set aside the orders passed by the Tribunal and restored the awards made by the Board of Arbitrators.

The Bank has now appealed against the decision of the High Court after obtaining Special Leave from this Court.

Three points are raised before us in support of the appeal. The first is that the Tribunal had not made any error in holding that the Board had acted illegally in acting upon the evidence recorded by the previous Boards. Secondly, it is urged that even if the Board had erred it was not such an error as would entitle the High Court to interfere under Article 227 of the Constitution. Lastly, it was contended that in any case, the High Court was not justified in setting aside the awards when the Tribunal had disposed of the application only on preliminary points and had not considered it on merits. In our opinion there is no substance in the first two contentions. As the High Court has pointed out normally it would have been wrong and indeed illegal for the Tribunal to act on evidence not taken before it. The position is however different when the parties expressly or impliedly agree that some evidence not taken before the Tribunal should be treated as evidence and taken into consideration. It is settled law that question of mode of proof is a question of procedure and is capable of being waived and therefore evidence taken in a previous judicial proceeding can be made admissible in a subsequent proceeding by consent of parties. This applies to proceedings of a civil nature. While what is not relevant under the Evidence Act cannot in proceedings to which Evidence Act applies, be made relevant by consent of parties, relevant evidence can be brought on the record for consideration of the Court or the Tribunal without following the regular mode, if parties agree. The reason behind this rule is that it would be unfair to ask any party to prove a particular fact when the other party has already admitted that the way it has been brought before the Court has sufficiently proved it. We are therefore of opinion that in the facts of these cases when the appellant Bank not only raised no objection to the Board as last constituted proceeding on the evidence already recorded before the previous Boards, but indeed appears to have invited the Board to act on such evidence previously recorded, the appellant cannot be allowed later on to object to the Board having considered the evidence—merely because the decision has gone against it. The Tribunal was clearly wrong in thinking otherwise and the error cannot but be considered to be an error apparent on the face of the record and as such the High Court had not only the power but the duty to interfere with the Tribunal's order.

It appears to us however that having come to the conclusion that the Tribunal was wrong in allowing the preliminary objection raised before it the High Court was not entitled to ignore the fact that before the Tribunal other questions had

been raised which had not been considered by it. The proper order to pass in such a case, in our opinion, would be to set aside the order of the Tribunal and direct it to decide the applications for revision on their merits.

We therefore allow the appeals in part, and order, in modification of the order made by the High Court, that the Tribunal's order remanding the cases to the Assistant Registrar be set aside but the Tribunal should now proceed to hear the revision applications on their merits. In the circumstances of the case, we order that the parties will bear their own costs.

V.S.

*Allowed in part.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, N. RAJAGOPALA AYYANGAR AND T. L. VENKATARAMA AYYAR, JJ.

The Government of Andhra Pradesh (In all the Appeals) .. Appellant\*

*v.*

Syed Mohd. Khan, etc.

.. Respondents.

*Citizenship Act (LVII of 1955), section 9—Acquisition of citizenship of foreign State and loss of Indian citizenship—Question to be decided by the Central Government.*

In all cases where action is proposed to be taken against persons residing in this country on the ground that they have acquired the citizenship of a foreign State and have lost in consequence the citizenship of this country, it is essential that the question should be first considered by the Central Government. In dealing with the question, the Central Government would undoubtedly be entitled to give effect to rule 3 in Schedule III and deal with the matter in accordance with the other relevant Rules framed under the Act. The decision of the Central Government about the status of the person is the basis on which any further action can be taken against him.

Appeals from the Judgment and Order, dated the 4th September, 1957, of the Andhra Pradesh High Court in Writ Appeals Nos. 46-66 and 73 of 1957.<sup>1</sup>

T. V. R. Talachari and P. D. Menon, Advocates, for Appellant (in all the Appeals.)

P. Ram Reddy, Advocate, for Respondents in Appeals Nos. 258-267, 271-273 and 275-279 of 1961.

The Judgment of the Court<sup>2</sup> was delivered by

Gajendragadkar, J.—This group of twenty-two appeals has been brought to this Court with certificates granted by the Andhra High Court, and they challenge the correctness of the decision of the said High Court that rule 3 in Schedule 3 of the Citizenship Rules, 1956, is *ultra vires*. Twenty-two persons who are the respective respondents in these appeals filed twenty-two writ petitions in the Andhra High Court challenging the validity of the orders passed by the appellant, Government of Andhra Pradesh, asking each one of them to remove themselves out of India before the date specified in the notices served on them in that behalf. It appears that all the said persons had come to India with a passport issued in their favour by the Government of Pakistan, and the appellant's case before the High Court was that as a result of the conduct of the respondents in applying for and obtaining the Pakistani passport, they had lost the citizenship of this country and had voluntarily acquired the citizenship of Pakistan. That is how the appellant justified the notices served on the respondents calling upon them to leave India.

The respondents, on the other hand, contended that section 9 of the Citizenship Act, 1955 (LVII of 1955), and rule 3 in Schedule 3 of the Citizenship Rules were *ultra vires* and they urged that they had not acquired the citizenship of Pakistan and continued to be the citizens of India. These writ petitions were tried by Bhimasankaram, J. The learned Judge held that the impugned section and the rule were *intra vires* and he came to the conclusion that as a result of section 9 read with:

\* C. As. Nos. 258-279 of 1961.

1. (1957) 2 An.W.R. 527.

17th April, 1962.

rule 3 in Schedule 3 of the Citizenship Rules, as soon as it is shown that a person has acquired a passport from the Pakistan Government, there is an automatic statutory cesser of his citizenship of India. In the result, the learned Judge upheld the validity of the orders of deportation passed by the appellant against the respondents and dismissed the writ petitions without costs.

This decision was challenged by the respondents by preferring 22 appeals before a Division Bench of the Andhra High Court. The Division Bench which heard these appeals held that section 9 was *intra vires*, but found that rule 3 of Schedule 3 of the Citizenship Rules was *ultra vires*. In its opinion, the said rule was outside the authority conferred on the Central Government by section 9 (1) and it also contravened Article 19 of the Constitution. The consequence of these findings inevitably was that the orders of deportation passed by the appellant against the respondents were held to be invalid. That is why the appeals preferred by the respondents were allowed and a writ of *mandamus* was issued directing the appellant to forbear from enforcing the said orders of deportation.

The Court of Appeal has also observed that under the Citizenship Act and the Rules framed thereunder, the Central Government has been constituted as Special Tribunal for deciding the question as to whether a person has acquired the citizenship of a foreign country or not, and so, before issuing the orders of deportation, it was necessary that the appellant should have obtained a decision of the Central Government on the point about the status of the respondents. The High Court accordingly made it clear that its decision in the appeals in question would not preclude the Central Government from determining the question whether the respondents have voluntarily acquired the citizenship of another country within the meaning of section 9 (1), but it added that in deciding the question, the Central Government must ignore rule 3 of Schedule 3 which, in its opinion, was *ultra vires*. It is against this decision of the Division Bench about the invalidity of the impugned rule that the appellant has come to this Court.

The question about the validity of section 9 of the Citizenship Act and of rule 3 in Schedule 3 of the Citizenship Rules has been recently considered by this Court in Petitions Nos. 101 and 136 of 1959 and 88 of 1961,<sup>1</sup> and this Court has held that both section 9 (2) and Rule 3 in Schedule 3 are *intra vires*. The point raised by the appellant in these appeals is, therefore, concluded in its favour by this decision. This position is not disputed by the respondents.

That raises the question about the proper order to be passed in the present appeals. It has been urged before us by Mr. Tatachari for the appellant that the effect of our decision in the case of Izhar Ahmad Khan is that as soon as it is shown that a person has acquired a passport from a foreign Government his citizenship of India automatically comes to an end, and he contends that in such a case, it is not necessary that the Central Government should hold any enquiry and make finding against the person before the appellant can issue an order of deportation against him. In our opinion, this contention is clearly misconceived. In dealing with the question about the validity of the impugned section and the rule, this Court has, no doubt, stated that

“the proof of the fact that a passport from a foreign country has been obtained on a certain date conclusively determines the other fact that before that date he has voluntarily acquired the citizenship of that country.”

But in appreciating the effect of this observation, it must be borne in mind that in all the cases with which this Court was then dealing, the question about the citizenship of the petitioners had been expressly referred to the Central Government and the Central Government had made its findings on that question. It was after the Central Government had recorded a finding against the petitioners that they had acquired the citizenship of Pakistan that the said writ petitions came before this Court for final disposal and it is in the light of these facts that this Court proceeded to consider the contention about the validity of the impugned section and the impugned rule. It is plain, therefore, that the observations on which Mr. Tatachari

1. *Izhar Ahmadkhan v. Union of India*, A.I.R. 1962 S.C. 1052.

relied were not intended to mean that as soon as it is alleged that a passport has been obtained by a person from a foreign Government, the State Government can immediately proceed to deport him without the necessary enquiry by the Central Government. Indeed, it is clear that in the course of the judgment, this Court has emphasised the fact that the question as to whether a person has lost his citizenship of this country and has acquired the citizenship of a foreign country has to be tried by the Central Government and it is only after the Central Government has decided the point that the State Government can deal with the person as a foreigner. It may be that if a passport from a foreign Government is obtained by a citizen and the case falls under the impugned Rule, the conclusion may follow that he has acquired the citizenship of the foreign country; but that conclusion can be drawn only by the appropriate authority authorised under the Act to enquire into the question. Therefore, there is no doubt that in all cases where action is proposed to be taken against persons residing in this country on the ground that they have acquired the citizenship of a foreign State and have lost in consequence the citizenship of this country, it is essential that that question should be first considered by the Central Government. In dealing with the question, the Central Government would undoubtedly be entitled to give effect to the impugned rule 3 in Schedule 3 and deal with the matter in accordance with the other relevant Rules framed under the Act. The decision of the Central Government about the status of the person is the basis on which any further action can be taken against him. Therefore, we see no substance in the argument that the orders of deportation passed by the appellant against the respondents should be sustained even without an enquiry by the Central Government about their status. That is why we think, in substance, the direction of the High Court is right, though the High Court was in error in holding that the Central Government should hold the enquiry without reference to rule 3.

In the result, the appeals succeed on the main point of law and the decision of the High Court that the impugned rule in Schedule 3 is invalid is set aside. Even so, we cannot accept the view, of the learned trial Judge that there is an automatic cesser of the respondents' citizenship by virtue of section 9. We hold that the question about the status of the respondents has to be tried by the Central Government and it is only after the Central Government has reached the conclusion that the respondents have acquired the citizenship of Pakistan that the appellant can issue orders of deportation against them. That being our view, we confirm the writs issued by the High Court restraining the appellant from giving effect to the impugned orders of deportation until the question about the respondent's status is determined by the Central Government. There would be no order as to costs.

V.S.

*Appeals allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—S. K. DAS, M. HIDAYATULLAH AND J. C. SHAH, JJ.

M/s. G. Gilda Textile Agency, Vijayawada

.. *Appellants.\**

v.

The State of Andhra Pradesh and another

.. *Respondents.*

*Madras General Sales Tax Act (IX of 1939), section 14-A—Agent of non-resident principal—Liability to tax.*

If the non-resident principals took out railway receipts in their own names, thereby manifesting their intention to remain the owners and to retain the control over the goods, the sales must be taken to have been completed or to have taken place in the State of Andhra Pradesh. It was found that the non-resident principals were doing business of selling in Andhra Pradesh. Inasmuch as X (an agent of non-resident principals) after securing the orders received the railway receipts from the sellers and handed them over to the buyers and sometimes collected the consideration and transmitted the same to the sellers, the sales thus resulting must be held to have taken place in the State either on behalf of X or on behalf of the non-resident principals, and whichever view be correct, X



as agent was liable as a dealer within the Madras General Sales Tax Act. Either *X* was a dealer himself, or became a dealer by the fiction created by section 14-A, since the non-resident principals had done business in each case in the State of Andhra Pradesh.

Appeals by Special Leave from the Judgment and Order, dated the 19th September, 1958, of the Andhra Pradesh High Court in Tax Revision Cases Nos. 62 and 63 of 1956<sup>1</sup>.

*B. Sen*, Senior Advocate (*B.P. Maheshwari*, Advocate, with him), for Appellants.

*K. N. Rajagopal Sastri*, Senior Advocate (*D. Gupta*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

*Hidayatullah, J.*—These two appeals with Special Leave have been filed by Messrs. G. Gilda Textile Agency, Vijayawada, against the State of Andhra Pradesh. They are directed against a common order of the High Court of Andhra Pradesh in two revisions filed under section 12-B (1) of the Madras General Sales Tax Act, 1939 (IX of 1939).

The matter relates to the levy of sales tax from the appellant on its turnover for the years, 1954-55 and 1955-56. The appellant was an agent of several non-resident principals, on whose behalf it booked orders and dealt with the indents. There were agreements between the non-resident principals and the appellant, and three such agreements contained in letters have been produced as instances, and are marked Exhibits A-3; A-3 (a) and A-3(b). Under these agreements, the appellant was appointed as indenting agent in Andhra Pradesh for cloth merchants, who, admittedly, resided and carried on business outside Andhra Pradesh. It was required to book orders and to forward them to the principals, receiving commission on sale of goods despatched to Andhra Pradesh. In some cases, this commission was only available on the orders booked by the appellant, and in others, on all the sales effected by the principals in this territory. The appellant did business in three different ways, which have been described as three separate categories in the case. In the first category, the appellant took delivery of the goods from the railway, stocked them in its own godowns, found buyers and delivered the goods to the buyers. This category of sales was held to be within the Madras General Sales Tax Act and the appellant, liable to the tax. The appellant does not question this part of the decision. The second category was in which it merely booked orders and forwarded them to Bombay and the principals sent the goods with the railway receipts through the bank to the purchasers in Andhra Pradesh. The connection of the appellant was not considered sufficient to constitute it the "dealer", as defined in the Madras General Sales Tax Act, and such sales were omitted from the turnover. No dispute, therefore, arises about this category. The third category related to goods sold by the outside dealers to buyers in the State. The appellant in these transactions, besides booking orders, received the railway receipts from the outside principal, handed them over to the buyers and sometimes collected and transmitted the amounts to the outside principal. The period involved is covered by the Sales Tax Validation Act, 1956 (VII of 1956), and no question under the Constitution arises. The only question is whether the appellant comes within section 14-A of the Madras General Sales Tax Act, and is liable to tax as a dealer.

It may be pointed out that the appellant did not produce any correspondence between it and the non-resident principals or the covering letters which must have been sent along with the railway receipts. The Tribunal under the Madras General Sales Tax Act, therefore, came to the conclusion that the railway receipts which had been sent, must have been endorsed by the sellers either in favour of the appellant or in blank, to enable the appellant to claim the goods from the railway or to negotiate them. The Tribunal, therefore, held that the appellant must be deemed to be a "dealer" under section 14-A and thus liable to tax under that section.

### Section 14-A of the Act reads as follows :

" In the case of any person carrying on the business of buying and selling goods in the State but residing outside it (hereinafter in this section referred to as a 'non-resident'), the provisions of this Act shall apply subject to the following modifications and additions, namely :

(i) In respect of the business of the non-resident, his agent residing in the State shall be deemed to be the dealer:

(ii) The agent of a non-resident shall be assessed to tax or taxes under this Act at the rate or rates leviable thereunder in respect of the business of such non-resident in which the agent is concerned, irrespective of the amount of the turnover of such business being less than the minimum specified in section 3, sub-section (3).

(iii) Without prejudice to his other rights, any agent of a non-resident who is assessed under this Act in respect of the business of such non-resident may retain out of any moneys payable to the non-resident by the agent, a sum equal to the amount of the tax or taxes assessed on or paid by the agent.

(iv) Where no tax would have been payable by the non-resident in respect of his business in the State by reason of the turnover thereof being less than the minimum specified in section 3, sub-section (3), he shall be entitled to have the amount of the tax or taxes paid by his agent refunded, to him on application made to the assessing authority concerned, or where more than one such authority is concerned, to such one of the authorities as may be authorised in this behalf by the State Government by general or special order.

(v) Such application shall be made within twelve months from the end of the year in which payment was made by or on behalf of the non-resident of the tax or taxes or any part thereof."

The section makes the agent liable fictionally as a dealer in the circumstances laid down in the section, *viz.*, that he is acting on behalf of a non-resident person doing business of buying or selling goods in the State. The agent is assessed to tax under the Act in respect of the business of such non-resident in which the agent is concerned, irrespective of whether the turnover of such business is more or less than the minimum prescribed in the Act. It is contended that the first thing to decide is whether the non-resident could be said to be carrying on the business of selling in Andhra Pradesh in the circumstances of this case, and reliance is placed upon a decision of this Court reported in *Mahadaya! Premchandra v. Commercial Tax Officer, Calcutta*<sup>1</sup>. In that case, this Court was called upon to consider the Bengal Finance (Sales Tax) Act, 1941 (VI of 1941). There also, the agent was sought to be made liable in respect of the sale of goods belonging to a non-resident principal under a section which may be taken to be in *pari materia* with the section, we are considering. This Court held that the Kanpur Mills, whose agent the appellant in the case was, were not carrying on any business of selling goods in West Bengal and were selling goods in Kanpur and despatching them to West Bengal for consumption. This part of the judgment is called in aid to show that the first condition of the liability of the agent in the present case under the Madras General Sales Tax Act is not fulfilled. Unfortunately for the appellant, in this case there is a clear finding by the High Court that the non-resident principals were carrying on the business of selling in Andhra Pradesh. The High Court has observed that if the non-resident principals took, out railway receipts in their own names, thereby manifesting their intention to remain the owners and to retain the control over the goods, the sales must be taken to have been completed or to have taken place in the State of Andhra Pradesh. From this, the High Court came to the conclusion that the non-resident principals were doing business of selling in Andhra Pradesh. The High Court pointed out that inasmuch as the appellant after securing the orders received the railway receipts from the sellers and handed them over to the buyers and sometimes collected the consideration and transmitted the same to the sellers, the sales thus resulting must be held to have taken place in the State either on behalf of the appellant or on behalf of the non-resident principals, and whichever view be correct, the appellant as agent was liable as a dealer within the Act. Either it was a dealer itself, or it became a dealer by the fiction created by section 14-A, since the non-resident principals had done business in each case in the State of Andhra Pradesh. The case of this Court on which reliance has been placed, turned on its own facts, and

1. (1958) S.C.J. 723: (1958) 2 M.L.J. (S.C.) 93: (1958) 2 An. W.R. (S.C.) 93.

finding there cannot be used in the present case, because no finding on the facts of one case can be applied to the facts of another.

Sub-section (2) of section 14-A was said to be connected with the opening part, and it was argued that the tax was leviable on the turnover relating to the business of a non-resident, which was carried on by the non-resident in the taxable territory. In our opinion, once the finding is given that the non-resident principal carried on the business of selling in Andhra Pradesh and the appellant was the admitted agent through whom this business was carried on, the rest follows without any difficulty. The High Court, in our opinion, was, therefore, right in upholding the levy of the tax from the appellant, in view of our decision that the appellant came within the four corners of section 14-A in relation to the transactions disclosed in the last category.

The appeals fail, and are dismissed with costs, one hearing fee.

V.S.

*Appeals dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—J. L. KAPUR, K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

Union of India

.. *Appellant\**

v.

M/s. Udho Ram & Sons

.. *Respondent.*

*Railways Act (IX of 1890), section 72 and Contract Act (IX of 1872), section 151—Applicability—Goods loaded in a Railway wagon lost in transit—Responsibility of railway.*

It must be taken to be the duty of the Railway Protection Police to get out of the guard's van whenever the train stops, be it at the railway platform or at any other place. In fact the necessity to get down and watch the train when it stops at a place other than a station is greater than when the train stops at a station, where atleast on the station side there would be some persons in whose presence the miscreants would not dare to tamper with any wagon and any tampering to be done at a station is likely to be on the off side. The responsibility of the railway under section 72 of the Railways Act is subject to the provisions of section 151 of the Contract Act.

Therefore (in the instant case) the finding of the High Court that the loss took place due to the negligence of the railway servants and, consequently, of the Railway administration is justified.

Appeal from the Judgment and Decree, dated the 23rd day of April, 1958, of the Punjab High Court (Circuit Bench) Delhi, in Civil Regular First Appeal No. 33-D of 1953.

*Naunit Lal and D. Gupta*, Advocates, for Appellant.

*Gurbachan Singh*, Senior Advocate (*Harbans Singh*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

*Ragubar Dayal, J.*—This appeal, on certificate granted by the Punjab High Court, arises in the following circumstances.

M/s. Radha Ram Sohan Lal of Calcutta consigned certain goods to self at Delhi. Of the consignment, certain articles were not delivered to M/s. Udho Ram & Sons, the plaintiffs in whose favour the railway receipt had been endorsed by the consignor. Having failed to receive the compensation for the loss suffered on account of the articles not delivered, the suit giving rise to this appeal was instituted. There is no dispute about the amount of loss determined by the Court, as suffered by the plaintiffs.

The only dispute between the parties is whether the loss of goods in transit between Calcutta and Delhi was due to the misconduct and negligence of the railways or not. The Union of India, the defendant, contended that the loss occurred due to circumstances beyond the control of the railway administration.

The trial Court found that the railway wagon in which the consignment was loaded had been thereafter properly rivetted and sealed at Howrah, that the seals and rivet of one door of the wagon found open when the train which left Howrah at 1-30 A.M., on 1st October, 1949, reached Chandanpur Station at 3-15 A.M., the same night, the train having stopped for 15 minutes at the Howrah Burdwan Link for the home signal at 2-05 A.M., and that the Railway Protection Police escorted the train. The High Court accepted these findings and they are not questioned.

The trial Court, however, found that the precaution taken of posting Railway Protection Police in a goods train, in view of the frequent thefts in running trains between Howrah and Chandanpur, amounted to the railways taking proper care of the goods delivered to them as carriers and that therefore the railways were not guilty of any negligence or misconduct. It was of the view that the Railway Protection Police which usually travelled in the guard's van, could not possibly know what was happening in the wagons at the other end or in the middle of the train during the journey. It therefore dismissed the suit.

On appeal, the High Court held the railways responsible for the loss which, in its view, was due to its negligence and misconduct inasmuch as there was no evidence on record that the Railway Protection Police took any precautions to see that nobody interfered with the train when for 15 minutes at the Howrah-Burdwan Link at night, there was no other arrangement for watch and ward at the Link. There was no evidence as to what was the strength of the Railway Protection Police or to show that it did stir out of the train to see that the wagons were not interfered with. It therefore concluded that the servants of the railway were negligent and did nothing to see that opportunities for theft were eliminated as far as possible, that the railway administration was responsible for the negligence of its employees as it could act through its employees and that therefore the loss of goods was due to the misconduct and negligence of the railways. It therefore reversed, the degree of the trial Court and decreed the plaintiff's suit for the amount of loss held suffered by the plaintiffs. It is this decree against which the Union of India has obtained the certificate of fitness for appeal from the Punjab High Court and has preferred this appeal.

There is no evidence on record that the Railway Protection Police which escorted the train was adequate in strength for the purpose of seeing that the goods were not interfered with in transit. In fact, the defendants did not allege in their written statement that any Railway Protection Police escorted the train. The presence of the Railway Protection Police with the train was just deposed to by Chatterjee, D.W. 10, the then Assistant Station Master at Chandanpur Railway Station. He did not mention that fact in any of his messages or memorandum in which he simply mentioned the presence of the Railway Protection Police at the time of re-sealing the wagon. He stated in cross-examination that he did not remember from memory the events of the occurrence at Chandanpur Station on 1st October, 1949, and was making his statement on the basis of the record before him. However, both the Courts below have recorded the finding that Railway Protection Police did escort the train. There is no evidence as to why the police force could not see to the non-interference with the wagons when the train halted at the Link where, according to the Courts below, the thieves probably got at the wagon and tampered with its seal and rivets. In the absence of any evidence about the strength of the Railway Protection Police, contention of the appellant that the force was adequate cannot be accepted.

It may be true that any precautions taken may not be always successful against the loss in transit on account of theft, but in the present case there is no evidence with respect to the extent of the precautions taken and with respect to what the Railway Protection Police itself did at the place where the train had to stop. We cannot accept the contentions that the Railway Protection Police could not have moved out of the guard's van due to the uncertainty of the stoppage of the train at

the signal. It was the job of its members to get down on every stoppage of the train and to keep an eye at the various wagons, as best as they could. There could be no risk of the train leaving them on the spot suddenly. They could climb up when the train was to move. The wagon in which the plaintiff's goods were, was in the centre of the train. It was the 29th carriage from the other end. It must be taken to be the duty of the Railway Protection Police to get out of the guard's van whenever the train stops, be it at the railway platform or at any other place. In fact, the necessity to get down and watch the train when it stops at a place other than a station is greater than when the train stops at a station, where at least on the station side there would be some persons in whose presence the miscreants would not dare to tamper with any wagon and any tampering to be done at a station is likely to be on the off side.

The responsibility of the railways under section 72 of the Indian Railways Act is subject to the provisions of section 151 of the Indian Contract Act. Section 151 states that in all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. Needless to say that an ordinary person travelling in a train would be particular in keeping an eye on his goods especially when the train stops. It is not therefore imposing a higher standard of care on the railway administration when it is said that its staff, and especially the Railway Protection Police specially deputed for the purpose of seeing that no loss takes place to the goods, should get down from the wagon and keep an eye on the wagons in the train in order to see that no unauthorized person gets at the goods.

We are therefore of opinion that the finding of the High Court that the loss took place due to the negligence of the railway servants and, consequently, of the railway administration, is justified.

We therefore dismiss the appeal with costs.

K.L.B.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, K. SUBBA RAO, J. C. SHAH, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Madan Gopal

\* .. *Appellant\**

v.

The State of Punjab and others

.. *Respondents.*

*Constitution of India (1950), Article 311—Temporary public servant—Services liable to termination on notice of one month—But Authority framing a charge-sheet and conducting enquiry—Termination on the ground of the proof of misdemeanour—No compliance with Article 311 if no reasonable opportunity is given to show cause against the action.*

It is settled that the protection of Article 311 (2) of the Constitution applies as much to a temporary public servant as to permanent public servants.

The employee was a temporary public servant and his employment was liable to be terminated by notice of one month without assigning any reason. The Authorities did not act in exercise of this authority. The employee was served with a charge-sheet setting out his misdemeanour, an enquiry was held in respect of the alleged misdemeanour and his employment was terminated because in the view of the Authorities the misdemeanour was proved. Such a termination amounted to casting a "stigma affecting his future career". By virtue of Article 311 of the Constitution the employee was not liable to be dismissed or removed from service until he had been given reasonable opportunity to show cause against the action proposed to be taken in regard to him. If he was given no such opportunity there in no compliance with Article 311 of the Constitution.

Appeal from the Judgment and Order dated the 28th October, 1958 of the Punjab High Court in L.P.A. No. 72 of 1958.

*N. N. Keswani*, Advocate, for Appellant.

*N. S. Bindra*, Senior Advocate (*P. D. Menon*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

*Shah, J.*—The appellant Madan Gopal was appointed an Inspector of Consolidation by order dated 5th October, 1953 of the Settlement Commissioner of the Patiala and East Punjab States Union. The appointment was “on temporary basis and terminable with one month’s notice”. On 5th February, 1955, the appellant was served with a charge-sheet by the Settlement Officer, Bhatinda that he (the appellant) had received Rs. 150 as illegal gratification from one Darbara Singh and had demanded Rs. 30 as illegal gratification from one Ude Singh. The appellant was called upon to show cause why disciplinary action should not be taken against him if the allegations in the charge-sheet were proved. The appellant submitted his explanation to the charge-sheet. On 22nd February, 1955, the Settlement Officer submitted his report to the Deputy Commissioner, Bhatinda, that the charge relating to receipt of illegal gratification from Darbara Singh was proved. The Deputy Commissioner by order dated 17th March, 1955 ordered that the services of Madan Gopal, Inspector be terminated forthwith and that in lieu of notice he will get one month’s pay as required by the Rules.

The appellant requested the Deputy Commissioner to review the order, and also submitted a memorial to the Minister for Revenue affairs. Having failed to obtain relief, the appellant applied to the High Court of Pepsu for a writ under Article 226 of the Constitution quashing the order dated 17th March, 1955 on the ground *inter alia* that the order of dismissal from service was in contravention of Article 311 of the Constitution as no reasonable opportunity to show cause against the order of dismissal was at all given. He also challenged the authority of the Settlement Officer to hold the enquiry and submitted that the procedure followed by that Officer in making the enquiry was irregular. The petition was transferred to the High Court of Punjab on the re-organization of the State of Punjab.

Bishan Narain, J., who heard the application issued the writ prayed for, because, in his view, the order of termination of employment was in the nature of an order of punishment and as the provisions of Article 311 (2) had not been complied with by the Enquiry Officer, the Deputy Commissioner or the Settlement Commissioner, the order was invalid. In appeal under the Letters Patent, the order was reversed by a Division Bench of the High Court. The High Court held that the appellant was a temporary servant and had no right to hold the post he was occupying and by the impugned order the appellant was not dismissed or removed from service, but his employment was terminated in exercise of authority reserved under the terms of employment, and no penalty was imposed upon the appellant.

The appellant was a temporary employee, and his employment was liable to be terminated by “notice of one month” without assigning any reason. The Deputy Commissioner however, did not act in exercise of this authority: the appellant was served with a charge-sheet setting out his misdemeanour, an enquiry was held in respect of the alleged misdemeanour and his employment was terminated because in the view of the Settlement Officer—with which view the Deputy Commissioner agreed—the misdemeanour was proved. Such a termination amounted to casting a “stigma affecting his future career”. In *State of Bihar v. Gopi Kishore Prasad*<sup>1</sup>, the learned Chief Justice in dealing with cases of termination of service or discharge of public servant on probation set out five propositions of which the 3rd is enunciated thus :

“But, if instead of terminating such a person’s service without any enquiry, the employer chooses to hold an enquiry into his alleged misconduct, or inefficiency, or for some similar reason, the termination of service is by way of punishment, because it puts a stigma on his competence and thus affects his future career. In such a case, he is entitled to the protection of Article 311 (2) of the Constitution.”

It is true that in that case the Court was dealing with the case of a public servant on probation whereas the appellant was a temporary employee, but, in principle, it will make no difference whether the appellant was a probationer or a temporary employee. The appellant had been served with a charge-sheet that he had received illegal gratification from one person and had demanded illegal gratification from another. The appellant was given an opportunity to make his defence and it appears that witnesses in support of the charge and in defence were examined before the Settlement Officer. The Settlement Officer reported that on the evidence he was satisfied that the appellant had received Rs. 150 as illegal gratification and that the appellant did not "enjoy good reputation and was a person of doubtful integrity". It is now well-settled that the protection of Article 311 (2) of the Constitution applies as much to a temporary public servant as to permanent public servants. By virtue of Article 311 of the Constitution the appellant was not liable to be dismissed or removed from service until he had been given reasonable opportunity to show cause against the action proposed to be taken in regard to him. The appellant was given no such opportunity and Article 311 of the Constitution was therefore not complied with.

Counsel appearing for the State of Punjab contended that the order dated 17th March, 1955 was not the order pursuant to which employment of the appellant was terminated, the effective order being one passed by the Settlement Officer on 30th March, 1955. No such order is however found on the record, and it appears that in the written statement filed by the State in the High Court it was expressly admitted that the employment of the appellant was terminated on 17th March, 1955. Counsel also contended that enquiry was made by the Settlement Officer for the purpose of ascertaining whether the appellant who was a temporary employee should be continued in service or should be discharged under the terms of his employment, and to a termination made pursuant to such an enquiry the protection of Article 311 (2) of the Constitution was not attracted, and in support of his submission counsel relied upon a judgment of this Court in *the State of Orissa and another v. Ram Narayan Das*<sup>1</sup>. In *Ram Narayan Das's case*<sup>1</sup>, enquiry was made pursuant to Rules governing the conduct of public servants for ascertaining whether the probation of the public servant concerned should be continued and a notice to show cause in that behalf was served upon him. On the report of the enquiry officer that the work and conduct of the public servant was unsatisfactory, an order of termination of employment was passed without affording him an opportunity of showing cause against the action proposed to be taken in regard to him. This Court pointed out that the public servant had no right to the post he occupied and under the terms of his appointment he was liable to be discharged at any time during the period of probation. It was observed that mere termination of employment does not carry with it "any evil consequences" such as forfeiture of his pay or allowances, loss of seniority, stoppage or postponement of future chances of promotion, etc., and, therefore, there was no stigma affecting the future career of the public servant by the order terminating his employment for unsatisfactory work and conduct. "The enquiry against the respondent was for ascertaining whether he was fit to be confirmed. An order discharging a public servant, even if a probationer, in an enquiry on charges of misconduct, negligence, inefficiency or other disqualification, may appropriately be regarded as one by way of punishment, but an order discharging a probationer following upon an enquiry to ascertain whether he should be confirmed, is not of that nature ..... The third proposition in the latter (*Gopi Kishore Prasad's case*)<sup>2</sup> refers to an enquiry into allegations of misconduct or inefficiency with a view, if they were found established, to imposing punishment and not to an enquiry whether a probationer should be confirmed. Therefore, the fact of the holding of an enquiry is not decisive of the question. What is decisive is whether the order is by way of punishment, in the light of the tests laid down in *Parshottom Lal Dhingra's case*<sup>3</sup>."

1. (1961) 1 S.C.J. 209 : (1961) 1 S.C.R. 605.

2. A.I.R. 1930 S.C. 689.

3. (1958) S.C.J. 217 : (1958) S.C.R. 828.

In this case the enquiry made by the Settlement Officer was made with the object of ascertaining whether disciplinary action should be taken against the appellant for his alleged misdemeanour. It was clearly an enquiry for the purpose of taking punitive action including dismissal or removal from service if the appellant was found to have committed the misdemeanour charged against him. Such an enquiry and order consequent upon the report made in the enquiry will not fall within the principle of *Ram Narayan Das's case*<sup>1</sup>.

The appeal is therefore allowed and the order passed by the High Court is set aside and the order passed by Mr. Justice Bishan Narain is restored with costs in this Court and the High Court. The State to pay the Court-fee on the memo. of appeal, etc.

V.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate/Original Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, S. J. IMAM, K. SUBBA RAO, J. C. SHAH, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Sobhraj Odharmal and others

.. *Appellants \**

v.

The State of Rajasthan and others

.. *Respondents.*

*Motor Vehicles Act (IV of 1939), section 68-D—Scope—Scheme for State Undertaking operating on a route—If infringes rights of other operators whose permits are cancelled.*

The finding of the High Court that the objectors were duly served with the notice was one of fact and according to the settled practice of the Supreme Court, no interference with the conclusion of the High Court would be called for. If the objectors were duly served and they failed to appear to press their objections, they cannot seek to challenge the scheme after it is duly published and which by the statute is declared final.

Where a scheme was duly published and the permits in favour of a number of operators whose names were set out in the order were lawfully cancelled, those persons had since cancellation of the permits no fundamental right which could be infringed by the State Government plying its vehicles with or without permits issued by the Regional Transport Authority under section 42 (1) of the Motor Vehicles Act. Accordingly such operators are not entitled to have resort to the Supreme Court under Article 32 of the Constitution for protection of the alleged right.

Appeal from the Judgment and Decree, dated the 9th May, 1962 of the Rajasthan High Court in D.B. Civil Misc. Writ No. 214 of 1962 and Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

M. C. Setalwad, Attorney-General for India (R. K. Garg, D. P. Singh, S. C. Agarwala and M. K. Ramamurthi, Advocates of M/s. Ramamurthi & Co., with him), for Appellants and Petitioner.

C. K. Daphlary, Solicitor-General of India (S. K. Kapur, K. K. Jain and P. D. Menon, Advocates, with him), for Respondents (In Appeal and Petition).

The Judgment of the Court was delivered by

*Shah, J.*—Questions relating to the validity of a scheme approved by the State of Rajasthan under section 68-D of the Motor Vehicles Act IV of 1939 and its effect are raised by the appeal and the writ petition. In the appeal the validity of the scheme is challenged on the plea that the appellants were denied reasonable opportunity of being heard in support of their objections before the scheme was approved. In the writ petition it is submitted that the fundamental right of the petitioner to carry on business of a motor transport operator is infringed by the State of Rajasthan plying its buses along the route covered by the scheme without obtaining permits under section 42 (1) of the Motor Vehicles Act.

A scheme for operating a motor transport service on the Jaipur-Tonk-Deoli-Kotah route was published on 10th September, 1960 in the Rajasthan Government

<sup>1</sup>: (1961) 1 S.C.J. 209 : (1961) 1 S.C.R. 606.

\*C. A. No. 471 of 1962 with Writ Petition No. 66 of 1962.

17th September, 1962.



Gazette, by the Rajasthan State Roadways which is a State Transport Undertaking within the meaning of section 68-A (b) of the Motor Vehicles Act, 1939. Sixty-one persons, including certain holders of stage carriage permits authorising them to ply stage carriages on the route, lodged objections to the scheme with the Secretary, Government of Rajasthan, Transport Department, Jaipur, within the period prescribed. The objections were heard by the Legal Remembrancer of the State and were rejected by order, dated 2nd February, 1961. The scheme was then approved by the State Government and was published under section 68-D of the Motor Vehicles Act and Rule 8 of the Rajasthan State Road Transport Service (Development) Rules, 1960. Some holders of stage carriage permits applied under Articles 226 and 227 of the Constitution to the High Court of Rajasthan for the issue of writs cancelling the scheme. The High Court by order, dated 3rd May, 1961 allowed the petition and set aside the scheme. The operative part of the order, in so far as it is material, was as follows :

“ The approval of Scheme ‘ B ’ Jaipur-Kotah by the Legal Remembrancer is quashed and he is directed to decide the objections of the permit holders of Jaipur-Chaksu-Niwai-Banasthali-Tonk-Deoli route in accordance with the observations made above. The Notification of the State Government publishing the scheme is also set aside.”

Thereafter the Legal Remembrancer sent individual notices by registered post pre-paid and addressed to all the sixty-one objectors fixing 26th June, 1961 for hearing objections, and also published in the State Government Gazette a general notice to that effect. Out of sixty-one notices dispatched, thirteen were duly received by the addressees and thirty-nine were returned unserved : about the remaining nine notices no intimation was received from the Postal Department till 19th June, 1961. The Legal Remembrancer commenced hearing the objections. The proceeding lasted from June, 1961 to March, 1962. There were fifteen hearings, at which evidence was recorded and oral arguments were heard. The Legal Remembrancer by his order, dated 23rd March, 1962 approved the scheme subject to certain modifications. The scheme as approved was then published on 2nd April, 1962 in the Government Gazette. On 3, 4th May, 1962 the Secretary, Regional Transport Authority, Jaipur, issued an order declaring that the State Road Transport Service shall commence to operate from 15th May, 1962 on the route specified in the scheme as mentioned in Rule 2 and directed that fifty-five permits described in the order do stand cancelled. Pursuant to the scheme the State Transport Undertaking commenced operating its vehicles upon the route without obtaining permits under section 42 (1) of the Motor Vehicles Act. Subsequently, applications were submitted to the Regional Transport Authority for permits and the same were granted to the State Transport Undertaking on 28th July, 1962.

In the meantime, sixteen persons—who will be hereinafter referred to collectively as appellants—claiming that they had not received notice of the proceedings before the Legal Remembrancer after the scheme was quashed by the High Court of Rajasthan and the proceedings were remanded, applied to the High Court under Articles 226 and 227 of the Constitution for writs of *certiorari* quashing the order of the Legal Remembrancer, dated 23rd March, 1962 and all proceedings after 31st May, 1961 regarding the scheme of nationalisation of Road Transport Service on the route in question, and the scheme published in the Rajasthan Government Gazette on 2nd April, 1962, and writs of prohibition restraining the State of Rajasthan, the Regional Transport Authority, the Legal Remembrancer and the Rajasthan State Transport Undertaking from implementing the scheme and further restraining the Transport Authorities from cancelling their permits for plying vehicles on the route and restraining the Regional Transport Authority from granting permits to the Rajasthan State Transport Undertaking in pursuance of the impugned scheme. The appellants also claimed a declaration that clause (4) of rule 7 of the Rajasthan State Transport (Development) Rules, 1960 and the public notice, dated 30th May, 1961 published in the Rajasthan Government Gazette, dated 31st May, 1961 “ were illegal, null and void and *ultra vires* ” and a declaration that the proceeding before the Legal Remembrancer was taken without affording any real opportunity to the appellants to produce their evidence and without hearing their objections in accordance with law.

It was urged by the appellants, *inter alia*, that as only thirteen objectors were served and the remaining forty-eight were not served with notice of hearing, the proceeding commenced before the Legal Remembrancer, relying upon the presumption of due service under clause (4) of rule 7, was illegal. The High Court, without issuing rule upon the State and the Transport Authorities, dismissed the petition, holding that rule 7 (4) was not *ultra vires* the Motor Vehicles Act, and that it was difficult, on the material placed before the Court, to hold that the Legal Remembrancer had not in fact determined the question of regularity of service of notice upon the objectors before he commenced hearing the objections.

Against the order dismissing the petition Appeal No. 471 of 1962 has been filed by the appellants in this Court. A petition has also been filed by one of the appellants in this Court under Article 32 of the Constitution for a writ of *mandamus* restraining the State of Rajasthan, the Rajasthan State Transport Undertaking and the Regional Transport Authority, Jaipur Region, from "commencing their transport service" and from interfering with the right of the petitioner in the exercise of his right to ply stage carriages on that route under a permit issued by the Regional Transport Authority and which was, as originally granted, valid upto 30th November, 1963. The petitioner also prayed for a writ or direction quashing the resolution passed by the Regional Transport Authority on 3, 4th May, 1962 purporting to cancel his permits without issuing valid permits to the State Transport Undertaking. The principal ground in support of the petition was that the State of Rajasthan and the State Transport Undertaking could not commence to ply their vehicles on the route without obtaining valid permits under section 68-F and section 42 (1) of the Motor Vehicles Act.

By section 68-C of the Motor Vehicles Act (IV of 1939) a State Transport Undertaking, if it be of the opinion as to certain matters specified in the section, is authorised to prepare a scheme giving particulars of the nature of the service and the area of route to be covered thereby, and to publish it in the Government Gazette and in such manner as the State Government may direct. Persons affected by the scheme may lodge objections to the scheme within the period prescribed. The objections are thereafter heard by the State Government after giving opportunity to the objectors to support them. The State Government may, thereafter, approve or modify the scheme, and the scheme so approved or modified when published in the Official Gazette becomes final. Section 68-F (1) requires the Regional Transport Authority, notwithstanding anything to the contrary contained in Chapter IV, to issue permits to the State Transport Undertaking for plying vehicles when that Undertaking applies for permits in pursuance of an approved scheme. Sub-section (2) of section 68-D provides that for the purpose of giving effect to the approved scheme in respect of a notified area or notified route, the Regional Transport Authority may, by order, refuse to entertain any application for renewal of any other permit, cancel or modify an existing permit. Section 68-I confers power upon the State Government to make Rules for the purpose of carrying into effect the provisions of Chapter IV-A and in particular for certain specific matters set out therein. The Government of Rajasthan framed under section 68-I Rules called the Rajasthan State Transport Service (Development) Rules, 1960. Rule 3 prescribed the authority which was to prepare the scheme on behalf of the State Transport Undertaking, and the matters in respect of which provisions were to be made in the scheme. Rule 4 prescribed the method of publication and Rule 5 the manner of filing objections. It was provided by clause (4) of Rule 5 that the memorandum of objection shall contain, amongst others the following information :

"(a) Full name and address of the objector on which the service of notice or order under these Rules may be made ;".

Rule 7 dealt with the procedure for consideration and disposal of objections. By clause (1) it was provided that the objections shall be considered by an officer authorised to do so by the Governor. The officer so authorised had by clause (2) to fix the date, time and place for hearing objections and to issue notice thereof to the objectors and the General Manager of the State Transport Undertaking asking

them to appear before him. Clause (3) prescribed the method of service of notice, that

“the notice under sub-rule (2) shall be sent by registered post and shall be posted at least fourteen days before the date fixed for hearing.”

Clause (4) provided that “notwithstanding anything in sub-rule (3) a general notice may also be given regarding the date, time and place of hearing of objections by publication thereof in the official Gazette and where notice has been issued in this manner, it shall be presumed that all the parties concerned have been duly intimated.” Rule 8 prescribed the form in which the approved scheme shall be published and Rule 9 provided for the consequences of publication of the scheme.

The appellants contend that they did not receive the individual notices sent to them by registered post and that they

“did not at all come to know about the hearing or the decision of the aforesaid objections by the Legal Remembrancer till the approved scheme relating to Jaipur-Tonk-Deoli-Kotah route was published in the Rajasthan Government Gazette dated 2nd April, 1962.”

Opportunity to be afforded to the objector under section 68-D (1) must of course be a reasonable opportunity : he must have advance notice of the date, time and place and designation of the authority who will hear the objections. The authority hearing the objections must therefore give notice of the date, time and place for hearing the objections. Such notice must afford reasonable opportunity to the objector to appear before the authority and substantiate his objections. On behalf of the appellants it was submitted that the notice sent by registered post which was not served because it was never tendered to the addressees, followed by publication of the notice in the Government Gazette did not amount to affording reasonable opportunity to the objectors to substantiate their objections to the scheme. It was contended that clause (4) of rule 7 which raises a presumption of service on publication of notice in the Government Gazette is invalid, because the State Government is not entitled to deprive the objectors of a reasonable opportunity of being heard by prescribing a presumption of service of notice of hearing merely from publication of the notice in the Government Gazette. But in considering this case it is unnecessary to embark upon the larger question which was canvassed at the Bar, whether notice given in the manner prescribed by clause (3), rule 7 *i.e.*, an individual notice sent by registered post followed by a general notice published in the Government Gazette must, because of the presumption contained in clause (4) of rule 7, always be considered as affording reasonable opportunity to the objectors. As already observed, sixty-one objectors had filed objections before the Legal Remembrancer in the first instance. They appeared before the Legal Remembrancer and objected to the scheme. The scheme was approved by the Legal Remembrancer but the order of the Legal Remembrancer approving the scheme was set aside by the High Court in certain petitions filed before it. It is admitted by the appellants that they knew about the proceeding commenced in the High Court challenging the validity of the scheme, and the order passed by the High Court remanding it to the Legal Remembrancer for hearing the objections. The appellants, however, contend that thereafter they did not receive any notice of the hearing pursuant to the order of remand and they did not come to know of the proceeding before the Legal Remembrancer till the scheme was published by the Government of Rajasthan. But the Legal Remembrancer was primarily the authority to be satisfied whether the objectors had adequate notice. There is nothing to show that he even relied upon the presumption of service arising from the publication of the notice under rule 7 (4). The Legal Remembrancer was apprised of the fact that individual notice was received only by thirteen individual objectors by registered post and he had manifestly to consider whether the proceeding for hearing the objections could be started. The Legal Remembrancer had, when he commenced hearing, the following matters before him, that all the objectors were aware of the proceeding before the High Court and the order passed therein, that he had directed individual notices under rule 7, clause (3) and the same were duly dispatched, that a general notice was also published in the Government Gazette, that the scheme

was an integrated scheme in respect of a route on which stage carriages were being plyed by the objectors, and the objectors were vitally interested in plying and continuing to ply their buses and the publication of the scheme constituted a serious threat to their business. It is also manifest that he had to deal with operators of motor vehicles—a class of persons—who in order to carry on efficiently their business have constantly to acquaint themselves with the State Government Gazette in which the Rules framed under the Act, the schemes, notices and the directions which the Government issue for acquiring control over road transport are published as required by the Motor Vehicles Act. There is no reference in the order sheet dated 19th June, 1961 to the presumption which arises under rule 7 (4). It appears that the Legal Remembrancer was of the opinion that those who had not been personally served with individual notices sent by registered post had still notice that the proceeding was to commence on 26th June, 1961. The inference raised by the Legal Remembrancer cannot be said to be based on no evidence. The High Court has also held that the Legal Remembrancer was satisfied about service of the notice on the objectors in accordance with law, and that in proceeding to hear the objections the Legal Remembrancer acted according to law. The finding of the High Court that the objectors were duly served with the notice was one of fact, and according to the settled practice of this Court, no interference with the conclusion of the High Court would be called for. If the objectors were duly served and they failed to appear to press their objections before the Legal Remembrancer, they cannot seek to challenge the scheme after it is duly published and which by the statute is declared final.

That brings us to the question whether any fundamental right of the petitioner in the writ petition, to carry on business was infringed by the State Transport Undertaking plying its vehicles without obtaining permits under section 42 (1). The scheme was by order dated 23rd March, 1962 of the Legal Remembrancer who was invested with authority to hear objections thereto, duly approved. The scheme so approved by the Legal Remembrancer was published in the Government Gazette, and thereby it was directed that permits of 55 operators (amongst whom is the petitioner) on the route in question shall be cancelled, and the Regional Transport Authority in exercise of the powers conferred under section 68-F (2) and in pursuance of the scheme ordered that those permits be cancelled.

Sub-sections (1) and (2) of section 68-F deal with different matters; exercise of the powers under clause (2) is not dependent upon the grant of any permits to the State Transport Undertaking. By sub-section (1) a statutory duty is imposed upon the Regional Transport Authority to grant permits to the State Transport Undertaking, if application is made in that behalf pursuant to an approved scheme. To such an application the provisions contained in Chapter IV such as sections 47, 48, 57 and allied sections will not apply. It was observed by this Court in *Abdul Gafoor v. State of Mysore and others*<sup>1</sup>,

"In order that the approved scheme may be implemented the State Transport Undertaking which is to run and operate the Transport Service under the scheme must have a permit from the Regional Transport Authority. Section 68-F (1) provides that the State Transport Undertaking will have to apply for a permit (i) in pursuance of the approved scheme and (ii) in the manner specified in Chapter IV. Once that is done, the sub-section proceeds to say 'A Regional Transport Authority shall issue such permit to the State Transport Undertaking' and this notwithstanding anything to the contrary contained in Chapter IV'. It appears clear to us that the provisions of section 57 (3) have nothing to do with these matters dealt with by section 68-F (i)

\* \* \* \* \* Under section 68-F (i) as already mentioned the Regional Transport Authority has no option to refuse the grant of the permit provided it has been made in pursuance of the approved scheme and in the manner mentioned in Chapter IV. The duty of the Regional Transport Authority on receipt of the application from the State Transport Undertaking for a permit is therefore to examine the application for itself to see whether it is in pursuance of an approved scheme and secondly whether it has been made in the manner laid down in Chapter IV. This is a duty which the Regional Transport Authority has to perform for itself and there is no question of its asking for assistance from the public or existing permit holders for Transport Services on the route. Neither for the public in general nor the permit holders has any part to play in this matter."

1. (1962) 1 S.C.R. 909 : A.I.R. (1961) S.C. 1556.

Sub-section (2) authorises the Regional Transport Authority to take action or to make orders to effectuate the scheme and to implement its directions. In *Samarth Transport Co. (P), Ltd. v. The Regional Transport Authority, Nagpur and others*<sup>1</sup> dealing with the conditions under which the power under section 68-F (2) (a) may be exercised it was observed that:

"this power does not depend upon the presentation of an application by the State Transport Undertaking for a permit. This power is exercisable when it is brought to the notice of the authority that there is an approved scheme, and to give effect to it, application for renewal cannot be entertained."

In *Kalyan Singh v. State of Uttar Pradesh and others*<sup>2</sup>, it was held that an order passed by the Regional Transport Authority under section 68-F (2) pursuant to a direction under a scheme duly approved and published is purely consequential upon the scheme, and is not open to challenge. In considering the effect of clause (2) of section 68-F it was observed in that case that

"the Regional Transport Authority was by the terms of the scheme left no discretion in the matter. It was by the scheme that the right of the appellant was restricted and if the scheme became final and binding the Regional Transport Authority had no authority to permit the appellant to ply his vehicles."

It was further observed that :

"if the right of the appellant to ply his buses is lawfully extinguished he is not entitled to maintain an appeal challenging the right of the State Transport Undertaking to ply their buses with or without permits. Nor is any fundamental right of the appellant infringed by the State Transport Undertaking plying its buses without permits, and a petition under Article 32 of the Constitution cannot be maintained unless a fundamental right of the applicant is infringed."

It was therefore held in that case that if a valid scheme contains a direction for cancellation of outstanding permits and the permits are in fact cancelled by order of the Regional Transport Authority, it is not open to the operator whose permits are cancelled to claim that the State Authority which commenced to operate its vehicles without obtaining permits under section 42 of the Motor Vehicles Act infringes the right of the operator to carry on his business. The right of the operator having been lawfully extinguished *pro tanto* by the scheme and the consequential order under section 68-F (2), he is not entitled to have resort to this Court under Article 32 of the Constitution for protection of his alleged right.

The scheme was duly published and the permits issued in favour of fifty-five operators whose names are set out in the order dated 3, 4th May, 1962 were lawfully cancelled. The objectors had since cancellation of their permits no fundamental right which could be infringed by the State Government plying its vehicles with or without permits issued by the Regional Transport Authority under section 42 (1) of the Motor Vehicles Act.

The Appeal and the writ petition therefore fail and are dismissed with costs. There will be one hearing fee.

K.S.

*Appeal and Petition dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. C. DAS GUPTA AND J. R. MUDHOLKAR, JJ.  
R. B. Diwan Badri Dass and others .. Appellants\*

v.  
The Industrial Tribunal, Punjab, Patiala and others .. Respondents.

*Industrial Disputes—Demand for same earned leave facilities for new employees as was given for old employees—Grant of—If would trespass on employer's freedom of contract.*

In industrial adjudication the doctrine of freedom of contract has to yield to the higher claims for social justice. The general question about the employer's right to manage his own affairs in the best

1. (1961) 1 S.C.J. 368 : A.I.R. (1961) S.C. 1183. 2. (1963) 1 S.C.J. 50 : A.I.R. (1962) S.C.

way he chooses cannot be answered in the abstract without reference to the facts and circumstances in regard to which the question is raised. The best course to adopt in dealing with individual disputes is to consider the facts of the case, the nature of the demand made by the employees, the nature of the defence raised by the employer and decide the dispute without unduly enlarging the scope of the enquiry.

In constitutional law the fundamental right of the individual citizen is guaranteed and its reasonable restriction is permissible in the interest of the general public. So too, in the case of industrial adjudication, the claims of the employer based on the freedom of contract have to be adjusted with the claims of industrial employees for social justice.

In respect of earned leave facilities where workmen employed before 1st July, 1956 were allowed better facilities (which they were all along enjoying) than those employed after that date (the facilities provided for the latter category being the minimum under section 79 of the Factories Act)

*Held* : It cannot be said that the Tribunal was in error in holding that in the matter of earned leave, there should be uniformity of conditions of service governing all the employees in the service of the employer in the instant case.

*Per Mudholkar, J.*—It is open to the employer to offer different and even less favourable terms to new entrants and if the new entrants entered service with their eyes wide open they cannot reasonably complain of being discriminated against. Since the employer in the instant case has provided for its new entrants such leave facilities as are recognised by the Factories Act itself as fair, it was not open to the Tribunal to revise the relevant term of contract.

No doubt, the provisions of the Industrial Disputes Act are wide enough, like those of other legislative enactments placed on the statute book, for promoting the welfare of the employees to permit an Industrial Tribunal to override the contract between an employer and his employees governing the conditions of service of the employees. But the power to interfere with a contract of service can only be resorted to in certain limited circumstances.

Appeal by Special Leave from the Award dated the 29th September 1960 of the Industrial Tribunal, Punjab, Patiala in Reference No. 13 of 1960.

*C. K. Daphtary*, Solicitor-General of India (*Bhagirath Das* and *B. P. Maheshwari*, Advocates, with him), for Appellants.

*M. K. Ramamurthi*, *R. K. Garg*, *D. P. Singh* and *S.C. Agarwal*, Advocates of *M/s. Ramamurthi & Co.*, for Respondent No. 2 (i)

The Court delivered the following Judgments :

*Gajendragadkar, J.* (for himself and *Das Gupta, J.*)—This appeal by Special Leave arises out of an industrial dispute in relation to a comparatively minor demand made against the appellants by the respondents—their employees; but in challenging the validity of the award passed by the Industrial Tribunal in favour of the respondents on that demand the learned Solicitor-General has raised a general question before us. He contends that in granting the demand made by the respondents, the award has illegitimately and unjustifiably trespassed on the appellants' freedom of contract. The appellants as employers, are entitled to fix the terms of employment on which they would be willing to employ workmen and it is open to the workmen either to accept those terms or not; industrial adjudication should not interfere in such a matter. That is the nature of the general contention which has been raised before us in the present appeal.

The facts leading to the dispute are few and they lie within a very narrow compass. The appellants are the Trustees of the Tribune Press and Paper and the Trust is being worked in accordance with the terms of the will executed by *Dayal Singh Majithia* on the 15th June, 1895. In carrying out the policy of the Trust, the five appellants have executed a Power of Attorney in favour of *Mr. R. P. Sharma* and the Press is managed and the Paper is conducted to carry out the policy laid down by the will.

It appears that before the 1st of July, 1956, for the purposes of leave, the appellants had divided their employees into two categories (1) the Lino-operators and (2) the rest of the workmen in the Press Section; and rule 57 made provision for leave on the basis of the said classification. The effect of the said rule was that no press worker other than the lino-operator was entitled to any kind of paid leave although he was given the right to claim 30 days' wages plus dearness allowance payable in January every year if he had worked for 11 months. In addition, the said press worker was entitled to quarantine leave on the terms mentioned in rule 53.

This position was substantially altered on 1st July, 1956, when the appellants framed a new rule in respect of earned leave. This rule abolished the two catego-

ries of workers on which the earlier rule 57 was based and divided the workers into two categories (i) workers who were employed on or before 1st July, 1956, (ii) those who were employed after 1st July, 1956. In respect of the former category of workmen, the new rule made the following provision :

" Subject to the provisions of the Indian Factories Act, 1948, every workman in the service of the Tribune on the 1st July, 1956 will be entitled to 30 days' leave with wages, after having worked for a period of 11 months. This leave shall cease to be earned, when it amounts to 60 days."

In regard to the workmen falling under the latter category, earned leave was to be governed by the provisions of section 79 of the Indian Factories Act. It is common ground that the provision for earned leave made by the said section is a provision for minimum earned leave which the employer is bound to give ; whether or not additional leave should be granted by way of earned leave is a matter within the discretion of the employer. As a result of the new rule, the position was that the employees who had joined the service of the appellants on or before 1st July, 1956 were entitled to 30 days' earned leave with wages, whereas those who joined after the said date became entitled to the statutory minimum of 21 days of earned leave.

At the time when this rule came into force there were 94 old employees to whom the rule applied and 27 new employees to whom by virtue of the new rule, section 79 of the Factories Act was made applicable. Gradually, new hands have also been employed and to all such new employees section 79 is applicable. It appears that by its resolution passed on the 8th January, 1960, the Tribune Employees Union sent to the Management a charter embodying about 20 demands. Attempts at conciliation were made but they failed and so, on the 4th April, 1960, eight of the said demands were referred by the Punjab Government to the Industrial Tribunal for its adjudication under section 10 of the Industrial Disputes Act. One of these demands was in relation to earned leave. The demand was that the employees in the Press Section should be allowed 30 days' earned leave with full wages for every 11 months' service without any discrimination. The Tribunal has allowed this demand and it has held that all workmen of the Press are entitled to 30 days' earned leave without making any distinction between workmen who joined before 1st July, 1956 and those who joined subsequently. It is the validity of this award which is questioned before us by the appellants.

The broad and general question raised by the learned Solicitor-General on the basis of the employer's freedom of contract has been frequently raised in industrial adjudication, and it has consistently been held that the said right is now subject to certain principles which have been evolved by industrial adjudication in advancing the cause of social justice. It will be recalled that as early as 1949, it was urged before the Federal Court in *Western India Automobile Association v. The Industrial Tribunal, Bombay*<sup>1</sup>, that the Industrial Tribunal had no jurisdiction to direct an employer to reinstate his dismissed employees and the plea made was that such a direction was contrary to the known principles which govern the relationship between master and servant. This contention was negatived by the Federal Court. Speaking for the Court, Mahajan, J., as he then was, observed that the award of the Tribunal may contain provisions for the settlement of a dispute which no Court could order if it was bound by ordinary law, but the Tribunal is not fettered in any way by these limitations. The same plea was again raised before this Court in *The Bharat Bank, Ltd. Delhi v. The Employees of the Bharat Bank, Ltd., Delhi*<sup>2</sup> and Mukherjea, J., as he then was, emphatically rejected it. " In settling the disputes between the employers and the workmen ", observed the learned Judge,

" the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or to give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace."

This view has been consistently accepted by industrial adjudication since 1949.

The doctrine of the absolute freedom of contract has thus to yield to the higher claims for social justice. Take, for instance, the case where an employer wants to exercise his right to employ industrial labour on any wages he likes. It is not unlikely that in an economically under-developed country where unemployment looms very large, for industrial work, employees may be found willing to take employment on terms which do not amount to a minimum basic wage. Industrial adjudication does not recognise the employer's right to employ labour on terms below the terms of minimum basic wage. This, no doubt, is an interference with the employer's right to hire labour; but social justice requires that the right should be controlled. Similarly, the right to dismiss an employee is also controlled subject to well recognised limits in order to guarantee security of tenure to industrial employees. In the matter of earned leave, section 79 of the Factories Act prescribes a minimum in regard to establishments to which the Act applies. In the matter of bonus which is now regarded as an item of deferred wages, industrial adjudication has evolved a formula by the working of which employees are entitled to claim bonus. We have referred to these illustrations to show how under the impact of the demand of social justice, the doctrine of absolute freedom of contract has been regulated.

It is, however, necessary to add that the general question about the employer's right to manage his own affairs in the best way he chooses cannot be answered in the abstract without reference to the facts and circumstances in regard to which the question is raised. If a general question is posed and an answer must be given to it, the answer would be both yes and no. The right would be recognised and industrial adjudication would not be permitted or would be reluctant to trespass on that right or on the field of management functions unless compelled by over-riding considerations of social justice. The right would not be recognised and would be controlled if social justice and industrial peace require such regulation. That is why we think industrial adjudication always attempts not to answer questions in the abstract in order to evolve any general or inflexible principles. The best course to adopt in dealing with industrial disputes is to consider the facts of the case, the nature of the demand made by employees, the nature of the defence raised by the employer and decide the dispute without unduly enlarging the scope of the enquiry. If in the decision of the dispute, some principles have to be followed or evolved; that must be done; but care must be taken not to evolve larger principles which would tend to pre-judge issues not directly raised in the case before the Industrial Tribunal. That is why we think we would not be justified in giving any general answer to the broad contention raised by the learned Solicitor-General before us in the present appeal.

The development and growth of industrial law during the last decade presents a close analogy to the development and growth of constitutional law during the same period in some respects. It is well-known that Article 19 of the Constitution has guaranteed fundamental rights to individual citizens and at the same time, has provided for the regulation of the said fundamental rights subject to the provisions of clauses (2) to (6) of the said article. Where a conflict arises between the citizen's fundamental right to hold property and a restriction sought to be imposed upon that right in the interest of the general public, Courts take the precaution of confining their decisions to the points raised before them and not to lay down unduly broad and general propositions. As in the decision of constitutional questions of this kind, so in industrial adjudication, it is always a matter of making a reasonable adjustment between two competing claims. The fundamental right of the individual citizen is guaranteed and its reasonable restriction is permissible in the interest of the general public; so, the claims of the interest of the general public have to be weighed and balanced against the claims of the individual citizen in regard to his fundamental right. So too, in the case of industrial adjudication, the claims of the employer based on the freedom of contract have to be adjusted with the claims of the industrial employees for social justice. The process of making a reasonable adjustment is not always easy, and so, in reaching conclusions in such a matter, it is essential not to decide more than is necessary. If industrial adjudication purports to lay



down broad general principles, it is likely to make its approach in future cases inflexible and that must always be avoided. In order that industrial adjudication should be completely free from the tyranny of dogmas or the sub-conscious pressure of pre-conceived notions, it is of utmost importance that the temptation to lay down broad principles should be avoided. In these matters, there are no absolutes and no formula can be evolved which would invariably give an answer to different problems which may be posed in different cases on different facts. Let us, therefore, revert to the facts of this case and decide whether the appellant's attack against the validity or the propriety of the award can be sustained.

In dealing with the narrow dispute presented by this appeal, it is necessary to remember that all the employees of the appellants are governed by the same terms and conditions of service, except in regard to earned leave. It is only in respect of this term and condition of service that a distinction is made between workmen employed on or before 1st July, 1956, and those employed after that date. Generally, in the matter of providing leave rules, industrial adjudication prefers to have similar conditions of service in the same industry situated in the same region. There is no evidence adduced in this case in regard to the condition of earned leave prevailing in the comparable industry in this region. But we cannot ignore the fact that this very concern provides for better facilities of earned leave to a section of its employees when other terms and conditions of service are the same in respect of both the categories of employees. It is not difficult to imagine that the continuance of these two different provisions in the same concern is likely to lead to dissatisfaction and frustration amongst the new employees. It cannot be denied that the existence of industrial peace and harmony and the continuance of the said peace and harmony are relevant factors, but their importance should not be unduly exaggerated. If a frivolous demand is made by the employees and it is accompanied by a threat that non-compliance with the demand would lead to industrial disharmony or absence of peace, it would be unreasonable to treat the threat as relevant in deciding the merits of the demand. In this connection it is necessary to remember that the continuance of harmonious relations between the employer and his employees is treated as relevant by industrial adjudication, because it leads to more production and thereby has a healthy impact on national economy, and so it is necessary that in dealing with several industrial disputes, industrial adjudication has to bear in mind the effect of its decisions on national economy. In their zest to fight for their respective claims, the parties may choose to ignore the demand of national economy, but industrial adjudication cannot. If the demand is plainly frivolous, it has to be rejected whatever the consequences may be. In the present case, the argument that the continuance of two different provisions would lead to disharmony cannot, however, be treated as frivolous. It is difficult to understand on what principle the discrimination is based. The only argument urged in support of the discrimination is the employer's right to provide for new terms of service to the new entrants in services. In our opinion, the validity of this argument cannot be accepted in the circumstances of this case.

Take the case of the wages or dearness allowance which the appellants paid to their employees. Would the appellants be justified in assertion of their right of freedom of contract to offer less favourable terms of wages or dearness allowance to employees who would be employed after a certain date? If the general point raised by the learned Solicitor-General is upheld without any qualifications, then it would be open to the employer to fix different wages for different sets of workmen who are doing the same kind of work in his concern. We have rarely come across a case where such a claim has either been made or has been upheld. It is well-known that both industrial legislation and industrial adjudication seek to attain similarity or uniformity of terms of service in the same industry existing in the same region, as far as it may be practicable or possible, without doing injustice or harm to any particular employer or a group of employers. That being so, we do not think the Tribunal was in error in holding that in the matter of earned leave, there should be uniformity of conditions of service governing all the employees in the service of the appellants.

There is another aspect of this question to which reference must be made. This is not a case in which the financial liability imposed on the employer by the award when it directed the employer to grant the earned leave of 30 days to all the employees, is very heavy ; and so, having regard to the fact that the appellants have been conducting their business in a profitable way and their financial position is distinctly good, no attempt has been made before us, and rightly, to suggest that the burden imposed by the award is beyond their means. It is not disputed that the total annual liability which may accrue as a result of the award may not exceed Rs. 1,000, and it is also common ground that the appellants are flourishing concern and their net profits which were in the neighbourhood of a lac of rupees in 1949, have shown an upward tendency and have reached almost rupees eight lacs in 1959. That is another factor which has to be borne in mind in dealing with the present dispute.

It is not suggested by the appellants that the provision made by them for earned leave in respect of old employees is unduly generous or extravagant and so, it has become necessary to invoke the provisions of section 79 of the Factories Act in respect of new employees. On the other hand, earned leave provided by section 79 is the minimum statutory leave to which employees are entitled and if the appellants thought it necessary to provide for additional earned leave to their old employees, there is no reason why they should not make a similar provision in respect of the new employees as well. We ought to add that on the record, it does appear that the appellants are good employers and they are treating their employees in a liberal manner. It, however, appears that they have brought the present dispute to this Court more for asserting the general principle of the employer's right to fix conditions of service with his new employees than for vindicating any real or substantial grievance against the award which would prejudicially affect their interest. In our opinion, having regard to the nature of the dispute raised in the present appeal and the other relevant facts and circumstances, it cannot be said that the Industrial Tribunal erred in law in directing the appellants to provide for the same uniform rule as to earned leave for all their employees. We are satisfied that the award under appeal cannot be set aside only on the academic or abstract point of law raised by the appellants.

The result is, the appeal fails and is dismissed with costs.

*Mudholkar, J.*—This is an appeal by Special Leave from the award of the Industrial Tribunal, Punjab. The appellants before us are the trustees of, "The Tribune", Ambala Cantonment and the opposite party to the appeal consists of the workmen of the Tribune through their two unions, one the Tribune Employees' Union and the other the Tribune Workers' Union.

The Trust was founded in Lahore by the late Sardar Dayal Singh Majithia on 1st February, 1881. It publishes the newspaper "Tribune". By the will of the founder dated 15th June, 1895 the Management of the Tribune was vested in the public trust in September, 1898. After the partition of India the offices of the newspaper had to be shifted from Lahore and they are now located at Ambala. The Trust naturally had to leave the entire machinery and other equipment of the Tribune Trust along with its immovable property in Lahore. The value of that property is stated by the appellants to be Rs. 25 lakhs or so. The Trust was, however, able to transfer its bank accounts and Government securities to India a few days before the partition. With the help of these assets it re-established the Tribune Press and Office at Ambala and established new machinery at a cost of Rs. 15 lakhs or so. Gradually the Trust has been able to rehabilitate its fortunes. It is not disputed before us that despite the heavy loss entailed by the Trust by reason of being uprooted from Pakistan, the employees quite a number of whom are old employees who were able to migrate to India, have been treated with a great deal of consideration. After the Tribune started making profits the employees are being given bonus every year. Moreover even before the Employee's Provident Fund Scheme applicable to newspaper industry and even before the scheme of gratuity for all categories of employees were enforced by statute the Tribune had provided for both provident

fund and gratuity to its employees. In addition to this it has provided free housing accommodation to its workmen in two colonies, one built in 1955 with the help of subsidy from the Government of India and the other in the year 1958 at a cost of Rs. 6 lakhs. The quarters in the two colonies are provided with modern sanitation. Besides that, there are extensive recreation grounds, lawns, *etc.*, in these colonies. Even electricity is supplied free to the employees. Several other amenities are also provided by the Trust. It would thus appear that the welfare of the employees has been kept prominently in mind by the trustees.

Even so, some disputes arose between the management and the employees. Ultimately eight demands made by the employees were referred by the Government of Punjab for adjudication under section 10 (1) of the Industrial Disputes Act, 1947 (XIV of 1947) to the Industrial Tribunal, Punjab, Patiala, constituted under section 7-A of the Act. Four demands were rejected by the Tribunal as having been withdrawn, one was settled amicably and on the remaining three the Tribunal has made its award. One of those three demands is ;

"Whether the employees in the Press Section should be allowed 30 days' earned leave with full wages for every 11 months' service without discrimination ?"

The Tribunal held in favour of the workmen and it is only against this part of the award of Tribunal that the trustees have come up in appeal before us. Certain facts have to be stated in connection with this demand. The Trust had framed certain rules governing the conditions of service of its employees. Rule 57 of those Rules deals with leave and reads thus :

"The Lino Operators shall be entitled to 30 days' leave of all description during the course of a calendar year, which will be with pay plus all allowances.

Press employees, other than the Lino Operators may be granted leave by the competent authority from time to time as the authority may determine. Such leave shall be without pay or allowance. They shall, however, be entitled to in the month of January every year to receive a sum amounting to the leave pay plus ordinary dearness allowance for the preceding month of December for the period of 11 months' service or to a proportionate amount for a lesser period. In addition, Press workers will be entitled to quarantine leave on the terms mentioned in rule 53."

On 1st July, 1956 a new rule was framed which read as follows :

"(1) Subject to the provisions of the Indian Factories Act, 1948, every workman in the service of the Tribune on the 1st July, 1956, will be entitled to 30 days' leave with wages, after having worked for a period of 11 months. This leave shall cease to be earned, when it amounts to 60 days.

(2) A workman joining the service of the Tribune after the 1st July, 1956 will be entitled to leave, in accordance with the provisions of section 79 of the Indian Factories Act, 1948."

Under the old rule the Lino Operators in the Press section were, however, allowed 30 days leave on full wages including dearness allowance. The other workers in the press section were, however, allowed not leave with pay, but 30 days' wages in the month of January calculated on the basis of the full wages drawn in the preceding month provided that an employee had served for a period of 11 months till the beginning of the month of January. If he had served for a lesser period he was to be paid proportionately less amount. Bearing in mind the fact that in industries leave, vacation and holidays with pay are regarded as supplemental pay practices (see *Collective Bargaining-Principles and Cases* by John T. Dunlop and James J. Healy, revised edition, page 433), in substance even the employees in the press section other than lino operators got the same money equivalent of the leave allowed to Lino Operators. It may be mentioned that these other press section employees were also entitled to take leave but the rule provided that they will not be paid any pay and allowances for such leave. That was perfectly reasonable because they got pay in lieu of paid leave for an additional period in the month of January. However, even this slight distinction in the mode of conferring benefits on the two categories of employees was abolished by the new rule which came into force on 1st July, 1956 and all employees in the press section up to that date were made eligible for the grant of 30 days' leave with wages after having worked for a period of 11 months. It may be mentioned here that the Factories Act of 1948 provided in section 79 that every worker who has worked for a period of 240 days or more in a calendar year shall be given at least one day's leave for every 20 days of service. No doubt this was the

minimum provided by the Act but since the press section is governed by the Factories Act it was open to the Trust to modify its Rules with regard to all employees of this section and grant leave according to the provisions of this section. There is no prohibition in law against doing so but still it did not wish to revise unfavourably its Rules regarding the quantum of leave to its existing employees. It, however, felt that in view of the statutory provision there was no obligation upon it to provide for a longer leave than that laid down in section 79 of the Factories Act. It was for this reason that it provided that all employees engaged on or after 1st July, 1956 will be granted leave according to the provisions of section 79 of the Factories Act, the idea being that eventually all employees should be governed by the Rules. Apparently, to forestall this consequence the employees contend that the new rule has introduced discrimination. That is why they raised a dispute relating to this matter and it was referred to the Tribunal along with the other disputes they had raised.

The Tribunal, dealing with this matter, has observed as follows :

“ It may be of some importance to note that till 1st July, 1956 the workmen who had entered service before that date and those who had been employed thereafter were, in the matter of leave compensation, treated alike. It was on 1st July, 1956 for the first time that the workmen who had been in service before that date were given 30 days' paid leave but for new entrants the number of days of that leave was reduced to that permitted by section 79 of the Factories Act. The Union's contention is that to allow 30 days' earned leave with full wages in an year to a certain group of workmen in Press section and to deny that benefit to the rest of the workmen of that section simply on the score of their having entered service after 1st July, 1956, is to acknowledge the prominent element of discrimination which has been responsible for the heartburning, resentment and dissatisfaction of the workmen. It is further urged with emphasis that all workers for the Press section should in the matter of earned leave be treated equally.

For the long space of seven years even after the Factories Act had come into force the management had continued to treat all workmen of the Press Section alike irrespective of the date of their employment. There is no reason why a distinction of a discriminatory nature and effect be made between the two artificially created sets of workmen belonging to the same section.”

It seems to me that the Tribunal's ultimate finding is vitiated by a misconception entertained by it. The first sentence in the above quotation would show that the Tribunal thought that those persons who were employed after 1st July, 1956 were treated in the matter of leave on par with those employed before 1st July, 1956 “ till 1st July, 1956 ” but were sought to be discriminated against only thereafter! It is difficult to understand how persons who were employed after 1st July, 1956 could possibly be treated before 1st July, 1956 equally with employees who were in service on that day. Apparently it is this confusion in the mind of the Tribunal which has influenced its ultimate conclusion. That apart, it is quite clear that what the Trust has done is to put in one category persons who enjoyed in substance the same kind of benefit up till the 1st of July, 1956 and permit them to enjoy the benefit they had hitherto enjoyed. Then it put in a separate category those persons who could never possibly lay any claim to have enjoyed a similar benefit because they were not its employees till 1st July, 1956 and decided that they will get leave only as provided in section 79 of the Factories Act. All persons in each category are intended to be alike and, therefore, the question of discrimination does not in fact arise. It was, in my opinion, open to the management to offer to the new entrants new terms. When the new entrants entered service accepting the new terms and knowing fully well that one of those terms, *i.e.*, the one relating to annual leave was different and less beneficial from the one which obtained in the case of the old employees, it is not reasonable for them now to say that they are being discriminated against.

The Tribunal, however, thinks otherwise. It has held that the Trust, by treating the new entrants less favourably in the matter of leave than its old employees has practised discrimination and that this discrimination has caused heartburning. Presumably, therefore, the Tribunal felt impelled to interfere and direct that the new entrants should be treated in the matter of leave on par with the old employees in order to avoid industrial unrest which may result from ‘ heartburning ’ amongst the new entrants.

What we must first consider is whether the existence of heartburning has at all been established in this case. It is said that the continuance of different provisions

in the same concern has caused heartburning, dissatisfaction and frustration among the new employees and this would lead to unrest in the industry. For one thing, there is no evidence before us to show that the new employees are making a very serious grievance of the fact that they would get a few days less of leave than the old employees. All that Mr. Ramamurthi could point out to us was the statement in the evidence of Som Nath, A.W. 7, that he should also be given 30 days' privilege leave in a year. Merely saying that he should be given privilege leave does not mean that he is harbouring bitterness in his mind. Apart from that it would be extremely unreasonable to take notice of bitterness, if any, in the minds of these new employees in regard to this matter because, as already stated, they voluntarily took up employment knowing that they would get less leave than the old employees. Som Nath's statement is no evidence of the fact that there is any heartburning. To say that the very fact that two sets of people are governed by different rules will necessarily lead to heartburning, without establishing anything more, such as inadequacy of the benefit enjoyed by one set will be to ignore that such differences are a matter of common occurrence and no reasonable person is expected to magnify their consequences. It seems to me, further, that the workers as a body did not think much of the distinction between the extent of leave enjoyed by old and new employees because during all the four years while the rule has been in force they raised no protest. No doubt they did ultimately make a protest in the year 1960 when the dispute was referred to the Tribunal. But then, this was not the sole dispute but was one of eight disputes, at least four of which were withdrawn by the Unions apparently after realising that there was no substance in them. The mere fact that they did not withdraw this dispute would not of itself indicate that they regarded it as of great importance. It may well be that they did not withdraw it in an erroneous belief that anything which is characterised as discrimination will at once earn the sympathy of Industrial Tribunals and the Courts.

Even assuming that that is creating heartburning amongst the employees the question arises whether they have a real grievance. They say that the Trust has discriminated against the new entrants and this is their grievance. In this connection it may be observed that the mere refusal or failure of an employer to treat equally all its employees doing a particular kind of work would not necessarily amount to discrimination. The subject of discrimination has come up for consideration before this Court in a large number of cases in which a complaint has been made that this equality clause of the Constitution, Article 14, has been violated. This Court has held that it is open to the State to make reasonable classification both as regards persons and as regards things. See in particular *Budhan v. State of Bihar*<sup>1</sup>; *Khandige Sham Bhat v. Agricultural Income-tax Officer and another*<sup>2</sup>; *K. Krishna Bhatta v. Agricultural Income-tax Officer and another*<sup>3</sup>. This Court has laid down that a classification made by the State will be reasonable provided that (1) it is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (2) that the differentia has a rational relation to the object sought to be achieved by the statute. In the *State of Madhya Pradesh v. Gwalior Sugar Co., Ltd.*<sup>4</sup> it has been held that it is permissible to make classification on historical grounds, by putting in one class one set of persons or things and in other all those left out from the first class. In *Ramjilal v. Income-tax Officer, Mohindargarh*<sup>5</sup> this Court has held that a taxing law may provide that a law imposing a new rate shall not apply to pending proceedings. In other words this Court has upheld the law where one rate of income-tax shall be applicable to persons whose cases were pending for assessment and another rate to persons whose cases were not so pending. Thus, this Court has held as reasonable classification made by reference to difference in time. In *Sardar Inder Singh v. The State of Rajasthan*<sup>6</sup> this Court has held that it is open to the Legislature to decide the date from which a law should be given operation and that the law made

1. (1955) S.C.J. 163 : A.I.R. 1955 S.C. 191.  
 2. (1963) 1 S.C.J. 140 : (1963) 1 I.T.J. 103.  
 3. W.P. No. 104 of 1961 decided on August 29, 1962.

4. (1962) 2 S.C.R. 619.  
 5. (1951) S.C.J. 203 : (1951) 1 M.L.J. 384 : (1951) S.C.R. 127.  
 6. (1957) S.C.J. 376 : (1957) S.C.R. 605.

by it cannot be challenged as discriminatory because it does not apply to prior transactions. Thus in this case also classification made on the basis of difference in time has been upheld. Finally in *Hathising Manufacturing Co. v. Union of India*<sup>1</sup> this Court has held that there is no discrimination if the law applies generally to all persons who come within its ambit as from the date on which it is made operative. This case likewise accepts that it will not amount to discrimination if one set of persons is treated differently from another by reference to a point of time. It would follow from these decisions that if the State as an employer provided that persons entering its service after a certain date will be governed by a set of conditions which will be different and may be, less favourable than those governing the existing entrants that law will not be open to attack under Article 14 of the Constitution on the ground that it discriminates between one set of employees and another.

In my judgment the principle laid down by this Court that reasonable classification does not amount to discrimination is of general application. Therefore, when an employer's action is challenged before an Industrial Tribunal as discriminatory the Tribunal will also have to bear it in mind. For, if an action cannot be regarded as discriminatory and violative of Article 14 of the Constitution because it is based on a reasonable classification an identical action of a private employer affecting his employees can also not be regarded as discriminatory. The content and meaning of 'discrimination', wherever the term is used must necessarily be the same and we cannot adopt one standard for judging whether an action when it emanates from the State is discriminatory or not and another standard for judging an identical action, when it emanates from a private citizen. Looked at this way, I have no doubt that the Trust has not practised what can in law be regarded as discrimination against its new entrants by allowing them lesser leave than it has allowed to its old entrants.

I may point out that it is not an unusual thing even in Government service to find new entrants being treated differently in the matter of leave, emoluments, etc., from the old entrants. It is a well-known fact that in most of the Provinces of India in the year 1932 or 1933 pay scales in various categories of Government service were revised and new scales less favourable than the old ones were introduced. Therefore, a large body of men were performing the same duties as other large body of men but were getting lesser pay than the latter. That happens often, is happening to-day in several of the recently reorganised States and may happen hereafter also. But merely because new terms of service are less favourable than the old ones, would it be correct to say that there is discrimination between the new entrants and the old entrants?

As already pointed out, it is open to the employer to offer different and even less favourable terms to new entrants and if the new entrants entered service with their eyes wide open they cannot reasonably complain of being discriminated against. Mr. Ramamurti who appears for the employees, however, contends that it is open to an employee to take up employment on the existing conditions of service and immediately start clamouring for improving his conditions of service. It is sufficient to say that without establishing that there was a change in circumstances subsequent to the time when a workman accepted service a demand for improvement in the conditions of service cannot, with justice, be entertained unless of course the original conditions of service were plainly unfair. Mr. Ramamurti does not say that the term regarding leave in the rule applicable to the new entrants is unfair in the sense that the leave allowed is inadequate. But, Mr. Ramamurti said that where a service condition causes heartburning amongst two sections of employees discontent and unrest would be its natural outcome and so it is open to the Tribunal to revise the condition and thus eliminate that discontent. I am unable to accept the argument. No doubt, the provisions of the Industrial Disputes Act are wide enough, like those of other legislative enactments placed on the statute book, for promoting the welfare of the employees to permit an Industrial Tribunal to override the contract between an employer and his employees governing the conditions of service of the employees. But it does not follow from this that no sooner a reference of a dispute is made to a Tribunal for adjudication than the contract of service ceases to have any force. The

power to interfere with the contract of service can only be resorted to in certain limited circumstances.

As has been pointed out by this Court in *State of Madras v. C. P. Sarathy and another*<sup>1</sup> the adjudication by a Tribunal is only an alternative form of settlement of disputes on a fair and just basis, having regard to the prevailing conditions of the industry. Bearing in mind this principle it would follow that it is only for securing a fair and just settlement of an industrial dispute that the Tribunal can override the contract between the parties. For deciding what is fair and just it is not enough for the Tribunal to say that a particular demand be granted for doing social justice; what it must ascertain is whether the grievance is a real one and whether it is of a type of which the employees can justly complain. In *Muir Mills Co., Ltd. v. Suti Mills Mazdoor Union, Kanpur*<sup>2</sup> it has been pointed out that social justice is a very vague and indeterminate expression and no clear-cut definition can be laid down which will cover all the situations and that the fancy of an individual adjudicator is not social justice. But, of course, that does not mean that social justice has no place in the settlement of industrial disputes. It is indeed a relevant consideration but it is well to bear in mind that doing social justice in an industrial dispute is not merely doing justice between the employer and the employee. The question of doing anything in the interest of social justice comes in when the State has a social interest in a situation or in an activity because of its repercussions on the community at large. Therefore, when the social interest of the community is involved in a situation or an activity, the interests of all parties who are affected by it have to be borne in mind, the parties being not merely the employers and the employees but also the community at large which includes also the consumers. So, where a direction in an award is sought to be sustained on the ground that it was made with the intention of promoting social justice it must be shown that the adjudicator had borne in mind also the interest of the community. This aspect of the matter has not been borne in mind by the Tribunal and, therefore, the relevant direction in its award cannot be sustained on the ground that it is actuated by the need of promoting social justice.

The ground given by the Tribunal, as already stated, is that there is discrimination and the existence of the discrimination will be a perpetual source of unrest. Granting, again, that there is discrimination it is difficult to appreciate how it can be a perpetual source of bitterness for, with the efflux of time, the old employees will gradually be fading out till at last there will be left only that category of workers to which the provisions of section 79 of the Factories Act apply.

Nor again, do I think the fact that a dispute is comparatively of minor character and that the financial burden entailed on the employer is inconsiderable, a matter which would entitle the Tribunal to alter a contract between an employer and his employees. In fact these factors are not relevant for consideration. If the leave terms offered to new employees were on their face unfair, the mere fact that the employer did not have the capacity to pay would not have been allowed to influence the determination of the issue. I would go further and say that since the Trust has provided for its new entrants such leave facilities as are recognised by the Factories Act itself as fair, it was not open to the Tribunal to revise the relevant term of the contract.

For all these reasons I am of opinion that the appeal must succeed and the award of the Tribunal should be set aside in so far as it refers to the demand made by the employees for grant of the same leave to new entrants as is being granted to old employees.

ORDER.—In accordance with the opinion of the majority, the appeal fails and is dismissed with costs.

K. S.

*Appeal dismissed.*

<sup>1</sup>. (1953) S.C.J. 39 : (1953) 1 M.L.J. 212 :  
(1953) S.C.R. 334.

<sup>2</sup>. (1955) S.C.J. 214 : (1955) 1 M.L.J. (S.C.)  
127 : (1955) 1 S.C.R. 991.

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. C. DAS GUPTA AND J. R. MUDHOLKAR, JJ.

The State of West Bengal

.. Appellant\*

v.

Tulsidas Mundhra

.. Respondents.

*Criminal Procedure Code (V of 1898), section 540—Applies also to case tried by a Magistrate under section 207-A.*

Though section 207-A of the Criminal Procedure Code suggests by necessary implication for the exclusion of the accused person's right to lead evidence, section 540 of the Code does not refer to the right of the accused person or the prosecution to lead any evidence, but deals with the Courts power to examine witnesses as Court witnesses in the interest of justice. Section 540 in terms applies at any stage of any enquiry, trial or other proceeding under the Criminal Procedure Code. This section is wide enough to include a proceeding under section 207-A and so it would be unreasonable to contend that the scheme of section 207-A makes section 540 inapplicable to the proceeding governed by section 207-A.

Appeal by Special Leave from the Judgment and Order, dated the 30th November, 1961 of the Calcutta High Court in Criminal Revision No. 1117 of 1961.

D. R. Prem, Senior Advocate (R. N. Sachthey and R. H. Dhebar, Advocates, with him), for Appellant.

A. S. R. Chari, Senior Advocate (Ravinder Narain, J. B. Dadachanji and O. C. Mathur, Advocates of M/s. J. B. Dadachanji & Co., with him), for Respondent.

The Judgment of the Court was delivered by

*Gajendragadkar, J.*—The principal point which the appellant, the State of West Bengal, has raised for our decision in the present appeal, is whether the provisions of section 540 of the Code of Criminal Procedure apply to a case tried by the Magistrate under section 207-A of the Code. That question arises in this way. On 7th July, 1960, a charge-sheet was submitted under section 173 of the Code by Inspector Bhuromal of the Special Police Establishment, New Delhi, in the Court of the Chief Presidency Magistrate, Calcutta, against Hari Das Mundhra, accused No. 1, and the respondent Tulsidas Mundhra, accused No. 2, under sections 120-B, 409 and sections 409 and 477-A of the Indian Penal Code. On the 5th August, 1960, both the accused persons appeared before the learned Chief Presidency Magistrate and furnished bail. Thereafter, the case was transferred to M. Roy, the Presidency Magistrate, 5th Court for further proceedings.

On 10th October, 1960, copies of the documents were furnished to the accused persons, and since the record was voluminous, the hearing of the case was adjourned to 7th December, 1960. On 1st March, 1961, parties were heard and in view of the nature of the offences and the amounts involved, the Magistrate took the view that the proper course to follow would be to adopt the commitment proceedings as laid down in section 207-A of the Code. Subsequently, the procedure prescribed by the said section was followed. It appears that accused No. 1 who had in the meanwhile been convicted in another case was undergoing a sentence of imprisonment in the District Jail at Kanpur and so, he could not be produced before the Magistrate until 7th July, 1961. That is why the case had to be adjourned on some occasions and effective hearings did not make a material progress until the 7th July.

On 6th July, 1961, the respondent filed a petition before the Magistrate alleging that amongst the documentary evidence sought to be relied upon against him, the writing on the cheques was in the handwriting of the respondent. The respondent disputed this allegation and prayed that he should be allowed an oppor-



tunity to examine defence witnesses to prove that the impugned handwriting was not his.

On 7th July, 1961, when the case was taken up for hearing before the Magistrate, he first considered the application made by the respondent to call defence witnesses and on the merits, he rejected the said application. Then he proceeded to make an order of commitment. In rejecting the application of the respondent for examining defence witnesses, the Magistrate took into account the fact that the application had been deliberately made at a very late stage in order to prolong the proceedings in his Court and so, that was one reason why he thought that an unconscionably delayed petition which had been made solely with the object of gaining time should not be granted. He also held that the application was misconceived. It was urged before the Magistrate that he could examine the said witnesses and in support of this argument, reliance was placed on a decision of the Bombay High Court in the case of *Arunachalam Swami and others v. State of Bombay and another*<sup>1</sup>. The learned Magistrate took the view that the said decision was distinguishable on facts. Whilst the learned Magistrate was delivering this order, an application was made before him that the respondent wanted to move the higher Court for a transfer of the case, and though the learned Magistrate felt that this application also was intended merely to prolong the proceedings in his Court, he adjourned the case because under section 526 (8) it was obligatory on him to do so. That is why he adjourned the hearing of the case to 20th July, 1961 for passing the remaining portion of the final order in case. The respondent failed to obtain from the higher Court the necessary order of transfer.

This order was challenged by the respondent by moving the Calcutta High Court in its criminal revisional jurisdiction. The High Court took the view that section 540 applied to cases tried under section 207-A and it directed the Magistrate to consider afresh whether he should summon and examine the defence witnesses mentioned by the respondent in his application of 6th July, 1961 under the provisions of the said section. Incidentally, the High Court also observed that the accused persons had not been examined under section 342 and so, it thought that an opportunity should be given to them to explain the circumstances appearing against them by asking them questions under section 342. This observation was made even though the High Court did not think it necessary to decide the general question whether in a commitment enquiry, examination of the accused under section 342 is compulsory or not. In the result, the order passed by the Magistrate on the 7th July, 1961 was set aside and the matter was sent back to his Court for disposal in accordance with law. It is against this order that the appellant has come to this Court by Special Leave and on its behalf Mr. Prem has contended that the High Court was in error in holding that section 540 of the Code applied to proceedings under section 207-A. In the alternative, he has argued that the Magistrate had himself considered the question as to whether the witnesses should be examined in the light of his powers under section 540 and so, even if his first point failed, he was entitled to contend that the High Court was not justified in sending the case back to the Magistrate. There is no point, he argues, in asking the Magistrate to consider the question once again.

There is no doubt that the new provisions under section 207-A have been introduced for the purpose of expediting the commitment proceedings so as to shorten the duration of criminal cases which are exclusively triable by the Court of Session or High Court. Section 206, *inter alia*, confers powers on the Magistrates specified in the section to commit any person for trial to the Court of Session or High Court for any offence triable by such Court. Under section 207, it is provided that in regard to a case which is triable exclusively by a Court of Session or High Court, or which, in the opinion of the Magistrate, ought to be tried by such Court, the Magistrate shall : (a) in any proceeding instituted on a Police Report follow the procedure specified in section 207-A ; and (b) in any other proceeding, follow the procedure specified in the other provisions of this Chapter. Thus, section 207-A is applicable to proceedings in respect of offences which are exclusively triable by

the Court of Session or High Court, or which, in the opinion of the Magistrate, ought to be tried by such Court. This section consists of 16 sub-sections which, in a sense, constitute a self-contained Code which has to be followed in dealing with cases under the said section. Sub-section (2) authorises the Magistrate to issue a process to compel the attendance of any witness or the production of any document or thing. Under sub-section (3), the Magistrate has to satisfy himself that the documents referred to in section 173 have been furnished to the accused and if they are not so furnished, he has to cause the same to be so furnished. Sub-section (4) then deals with the stage where the Magistrate proceeds to take evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged, and it adds that if the Magistrate is of opinion that it is necessary in the interests of justice to take the evidence of any one or more of the other witnesses for the prosecution, he may take such evidence also. By sub-section (5), the accused is given liberty to cross-examine the witnesses examined under sub-section (4). Sub-section (6) then lays down that if evidence is recorded under sub-section (4) and the Magistrate has considered all the documents referred to in section 173 and has, if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him and given the prosecution and the accused an opportunity of being heard, he shall, if he is of opinion that such evidence and documents disclose no grounds for committing the accused person for trial, record his reasons and discharge him, unless he thinks that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly. Sub-section (7) deals with a case where on considering the evidence and the documents produced and after giving opportunity to the prosecution and the accused to be heard, the Magistrate is of opinion that the accused should be committed for trial, "he shall frame a charge under his hand, declaring with what offence the accused is charged". Sub-section (8) then lays down that as soon as the charge has been framed, it shall be read and explained to the accused and a copy thereof given to him free of cost. Under sub-section (9), the accused shall be required at once to give orally or in writing, a list of the persons, if any, whom he wishes to be summoned to give evidence on his trial. There is a Proviso to this sub-section which entitles the Magistrate in his discretion to allow such list to be given later, but we are not concerned with that Proviso in the present appeal. The rest of the clauses are not relevant for our purpose.

It will thus be seen that before the Magistrate decides either to discharge the accused person, or to direct that he should be tried by himself or by any other Magistrate, or to commit him to the Court of Session or High Court, he has to consider the evidence recorded before him under sub-section (4) and the documents referred to in section 173. It is open to him to examine the accused person also if he thinks it necessary to do so for the purpose of enabling him to explain circumstances appearing against him in the evidence. He has, of course, to hear the prosecution and the accused person before making the order. The scheme of section 207-A thus does not appear to provide for a defence witness to be examined before an order is passed either under sub-section (6) or sub-section (7), and that may be because it was thought by the Legislature that in dealing with criminal cases instituted on a Police Report, it may ordinarily not be necessary to prolong provision in that behalf has been made. Even the examination of the accused section (7) also shows that the examination of the accused person is in the discretion of the Magistrate. As we have already seen, it is after the charge is framed and read and explained to the accused person under sub-section (8) that the stage is reached for him to give a list of persons whom he wants to examine under sub-section (9).

This position shows a striking contrast to the relevant provisions of section 208. Section 208 deals with cases where proceedings are instituted otherwise than on a Police Report, and it provides that when the accused person is brought before the

Magistrate, he shall proceed to hear the complainant, if any, and take all such evidence as may be produced in support of the prosecution or on behalf of the accused, or as may be called for by the Magistrate. Section 208 (3) provides, *inter alia*, that if the accused applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or thing the Magistrate shall issue such process unless, for reasons to be recorded he deems it unnecessary to do so. In other words, in regard to the proceedings tried under section 208, an accused person is entitled to lead evidence in defence and the Magistrate is bound to allow such evidence to be led, except, of course, where he comes to the conclusion that such evidence need not be led in which case he has to record his reasons for coming to that conclusion. When we consider the relevant provisions of section 207-A and contrast them with the corresponding provisions of section 208, it becomes clear that an accused person has no right to lead evidence in defence in proceedings governed by section 207-A, whereas he has a right to call for such evidence in proceedings governed by section 208.

This position, however, does not affect the question as to whether section 540 applies even to the proceedings governed by section 207-A. Section 540 gives power to the Court to summon material witness or examine a person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, and the section specifically provides that the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case. It would be noticed that this section confers on criminal Courts very wide powers. It is no doubt for the Court to consider whether its power under this section should be exercised or not. But if it is satisfied that the evidence of any person not examined or further evidence of any person already examined is essential to the just decision of the case, it is its duty to take such evidence. The exercise of the power conferred by section 540 is conditioned by the requirement that such exercise would be essential to the just decision of the case. That being so, it is difficult to appreciate the argument that the scheme of section 207-A excludes the application of section 540 to the proceedings governed by the former section. It is true that section 207-A does not give an accused person a right to lead evidence in defence, and so, he would not be entitled to make an application in that behalf; but that is very different from saying that in proceedings under section 207-A the Magistrate has no jurisdiction to examine a witness by exercising his powers under section 540. The denial to the accused person of the right to lead evidence in defence has no material bearing on the question as to whether the Magistrate can exercise his power under section 540. We do not think that the scheme of the special provisions contained in section 207-A legitimately leads to the inference that the applicability of section 540 is thereby excluded. Sometimes, if a statute contains a special or particular provision dealing with a special or particular case or topic and also includes a general provision dealing with the said special or particular topic or case as well as others, the particular or the special provision excludes the application of the general provision in respect of the topic or case covered by the former. That, however, is not the position in the present case, because section 207-A suggests, by necessary implication, for the exclusion of the accused person's right to lead evidence, whereas section 540 does not refer to the right of the accused person or the prosecution to lead any evidence, but deals with the Court's power to examine witnesses as Court witnesses in the interest of justice. Section 540 in terms applies at any stage of any enquiry, trial or other proceeding under this Code. This section is wide enough to include a proceeding under section 207-A and so, it would be unreasonable to contend that the scheme of section 207-A makes section 540 inapplicable to the proceeding governed by section 207-A. The power of the Court under section 540 can be exercised as much in regard to cases governed by section 207-A as in regard to other proceedings governed by the other relevant provisions of the Code. Therefore, we are satisfied that Mr. Prem is not justified in arguing that the Magistrate had no jurisdiction to examine witnesses as Court's witnesses even if he had held that the examination of such witnesses would be essential to the just decision of the case.

The alternative argument urged by Mr. Prem still remains to be considered. The High Court seems to have thought that in rejecting the application of the respondent for examining defence witnesses, the Magistrate took the view that he had no power to do so in the present proceedings because his jurisdiction was circumscribed by the provisions of section 207-A. That appears to be the sole basis of the decision of the High Court in reversing the order of the Magistrate and sending the proceedings back to his Court. In our opinion, the High Court was in error in assuming that the Magistrate had not considered the question on the basis of the applicability of section 540. In fact, as we have already pointed out, when the Magistrate's attention was drawn to the decision of the Bombay High Court in the case of *Arunachalam Swami and others*<sup>1</sup>, he observed that the case was distinguishable on facts; he did not say that the case was irrelevant because section 540 was inapplicable to the proceedings before him. If he had taken the view that section 540 did not apply at all, the Magistrate would obviously have said that the Bombay decision had no relevance. The reason given by the Magistrate that the case was distinguishable on facts postulates that section 540 was applicable, but, in his opinion, the particular decision was of no assistance to the respondent, having regard to the difference of facts between the case before the Magistrate and the *Bombay Case*.<sup>1</sup> Therefore, the order passed by the Magistrate cannot be successfully challenged on the ground that the Magistrate did not consider the question under section 540 of the Code.

It appears from the order passed by the learned Magistrate that he took the view that having regard to the voluminous evidence adduced by the prosecution, there was no substance in the allegation of the respondent that the evidence of the witnesses whom he proposed to examine was material or would be decisive. He has observed that the documentary evidence adduced by the prosecution was voluminous and it clearly showed a *prima facie* case against both the accused persons. In that connection, he has also commented on the conduct of the respondent. The photostat copies of the disputed cheques had been given to both the accused persons nearly nine months before 6th July, 1961. Arguments in respect of those documents were urged before the Magistrate nearly two months before the said date. At no stage was it ever suggested to the Magistrate that the respondent wanted to lead evidence to show that the writings on the cheques were not in his handwriting and that the said fact, if proved, would materially affect the prosecution case. The conclusion of the Magistrate was that the application made by the respondent was vexatious and so, was intended merely to delay the proceedings in his Court. In view of the reasons given by the learned Magistrate in rejecting the application of the respondent, it is very difficult to sustain the view taken by the High Court that the Magistrate was inclined to hold that section 540 did not apply to the proceedings in the present case.

The High Court has also referred to the fact that the accused persons have not been examined under section 342 of the Code, and it has apparently asked the Magistrate to examine the accused persons under that section, without considering the question as to whether it was necessary that the Magistrate should examine them at this stage. We have already referred to the relevant provisions of section 207-A (6). Sub-section (6) provides that the Magistrate can examine the accused if he thinks it necessary to do so. Besides, even according to the judgment of the High Court, the failure to examine the accused persons under section 342 did not amount to a material irregularity and could not by itself, therefore, justify the reversal of the order passed by the learned Magistrate.

The result is, the appeal is allowed, the order passed by the High Court is set aside and that passed by the learned Magistrate on 7th July, 1961, is restored. It is to be regretted that the proceedings taken by the respondent in the High Court and those taken by the appellant after the decision of the High Court have added to the

length of the life of this criminal case ; and so it is desirable that the Magistrate should proceed to pronounce his final orders as expeditiously as possible and the case should thereafter be tried by the Court of Session without unnecessary delay.

K.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. C. DAS GUPTA AND J. R. MUDHOLKAR, JJ.  
Babu Singh and another .. Appellants.\*

v.

The State of Punjab (In both the Appeals) .. Respondent.

*Criminal Procedure Code (V of 1898), sections 364 and 533—Scope—Recording of confessions—Non-compliance with requirements of section 364 (3)—Effect—Evidence Act (I of 1872), section 80—Applicability.*

It is desirable that Magistrates who take part in attesting recovery memos should not record confessions by persons accused of the offence being investigated.

It is necessary to emphasise that the safeguards provided by section 164 (3) and section 364 (3) of the Criminal Procedure Code are valuable safeguards intended to protect the interest of innocent persons. The recording of a confession is a solemn and serious act, and so any Magistrate who records confessions must see to it that a tone of casualness does not enter in the transaction.

Before confessions are recorded the Magistrate who records the confession should satisfy himself that the accused person's mind has been freed from fear or other complexes developed during police custody and generally 24 hours at least should be allowed to lapse before a confession is recorded. There can of course be no inflexible rule in the matter. In each case the Magistrate has to decide how much time should be given to the accused before his confession is recorded. [In the present case having regard to the fact that the accused had been kept in police custody for a long period an hours time given to them to consider whether they should make the confessions or not is wholly insufficient and unsatisfactory.]

It is open to argument whether section 80 of the Evidence Act would be available in a case where the recording of confessions is irregular in the same that section 364 (3) of the Criminal Procedure Code has not been complied with.

In the instant case as the Magistrate was not familiar with writing in Urdu the confession was recorded by a Reader who was not examined.

Appeals by Special Leave from the Judgment and Order, dated 6th March, 1962 of the Punjab High Court in Criminal Appeals Nos. 63 and 213 of 1962 and Murder Reference No. 10 of 1962.

*O. P. Rana*, Advocate (at State expense), for Appellants (In both Appeals).

*B. K. Khanna*, *R. H. Dhebar*, *R. N. Sachthey* and *P. D. Menon*, Advocates, for Respondent (In both Appeals).

The Judgment of the Court was delivered by

*Gajendragadkar, J.*—These two Criminal Appeals Nos. 121 and 140 of 1962 arise out of a criminal case in which the two appellants Babu Singh and Babu Lal were charged with having committed offences under section 302 read with sections 34 and 201 of the Indian Penal Code. The prosecution case against them was that on or about 22nd December, 1960 the two appellants murdered Mehtab Singh in furtherance of their common intention and thereby committed an offence under section 302 read with section 34. The case further was that on or about the day of the third week of January, 1961 they did cause the evidence of the said murder to disappear by burying the dead body of Mehtab Singh and thereby committed an offence under section 201 of the Code.

The victim Mehtab Singh was the father of the appellant Babu Singh and Babu Lal is the friend of Babu Singh. It appears that Mehtab Singh was living alone and that the relations between him and his son Babu Singh were not cordial. In fact

Mehtab Singh had complained to the police authorities that he apprehended danger from his son. The prosecution case as it was laid before the trial Court was that on 22nd December, 1960 the two appellants entered the house in which Mehtab Singh lived. They caught hold of Mehtab Singh while he was sleeping on a cot. Babu Singh sat on his chest and throttled him while his companion held the victim down. The dead body of the victim was then packed up in a gunny bag and concealed in a corner. Babu Singh who was familiar with the house and its contents forced open a locked trunk and removed a bag containing Rs. 1,200. With this bag the culprits left the house, Babu Singh taking care to lock the house before they left the scene of the offence. With the money thus obtained Babu Singh made several purchases. Some days later Babu Singh with the help of Babu Lal removed the dead body of his father to the house of Babu Lal, where it was put underground in a *kotha*. That in brief is the prosecution case against the appellants. The discovery of this offence was made in a somewhat unusual manner. Babu Lal was arrested in connection with another theft case, and whilst he was being interrogated in the course of the investigation of that offence he made a disclosure statement and showed his willingness to make some discoveries. He then took the police party to his house and as a result of the statement made by him the *kotha* containing the dead body of Mehtab Singh was dug up. On the same day Babu Lal made another disclosure statement as a result of which a pair of shoes, watch, radio, hundred rupees in currency notes and some other articles were found. The prosecution alleges that these goods had been purchased by Babu Singh with the money he took away after murdering his father and were kept in the house of Babu Lal.

Babu Singh who was arrested on 22nd January, 1961 made a similar disclosure statement which led to the discovery of shoes, copper trunk and purchase receipt relating to the watch.

After these discoveries were made in pursuance of the statements made by the appellants it is alleged that they expressed a desire to make confessional statements, and so they were sent to the Magistrate on 6th February, 1961. The learned Magistrate directed that they should be handed over to jail custody and accordingly they were taken to the jail. On 7th February, 1961 both the appellants were produced before the said Magistrate and their confessions were recorded. In addition to the discovery made by the investigating officer the prosecution relied on these two confessions in support of their charge against the appellants.

It also appears that on 15th January, 1961 a telegram was sent addressed to the appellant Babu Singh described as Bhola Ram from Patiala. This telegram purported to say "Mehtab Singh was seriously ill send Babu Singh". It was the prosecution case that this telegram had been deliberately sent to Babu Lal and was addressed to Babu Singh in order to conceal the commission of the principal offence of murder. It is on this material that the prosecution relied in support of its case against both the appellants in respect of the two charges already specified.

The learned trial judge has accepted this evidence and has attached no importance to the fact that the appellants retracted the confessions made by them. Accordingly he convicted both the appellants under section 302 read with section 34 as well as section 201. Babu Singh was sentenced to death for the offence of murder and to rigorous imprisonment for 7 years for the offence under section 201. Babu Lal was sentenced to imprisonment for life for the offence under section 302 read section 34 and 7 years for the offence under section 201.

The sentence of death imposed on Babu Singh was submitted to the Punjab High Court for confirmation. The two appellants also preferred appeals challenging the order of conviction and sentence passed against them by the trial Court. The High Court heard the said matters together and concurred with the view taken by the trial Court. The High Court has held that the confessions were duly recorded by the Magistrate, and that they were voluntary and true. The High Court took into account the fact that the said confessions had been retracted and so it proceeded to examine the question as to whether they were corroborated. In dealing with this

question the High Court took into account the discoveries made as a result of the statements made by the two appellants and it held that the said discoveries corroborated the two confessions. That is how the order of conviction and sentence imposed by the trial Court on the two appellants were confirmed. It is against this decision that the appellants have come to this Court by their two appeals.

Mr. Rana, for the appellants, contends that the confessions on which the prosecution relies have not been proved in this case. In the alternative he contends that having regard to the circumstances under which and the manner in which the said confessions have been recorded they should not be treated as voluntary. Unfortunately this aspect of the matter has not been considered by the High Court. The High Court has observed that the confessions were duly recorded by the Magistrate and it has held that the appellants were given enough time to consider whether they should make the confessions before the said confessions were recorded. In coming to the conclusion that the confessions had been duly recorded by the Magistrate the High Court appears to have relied on the statements made by Mr. Agnihotri, the Magistrate, in his examination-in-chief and its attention does not appear to have been drawn to the admissions made by the said Magistrate in his cross-examination. From the said admissions it is clear that in recording the said confessions the procedure prescribed by section 364 (3) of the Code has not been complied with, and that naturally raises a very important issue in the present case. It is to be regretted that though this aspect of the matter obviously arises in view of the statements made by the Magistrate in his cross-examination the High Court has not addressed itself to this point and has not noticed the defect in the recording of the said confessions and its effect before it decided to come to the conclusion that the confessions had been duly recorded and were voluntary and true.

We have already stated that the appellants were produced before the Magistrate on 6th February, 1961, and they were directed to be sent to jail custody on the evening of 6th February. On 7th February, 1961 their confessions were recorded during Court hours. When the Magistrate gave his evidence to prove these confessions he stated that the appellants were produced before him on 7th February, 1961, that he gave them one hour to consider whether they should make the confessions and then he proceeded to record the confessions in question verbatim. "I verbatim recorded," says the Magistrate, "whatever the accused stated," and he adds "the statements were read over by me to the accused and he thumb marked it after admitting the same to be correct." It is this statement on which the High Court appears to have acted in dealing with the question as to whether the confessions had been duly recorded or not. When the Magistrate was cross-examined in regard to the recording of these confessions he admitted that the confessions had in fact not been recorded by himself. The two confessions are Exhibits-PP and PQ, and he stated that they were recorded by his Ahlmad Reader. He was asked whether he remembered which confession was recorded by which Reader and he added that he could not say who wrote Exhibit-PQ or PP. The Magistrate explained why he adopted this course by saying that the statements were recorded by the Reader as a verbatim record in Urdu was required and he was not well conversant with Urdu writing. Then he was asked whether he made a separate memorandum of the statement as required by section 364 (3) and he stated that he had not made such a memorandum. He was further asked whether he remembered the sequence in which the statements were recorded and he stated he did not remember the sequence. He was asked whether he remembered where appellant Babu Singh was kept when Babu Lal made his confession and where Babu Lal was kept when Babu Singh made his confession. He stated he did not remember where the other appellant was. It would thus be seen that the confessions have not been recorded by the Magistrate in his own hand for the reason that he was not familiar with the writing in Urdu and that means that the requirements of section 364 (3) have not been complied with.

There is another aspect of the matter which would be relevant in dealing with the question as to whether the confessions can be safely taken to be voluntary in this case. It appears that the Magistrate who is an Ilaqua Magistrate of Ambala was

directed by the Additional District Magistrate to go to the Police Station at Ambala Cantonment on 22nd January, 1961 in connection with the recovery of the dead body. Accordingly, he went to the Police Station and he has attested the signatures of witnesses of the disclosure document which led to the discovery of the dead body. He was present when the statement was made by Babu Lal. He was present when the dead body was recovered and he has attested their recovery memo. He has also attested the other recovery memo, which showed the discovery of other articles made in pursuance of another statement made by Babu Lal. It is thus clear that the Magistrate who recorded the confessions had actively assisted the investigation by attesting the recovery memos which naturally play an important part in the present case. This aspect of the matter has also not been considered by the High Court.

It is unfortunate that though it was brought out in the cross-examination of the Magistrate that the confessions had not been recorded by the Magistrate himself, the prosecution did not examine the Officers of the Court who actually recorded the said confessions, nor did the trial Court call upon the prosecution to examine those witnesses. The defence examined Harbans Singh, one of the Officers who recorded the confession of Babu Lal. This witness stated that the two appellants were brought to the Court of the Magistrate and that they made their confessions on 7th February, 1961. He stated that the confession of Babu Lal was recorded first and it was he who wrote it down. Then he added that the statement of Babu Singh was recorded by Rajinder Dat Ahmad of the Court. It would thus be seen that Rajinder Dat Ahmad, who recorded the confessional statement of Babu Singh has not given evidence and Harbans Singh has given evidence as a witness for the defence. It is very much to be regretted that in a case of this kind where the appellants are charged with murder the prosecution should not have examined the scribes who actually recorded the confessions. It is conceded by the Magistrate that he was not familiar with the writing of the Urdu and that indeed is his justification for not recording the confessions himself. In such a case, it was of utmost importance that the scribes should have given evidence and an opportunity should have been given to the appellants to test by cross-examination, the prosecution claim that their confessional statements had been duly and properly recorded. That is a safeguard to which the appellants were undoubtedly entitled. That is another aspect of the matter which has to be borne in mind in dealing with the points raised before us by Mr. Rana.

If the Magistrate under whose supervision the confessions were recorded has not complied with the provisions of section 364 (3) of the Code of Criminal Procedure, can it be said that the said confessions are not proved or that the making of the confessions and their recording is vitiated so as to make them inadmissible. The decision of this question would naturally take us to three sections of the Code of Criminal Procedure. Section 164 of the Code confers power on the Magistrates specified in section 164 (1) to record statements and confessions. Section 164 (2) provides a safeguard to protect the interest of innocent persons. It lays down that such statements, meaning the statements authorised to be recorded by section 164 (1) shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in the opinion of the Magistrate, best fitted for the circumstances of the case. Then the section adds that such confessions shall be recorded and signed in the manner provided in section 364 and they shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried. It would thus be seen that sub-section (2) requires that the confessions should be recorded in the manner prescribed by section 364; that is one safeguard provided by this section. Sub-section (3) then proceeds to provide further safeguards. It lays down that the Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and it provides that when the confession is recorded after following the procedure prescribed by it the Magistrate shall make a memorandum at the foot of such record to the following effect.



When we turn to section 364 we find that sub-section (1) provides for the recording of the confession in full in the manner prescribed therein and for explaining the contents of the same to the accused in a language which he understands, and the accused shall be at liberty to explain or add to his answers. Sub-section (2) lays down that when the whole of the confession is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate, and the Magistrate shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused. Sub-section (3) is important for our purpose. It provides that in cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound as the examination proceeds to make a memorandum thereof in the language of the Court or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand and annexed to the record. It also says that if the Magistrate is unable to make a memorandum as required, he shall record the reason of such inability. It would thus be clear that if a confession is recorded not by the Magistrate himself as required by section 364 (1) it is necessary that the Magistrate should make a memorandum as the examination proceeds and the memorandum should be signed by him. It is conceded that in the present case, the confessions were not recorded as required by section 364 (1) and yet the safeguard prescribed by section 364 (3) has not been complied with. Mr. Rana contends that the failure to comply with the requirements of section 364 (3) makes the confessions inadmissible.

In dealing with this question we must consider the provisions of section 533 of the Code. It is on the provisions of this section that Mr. Khanna, for the respondent, relies. Section 533 (1) lays down that if any Court before which a confession recorded or purporting to be recorded under section 164 or section 364 is tendered or has been received in evidence finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and it adds that notwithstanding anything contained in section 91 of the Indian Evidence Act, 1872 such statement shall be admitted if the error has not injured the accused as to his defence on the merits. Mr. Khanna contends that the Magistrate has in fact given evidence in the Trial Court and the evidence of the Magistrate shows that the statement has been duly recorded; and he argues that unless it is shown that prejudice has been caused to the accused the irregularity committed by the Magistrate in not complying with section 364 (3) will not vitiate the confessions nor will it make them inadmissible. There is some force in this contention.

In this connection it would be necessary to consider section 80 of the Indian Evidence Act as well. This section provides that whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate or by any such officer as aforesaid, the Court shall presume that the document is genuine; that any statement as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken. Mr. Khanna also relies on this section in support of his argument that the confessions must be taken to be proved in the light of the evidence given by the Magistrate, and his certificates appended to the confessions. It is open to argument whether section 80 of the Evidence Act would be available in a case where the recording of the confessions is irregular in the sense that section 364 (3) has not been complied with. But for the purpose of the present appeals we are prepared to assume in favour of the prosecution that the confessions have been proved and may, therefore, be considered on the merits if they are shown to be voluntary and that is the alternative argument which has been urged before us by Mr. Rana.

Now, in dealing with the question as to whether the confessions are voluntary or not we have to bear in mind some broad features of this case. The first important circumstance on which Mr. Rana relies is that though both the appellants made discovery statements on 22nd January, and though it appears that on that date the substantial part of the investigation was really over the investigating officer kept both the appellants in police custody until 6th February. It is true that an investigating officer is entitled to keep an accused person in his custody if it is essential to do so for the purpose of investigation subject to the conditions prescribed by the Code of Criminal Procedure ; but where it appears that the investigating officer has kept an accused person in the police custody even after a substantial part of the investigation is over, the detention of the accused person in police custody is a matter which has to be borne in mind in considering the question as to whether the confessions substantially made by the accused persons are voluntary or not. That is one important fact in favour of the appellants.

The other fact which is equally important is that the appellants were produced before the Magistrate on 6th February in the evening and they were sent to jail custody. Thereafter they were brought back to the Magistrate's Court on 7th February and the Magistrate proceeded to record their confessions. In his evidence the Magistrate has stated that he gave them one hour to consider whether the confessions should be made or not. Unfortunately the record of the confessional statement does not make any endorsement to that effect. Usually, when a confession is recorded under section 364 the Magistrate makes an endorsement showing when the accused was arrested, when he was brought before him and how much time he gave him to consider whether he should make any confession or not. Amongst the many irregularities committed in the recording of this confession in this case this one also is noticed that there is no endorsement showing how much time was given to the appellants before they made their confessions. The confessions were made on 7th February and the Magistrate gave evidence in December. It is not easy to appreciate how the Magistrate could have remembered that he gave the appellants one hour's time to consider. This comment falls to be made because when the memory of the Magistrate was tested in other particulars he pleaded his inability to make any definite answer. Take for instance the question as to who recorded these confessions. That was a matter of some importance and yet the Magistrate stated that he did not remember which Reader in his Court recorded which confession. The Magistrate was also asked in what sequence the two appellants came and made their confessions. That again is a matter of some importance and the Magistrate said that he did not remember in what sequence the confessions were made. The Magistrate was asked where the other accused was when one was making the confession and he stated he did not remember. It is in the light of these admissions made by the Magistrate in respect of the other important details that we have to consider whether in the absence of any contemporaneous evidence on the record his statement that one hour was given to the appellants could be accepted without any reservations. Besides, even if we assume that one hour was given to the appellants that does not make up even 24 hours after the accused came out of police custody. This Court has always emphasised the fact that before confessions are recorded the Magistrate who records the confessions should satisfy himself that the accused persons' mind has been freed from fear or other complexes developed during police custody and generally 24 hours atleast should be allowed to lapse before a confession is recorded. There can of course be no inflexible rule in the matter. In each case the Magistrate has to decide how much time should be given to the accused before his confession is recorded. In the present case, having regard to the fact that the appellants were kept in police custody for a long period it seems to us that the time given to them to consider whether they should make the confessions or not is wholly insufficient and unsatisfactory. That is another fact on which Mr. Rana is entitled to rely.

Then we have the third unusual feature in the case and that is that the Magistrate who recorded the confessions has taken part in assisting the investigation by attesting recovery memos in two cases. Mr. Khanna contends that there is no legal prohibition against a Magistrate who has attested the recovery memos from recording a

confession. That technically may be true, but the point we are considering is not a matter of technicality ; it is a matter of propriety. The Magistrate who recorded the confessions has stated that when the appellants were brought before him he told them that he was independent of the police and that they were free either to confess or not to confess. When the Magistrate had taken active part in attesting recovery memos, to the unsophisticated appellants the claim made by him that he was independent of the police may have struck as rather subtle. It would be recalled in this connection that the Privy Council in the case of *Nazir Ahmed v. The King Emperor*<sup>1</sup> has stated that,

“in their Lordships view it would be particularly unfortunate if Magistrates were asked at all generally to act rather as police officers than as judicial persons”.

We are therefore inclined to take the view that it is desirable that Magistrates who take part in attesting recovery memos should not record confessions by persons accused of the offence being investigated. It is conceivable that the investigating department seeks the assistance of the Magistrates in the matter of investigation by requesting them to attest the recovery memos in order to give assurance and authenticity to the investigation. But if that is done care should be taken to see that for recording confessions the accused persons are sent to some other Magistrate. That is another factor which has weighed in our minds in dealing with the voluntary character of the confessions in the present appeals.

We have also been disturbed to notice that in recording the confessions the Magistrate has adopted a somewhat casual attitude. It is unnecessary to emphasise that the safeguards provided by section 164 (3) and section 364 (3) are valuable safeguards intended to protect the interest of innocent persons. The recording of a confession is a solemn and serious act, and so any Magistrate who records confessions must see to it that a tone of casualness does not enter in the transaction. Having regard to the evidence given by the Magistrate in the present case we are constrained to observe that when he got the confessions recorded in the present case he was not fully conscious of the solemnity and the seriousness of what he was doing. That is another factor which has weighed in our minds. Having regard to these features of the case we are not prepared to uphold the finding of the High Court that the confessions made by the appellants can be safely treated to be voluntary in the present case. If the confessions are, therefore, excluded from consideration it is impossible to sustain the charge of murder against either of the two appellants. In a case where the charge of murder was founded almost exclusively on the confessions it was necessary that the High Court should have considered these relevant factors more carefully before it confirmed the conviction of the appellants for the offence under section 302 and confirmed the sentence of death imposed on Babu Singh. In our opinion, if the confessions are left out of consideration the charge of murder cannot be sustained. The result is the conviction of both the appellants for the offence under section 302 read with section 34 is set aside and consequently the sentence imposed on them for that offence is also set aside.

That takes us to the question whether the alternative charge under section 201 can be held proved. This charge is held established against Babu Lal substantially because of the recovery of the dead body in his house. That recovery is evidenced by a memo. made in that behalf, and the witnesses who were present at the time of the recovery have given evidence in support of the memo. The High Court has held, and we think rightly, that the circumstances under which the dead body of Mehtab Singh was recovered, the time at which it was recovered and the statement made by Babu Lal prior to the said recovery, all indicate that Babu Lal has committed the offence under section 201, Indian Penal Code. The same cannot, however, be said about the conclusion of the High Court in respect of Babu Singh. In dealing with the charge against Babu Singh under section 201, the High Court was no doubt influenced by its finding that Babu Lal was guilty under section 302/34. If that finding had been affirmed by us, there would have been no difficulty in confirming

Babu Lal's conviction under section 201, because that finding was based on the two confessions made by Babu Lal and Babu Singh. If we discard the confessions, then there is no evidence on which Babu Singh can be convicted under section 201. The recovery of certain articles purchased by him with the money alleged to have been stolen by him from the house of his father cannot, in law, justify the inference that he assisted the commission of the offence under section 201. Therefore, the conviction of Babu Singh under section 201 cannot be sustained.

It may be that Babu Singh and Babu Lal both committed the offence under section 201 and it is not unlikely that both of them were concerned with the main offence of murder. But in a criminal trial, the presumption of innocence is a principle of cardinal importance and so, the guilt of the accused must in every case be proved beyond a reasonable doubt. Probabilities however strong and suspicion however grave can never take the place of proof. That is why we are satisfied that the appeal preferred by Babu Singh must be allowed and he must be acquitted of both the offences charged under section 302/34 and section 201 and ordered to be set at liberty. Criminal Appeal No. 140 of 1962 preferred by Babu Lal partly succeeds. His conviction and sentence under section 302/34 is set aside, but his conviction under section 201 as well as the sentence of seven years imposed on him for that offence are confirmed.

K. S.

*Cr.A. No. 121 of 1962 allowed  
and Cr.A. No. 140 of 1962 partly  
allowed.*

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[SUPREME COURT.]

S. J. Imam, K. Subba Rao, Raghubar  
Dayal and J. R. Mudholkar, JJ.  
6th February, 1963.

K. M. S. Transport, Tanjore v.  
The S.R.V.S.(P) Ltd.  
C.A. No. 697 of 1962.

*Motor Vehicles Act (IV of 1939), section 47 (1) (a) (c)—High Court's Jurisdiction under Article 226 of the Constitution—Scope of certiorari—Meaning of “error of law apparent on the face of the record.”*

Referring to its earlier decisions the Court held:—The question whether the said errors are errors of law or fact cannot be posited on *a priori* reasoning but falls to be decided in each case. We do not, therefore, propose to define with any precision the concept of “error of law apparent on the face of the record” but it should be left, as it has always been done to be decided in each case.”

It has been held by this Court in *M/s. Raman & Raman Ltd. v. The State of Madras*, (1959) S.C.J. 1256 : (1959) 2 M.L.J. (S.C.) 236 : (1959) 2 An.W.R. (S.C.) 236 : (1959) M.L.J. (Cr.) 844 : (1959) Supp. 2 S.C.R. 227, that section 43-A of the Motor Vehicles Act conferred a power on the State Government to issue administrative directions, and that any direction issued thereunder was not a law regulating rights of parties. It was also pointed out that the order made and the directions issued under section 43-A of the Act cannot obviously add to, or subtract from, the consideration prescribed under section 47 thereof on the basis of which the tribunal is empowered to issue or refuse to issue a permit, as the case may be. It is, therefore, clear that any direction given under section 43-A for the purpose of considering conflicting claims for a permit by applicants can only be to enable the Regional Transport Authority to discharge its duties under section 47 of the Act more satisfactorily, efficiently and impartially.

This judgment, therefore, is an authority only for the position that a tribunal in issuing or refusing to issue a permit to an applicant would be acting within its jurisdiction notwithstanding the fact that it ignored the administrative directions given by the Government under section 43-A of the Act, provided it had come to a decision on the relevant considerations laid down in section 47 of the Act.

But the decision cannot obviously be an authority for the position that on a wrong interpretation of the administrative directions or *de hors* the said directions, a tribunal can ignore the relevant considerations laid down in section 47 of the Act or on the basis of an error of law apparent on the record wrongly refuse to decide on any of such considerations.

To the same effect is the decision of this Court in *Ayyaswami Gounder v. M/s. Soudambiga Motor Service*, (Civil Appeal No. 198 of 1962, decided on 17th September, 1962).

The last of the cases relied upon is that in *Sankara Ayyar v. Narayana Swami Naidu*, (Civil Appeal No. 213 of 1960 decided on 10th October, 1960). This Court again following the earlier decisions dismissed the appeal holding that by construing the administrative directions the Tribunal did not take irrelevant considerations or refused to take relevant considerations in the matter of issue of permits.

In all those cases the Tribunal either ignored the instructions or misconstrued them, but nonetheless decided the question of issue of permits on considerations relevant under section 47 of the Act. They are not authorities on the question whether a writ of *certiorari* would lie, where a Tribunal had on an obviously wrong view of law refused to decide or wrongly decided on a consideration relevant under section 47 of the Act, whether or not it was covered by the instructions given under section 43-A. For if on the basis of such an error of law, it refuses to decide a relevant question, the fact that the Government also issued instructions to the Tribunal to apply some objective standards in deciding such a question does not make the said question anyhow a relevant consideration under section 47 of the Act.

*B. Sen*, Senior Advocate, (*Ravinder Narain*, *O. C. Mathur* and *J. B. Dadachanji*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant.

*A. V. Viswanatha Sastri*, Senior Advocate, (*R. Gopalakrishnan*, Advocate, with him), for Respondent No. 1.

*A. Ranganadham Chetty*, Senior Advocate, (*A. V. Rangam*, Advocate, with him), for Respondents Nos. 2 and 3.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

*K. Subba Rao*, *Raghubar Dayal* and  
*J. R. Mudholkar*, JJ.  
7th February, 1963.

*The Bank of Bihar v. Mahabir Lal.*  
C.A. No. 340 of 1955.

*Negotiable Instruments Act*, (XXVI of 1881), sections 85 and 118—*Vicarious liability—Limits.*

We are therefore, of the opinion that the money not having passed into the actual custody of the Firm or that of the custody of a person who was a servant or agent of the Firm, the Firm cannot be held liable for it.

For, vicarious liability may, in appropriate cases, rest on the master with respect to his servant's acts but it cannot possibly rest on a stranger with respect to the criminal acts of a servant of another. The principle on which the master's liability for certain acts of the servants rests is that the servant, when he commits such act, acts within the scope of his authority. If the servant was not acting within the scope of his authority, the master would not be liable and it is the person who did the particular act, that is, the servant, would alone be liable. If a third party sustains damage or loss by reason of an act of the servant he can hold the servant liable and also if the servant's act falls within the scope of his duties or authority, the master as well. That principle can obviously have no application for founding a liability against a stranger from whom the servant can in no sense be regarded as deriving any authority. We are, therefore, clear that whether the money had been misappropriated, by the Potdar or by the Manager, it is the Bank who is their employer that must bear the loss. The drawers of the cheque, that is, the firm to whom no part of the money was paid by the Bank cannot be held liable to make it good to the Bank.

*Sarjoo Prasad*, Senior Advocate, (*R.C. Prasad*, Advocate, with him), for Appellant

*N. C. Chatterjee*, Senior Advocate (*M. K. Ramamurthi*, *R. K. Garg*, *S. C. Agarwala* and *D. P. Singh*, Advocates, for *M/s. Ramamurthi & Co.*, with him), for Respondent No. 1.

G.R.

*Appeal dismissed*

[SUPREME COURT.]

*S. K. Das*, *A. K. Sarkar* and  
*N. Rajagopala Ayyangar*, JJ.  
11th February, 1963.

*The State of Punjab v*  
*Mst. Qaisar Jehan Begum*  
C.A. No. 592 of 1961

*Land Acquisition (I of 1894) section 18—What amounts to knowledge of the award—Conflict of decisions by the various High Courts.*

It seems clear to us that the ratio of the decision in *Raja Harish Chandra Raj Singh v. The Deputy Land Acquisition Officer and another*, (1962) 1 S.C.J. 696: (1962) 2 M.L.J. (S.C.) 10 : (1962) 2 An.W.R. (S.C.) 10 : (1962) 1 S.C.R. 676, is that the party affected by the award must know it, actually or constructively, and the period of six months will run from the date of that knowledge. Now knowledge of the award does not mean a mere knowledge of the fact that an award has been made. The knowledge must relate to the essential contents of the award. These contents may be known either actually or constructively. If the award is communicated to a party under section 12 (2) of the Act, the party must be obviously fixed with knowledge of the contents of the award whether he reads it or not. Similarly when a party is present in

Court either personally or through his representative when the award is made by the Collector, it must be presumed that he knows the contents of the award. Having regard to the scheme of the Act we think that knowledge of the award must mean knowledge of the essential contents of the award.

Referring to the decision of the Bombay High Court in I.L.R. 30 Bombay 275 and of the Allahabad High Court in I.L.R. 52 Allahabad 96 the Court observed "there is thus a marked conflict of judicial opinion on the question. This conflict, we think, must be resolved in a more appropriate case on a future occasion."

*R. Ganapathy Iyer and R. N. Sachthey, Advocates, for Appellant.*

*S. P. Sinha, Senior Advocate, (Shaukat Hussain, Advocate, with him), for Respondent No. 2.*

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

*P.B. Gajendragadkar, K.N. Wanchoo,  
M. Hidayatullah, K.C. Das Gupta and  
J.C. Shah, JJ.  
11th February, 1963.*

*Janapareddy Latchan Naidu v.  
Janapareddy Sanyasamma.  
C.A. No. 194 of 1961.*

*Decree for maintenance—Purchase in prior execution of property charged—Subsequent execution—Procedure—Jus in rem and a Jus ad rem.*

The short question is whether the decree must be held to be satisfied because the respondent purchased in an earlier execution one lot of properties subject to her charge for maintenance. Learned counsel for the appellant contends that the respondent must now look to the properties purchased by her for satisfaction of her claim in respect of maintenance past or future. In the alternative he contends that execution against the properties in his possession cannot proceed till the respondent has first proceeded against the properties with her. In our opinion neither proposition is correct.

In our opinion the respondent was entitled to proceed against the remaining properties in the hands of the appellant which continued charged. The Executing Court may, of course, sell only such items as may be sufficient to meet the present dues under the decree but the appellant cannot insist that the respondent should proceed against the properties acquired by her under the first sale. We express no opinion on the question whether the decree can be personally executed against the appellant because that question did not arise here.

*B. Ram Reddy, Advocate, for Appellants.*

*E. Udayarathnam, V.C. Prashar and K.R. Chaudhri, Advocates, for Respondent.*

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

*P.B. Gajendragadkar, K.N. Wanchoo,  
M. Hidayatullah, K.C. Das Gupta and  
J.C. Shah, JJ.  
11th February, 1963.*

*Girdharmal Kapur Chand v.  
Dev Raj Madan Gopal.  
C.A. No. 240 of 1961.*

*Partnership Act (IX of 1932)—Registration of the Firm on 16th August, 1946 with the Registrar of Punjab at Lahore Office—If effective after Partition of India—Forward contracts in cotton-seeds prohibited under the Defence of India Rule, 1943—Essential Supplies (Temporary Powers) Act (XXIV of 1946), section 5.*

It is argued that the Registrar of Punjab with his office at Lahore, ceased to be a Registrar under the Indian Act, when on the partition of India Lahore became part of a foreign country. So, it is said, the registration became the registration of a foreign country and thus ceased to be a registration for India. In our opinion, this argument is wholly unsound. Once there was registration under the Indian Partners : registration, in our opinion, continues to operate as regis-

[SUPREME COURT.]

P.B. Gajendragadkar, K.N. Wanchoo,  
M. Hidayatullah, K.C. Das Gupta and  
J.C. Shah, JJ.

15th February, 1963.

P.H. Kalyani. v.  
Air France, Calcutta.  
C.A. No. 419 of 1962.

*Industrial Disputes Act (XIV of 1947), section 33-A—Protected workmen—Domestic enquiry—Victimisation proved.*

In the present case the order of dismissal was passed by the Regional Representative on 28th May, 1960 and was communicated to the appellant on 30th May. The wages were offered to the appellant at the same time when the order was communicated to him, though he did not accept them. The respondent also made the application under section 33 (2) (b) to the industrial Tribunal the same day. In these circumstances we are of opinion that the Labour Court was right in holding that the application under section 33 (2) (b) was in accordance with the Proviso to that section and was properly made.

The Labour Court has held that according to the Rules framed by the Government of West Bengal as to the recognition of protected workmen there must be some positive action on the part of the employer in regard to the recognition of an employee as a protected workman before he could claim to be a protected workman for the purpose of section 33. Nothing has been shown to us against this view. In the absence therefore of any evidence as to recognition, the Labour Court rightly held that the appellant was not a protected workman and therefore previous permission under section 33 (3) of the Act would not be necessary before his dismissal.

We agree with the Labour Court that in the face of the appellant's admission of the mistakes there could be no question of victimisation in this case.

The present is a case where the employer has held an inquiry though it was defective and has passed an order of dismissal and seeks approval of that order. If the inquiry is not defective, the Labour Court has only to see whether there was a *prima facie* case for dismissal, and whether the employer had come to the *bona fide* conclusion that the employee was guilty of misconduct.

The observations therefore in Messrs. *Sasa Musa Sugar Company's case* (1960) S.C.J. 10: (1959) M.L.J. (Crl.) 981: (1959) Supp. 2 S.C.R. 836, on which the appellant relies apply only to a case where the employer had neither dismissed the employee nor had come to the conclusion that a case for dismissal had been made out. In that case the dismissal of the employee takes effect from the date of the award and so until then the relation of employer and employee continues in law and in fact. In the present case an inquiry has been held which is said to be defective in one respect and dismissal has been ordered. The respondent had however to justify the order of dismissal before the Labour Court in view of the defect in the inquiry. It has succeeded in doing so and therefore the approval of the Labour Court will relate back to the date on which the respondent passed the order of dismissal. The contention of the appellant therefore that dismissal in this case should take effect from the date from which the Labour Court's award came into operation must fail.

N.N. Keswani, Advocate, for Appellant.

C.K. Daphtary, Solicitor General of India (H.L. Anand, Advocate of M/s. Anand Das Gupta Sagar & Co., and K.B. Mehta, Advocate with him), for Respondent.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

P.B. Gajendragadkar, M. Hidayatullah and

J.C. Shah, JJ.

15th February, 1963.

*Industrial Disputes — Service Rules of the appellant, Rule 40 (1).*

The Tata Oil Mills Co Ltd. v.

The Workmen.

C.A. No. 322 of 1962.

In the present case, the Labour Court has made a definite finding in favour of the appellant that its action in terminating the services of Mr. Banerjee was not *mala fide* and did not amount to victimisation. Even so, it proceeded to examine the propriety of the said action and came to the conclusion that Mr. Banerjee's discharge from employment did not appear to it to be justified. In coming to this conclusion, the Labour Court has given some reasons which are clearly unsupportable.

On the whole, we have no hesitation in holding that the appellant acted *bona fide* in discharging Mr. Banerjee's services when it accepted Mr. Gupta's report and concurred with his conclusions that the *explanation* given by Mr. Banerjee was not satisfactory.

M.C. Setalvad, Senior Advocate (J.B. Dadachanji, O.C. Mathur and Ravinder Narain Advocates of M/S. J.B. Dadachanji & Co., with him), for Appellant.

C.K. Daphtary, Solicitor General of India, (Janardan Sharma, Advocate, with him), for Respondent No. 1.

G.R.

*Appeal allowed.*

[SUPREME COURT.]

P.B. Gajendragadkar, K.N. Wanchoo,

M. Hidayatullah, K.C. Das Gupta and

J.C. Shah, JJ.

18th February, 1963.

Ranendra Chandra Banerjee v.

The Union of India.

C.A. No. 271 of 1962.

*Constitution of India (1950), Civil Services (Classification, Control and Appeals) Rules Article 311 (2) and Rules 49 and 55-B.*

It has not been shown to us that any special provision has been made as to the appointment and conditions of employment of persons in the All-India Radio Service by or under any law for the time being in force. It cannot be said therefore that the term already mentioned, which appears in the letter of appointment issued to the appellant, is a special provision by virtue of any law or was inserted under any law for the time being in force. That term is nothing more than the usual term one finds in letters of appointment issued to persons appointed on probation. The High Court was therefore in our opinion not right in holding that rule 55-B will not apply to the appellant because of this term in the letter of appointment issued to him. We hold that rule 55-B will apply to the appellant and is not excluded by rule 3(a).

Therefore in a case covered by rule 55-B all that is required is that the defects noticed in the work which make a probationer unsuitable for retention in the service should be pointed out to him and he should be given an opportunity to show cause against the notice, enabling him to give an explanation as to the faults pointed out to him and show any reason why the proposal to terminate his services because of his unsuitability should not be given effect to. If such an opportunity is given to a probationer and his explanation in reply thereto is given due consideration, there is in our opinion sufficient compliance with rule 55-B. Generally speaking the purpose of a notice under rule 55-B is to ascertain after considering the explanation which a probationer may give, whether he should be retained or not and in such a case it would be sufficient compliance with that rule if the grounds on which the probationer is considered unsuitable for retention are communicated to him and any explanation given by him with respect to those grounds is duly considered before an order is passed. This is what was done in the present case and it cannot therefore be said that the appellant was not given the opportunity envisaged by rule 55-B. We there-

fore dismiss the appeal, though for slightly different reasons. In the circumstances there will be no order as to costs.

*K.B. Mehta*, Advocate, for Appellant.

*N.S. Bindra*, Senior Advocate, (*R.H. Dhebar*, Advocate for *R.N. Sachthey*, Advocate, with him), for Respondents.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

*K. Subba Rao*, *Raghubar Dayal* and  
*J. R. Mudholkar*, JJ.  
21st February, 1963.

*Kamla Devi v. Takhatmal*  
C.A. No. 72 of 1961.

*Displaced persons (Debts adjustment) Act (LXX of 1951)—Evidence Act (II of 1872) section 94 to 98—Construction of Surety bonds.*

In *The State of Bihar v. M. Homi*, (1955) S.C.J. 442 : (1955) 2 S.C.R. 78 this Court ruled that provisions in a surety bond which are penal in nature must be very strictly construed. This Court again in *The State of Uttar Pradesh v. Mohammad Sayeed*, (1957) S.C.R. 770 applied the strict rule of construction of a surety bond in that case. In the present case a strict construction of the bond leads to the only conclusion that a demand of the Court on the judgment-debtor and a default made by him were necessary conditions for the enforcement of the bond against the appellant.

*G. C. Mathur*, Advocate, for Appellant.

*H. N. Sanyal*, Additional Solicitor General of India, (*S. S. Shukla*, Advocate, with him), for Respondent No. 1.

G.R.

*Appeal allowed.*

[SUPREME COURT.]

*P. B. Gajendragadkar*, *M. Hidayatullah* and  
*J. C. Shah*, JJ.  
22nd February, 1963.

*Meenglas Tea Estate v. The Workmen*  
C.A. No. 359 of 1962.

*Industrial Dispute—Principles of Natural Justice.*

On the whole, it cannot be said that the Tribunal adopted an approach which made it impossible for the company to prove its case. It followed a standard which in the circumstances was prudent. We do not think that for this reason an interference is called for. Since no other point was argued the appeal of the Company in respect of the ten workmen, who were alleged to be concerned in the occurrence of 18th January, 1956, must be dismissed.

In addition, in such cases, it is not the practice of this Court to enter into evidence with a view to finding facts for itself. Following this well-settled practice we see no reason to interfere with the conclusion of the Tribunal.

*B. Sen*, Senior Advocate, *S. C. Mazumdar*, Advocate, and *D. N. Mukherjee*, Advocate for *B. N. Ghosh*, Advocate, with him), for Appellant.

*Janardan Sharma*, Advocate, for Respondents.

G.R.

*Appeal dismissed.*

THE SUPREME COURT OF INDIA:

(Original Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR, J. R. MUDHOLKAR AND T. L. VENKATARAMA AYYAR, JJ.

Kunj Behari Lal Agarwal

.. Petitioner \*

v.

The Union of India

.. Respondent.

Khem Singh and others

.. Interveners.

*Defence department—Clerical staff—Temporary Establishment service and Extra Temporary Establishment—Position of—Amalgamation—Seniority—Computation—Rules laid down by order, dated 20th April, 1955—Constitutionality—Different criteria—If discriminatory.*

(1) The two Services (the Temporary Establishment, Extra Temporary Establishment) in the Clerical staff of the Defence department had no common origin, but were recruited on different bases and originally on very different rates of pay and conditions of service ; though there was no doubt great similarity between the qualifications for recruitment and the nature of the services performed. (2) Even among the members of the two parallel Services there had been great disparities in the rate of pay and conditions of service and these had been unified within each group by separate orders therefor passed in 1945 and in 1946. Besides, as a result of the changes effected by these two orders in the two groups, a substantial amount of uniformity in the conditions of the service of each group compared with the other had also been achieved. (3) An attempt had been made to bring into a common roll members of the two services by a communication dated 14th August, 1946, and after a good deal of experiment, coagitation and correspondence that communication had been withdrawn, and the distinctness between the two services had been maintained as it originally existed by the cancellation on 15th February, 1947 of the communication dated 14th August, 1946. (4) Before 19th August, 1949 the Temporary Clerks held their employment as against sanctioned posts, while the Extra Temporary Clerks were *ad hoc* employees recruited on a temporary basis and not against any sanctioned post—permanent or temporary. Thus while the Temporary Clerks would claim to have been in the service from even before 19th August, 1949, the Extra Temporary Clerks could claim to belong to the service only from and after 19th August, 1949. In the absence of an express provision providing for a common basis of seniority based on length of service of the personnel falling under the two groups there was no intention of providing a common rule for determining seniority. The seniority of the Extra Temporary Clerks could date only from 19th August, 1949. On this basis an Extra Temporary Clerk can claim seniority only from the date on which he entered the common roll of Temporary Clerks in August, 1949 and there was no right to seniority possessed by him on the date the Constitution came into force.

The impugned order of 20th April, 1955, far from adversely affecting the rights of the petitioner conferred upon him larger rights than he previously possessed.

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

A. V. Viswanatha Sastri, Senior Advocate (*R. Gopalakrishnan*, Advocate, with him) for Petitioner and Intervener No. 3.

C. K. Daphtary, Solicitor-General of India (*R. Ganapathy Iyer* and *P. D. Menon*, Advocates, with him) for Respondent.

C. K. Daphtary, Solicitor-General of India (*Naunit Lal*, Advocate, with him) for Intervener No. 1.

A. S. R. Chari, Senior Advocate (*K. R. Chaudhuri*, Advocate, with him) for Intervener No. 2.

The Judgment of the Court was delivered by

*Rajagopala Ayyangar, J.*—The question raised in Writ Petition No. 264 of 1961 relates to the constitutionality of an order passed on April 20, 1955, by the Ministry of Defence by which, in modification of certain orders passed previously thereto, certain rules were laid down for the computation of the seniority of Clerks falling within the category of Extra Temporary Establishment Service. The petitioner was employed by the Ministry of Defence (Army Ordinance Corps) on February 26, 1942, as an Extra Temporary Establishment Clerk. The nature of this service

\* Petition No. 264 of 1961.

and its history are the matters which arise for consideration in the petition. It is the case of the petitioner that by reason of certain orders of Government which would be referred to in due course, there was an amalgamation of service known as the Non-industrial Staff in the Extra Temporary Establishment with those in another parallel service known as the Temporary Establishment and that as a result seniority in both these services had to be reckoned on the same basis, *viz.*, the date when any employee entered service. The Union Government, however, it is alleged, illegally discriminated against the Clerical personnel which were originally known as the Extra Temporary Establishment of which the petitioner was formerly a member by the order now impugned, with the consequence that persons much junior to him have superseded him and, in fact, 610 Clerks who belonged to the former Temporary Establishment had thus gained seniority over him. He has accordingly filed this petition impugning the constitutional validity of this order of Government and for a direction that his seniority be computed without reference to this order.

It will thus be seen that though the petitioner seeks relief for himself, the points involved in the petition affect the entire personnel of the Extra Temporary Establishment who would be governed by the impugned order and these are said to number nearly 6,000. It is only necessary to add that a petition for intervention seeking to support the petitioner has been allowed and we have heard Mr. Chari on behalf of the Intervener. The number of employees who would be adversely affected if the impugned order was set aside is also stated to be considerable—variously estimated from 600 to one thousand and one of this group has also intervened to resist the petition. We are stating these matters for pointing out that the question raised in the petition and its result would affect a very large number of employees of Government.

To understand the grievance of the petitioner it is necessary to set out in detail the history of the Extra Temporary Establishment Clerks in the Defence Services.

As early as 1925 Temporary Clerks came to be recruited in the Defence Establishment of the Army Ordinance Corps but the temporary hands were recruited as against sanctioned posts. The control of this service was central and they were borne on the records of the A.O.C. (Army Ordinance Corps records at Jubbalpore now transferred to Secunderabad). This state of affairs continued till about 1933 when a need was felt for recruiting a much larger establishment including Clerks than could be accommodated in the sanctioned posts. Special provision was made for enabling this additional recruitment to be effected by making rules under the Financial Regulations of India (referred to generally as FRI) by which this special recruitment was to be effected. Personnel so recruited were known as the Extra Temporary Establishment. In regard to the Service of which the petitioner was a member, the concerned clerical personnel could be recruited in the Ordinance Factories under FRI Part I, Para. 25 of 1933 on a pay not exceeding Rs. 250 per month and for a period not exceeding one year. As regards them there was no central office where their records were maintained—as in the case of the Temporary Establishment, but their records were maintained unitwise—in the office of the Director who recruited them. All such Extra Temporary Establishment personnel serving on the 31st of March of any year sanctioned for more than six months were to be regarded as technically discharged on that date and were to be re-appointed by the Director of Ordinance Factories or Director of Ordinance Services, as the case may be, under these powers, if necessary having regard to the manufacture programme for the ensuing financial year. Powers to recruit on similar terms were also conferred upon other Directors. As regards persons whose work was of a clerical nature, this rule provided that they might be recruited on daily rates of wages ranging from Rs. 1-8-0 to Rs. 3 per day, but just as in the case of the monthly paid staff, those serving on the 31st of March of any year were to be regarded as technically discharged on that date and their re-engagement for later periods had to be arranged in accordance with these rules.



After the Commencement of the Second World War the recruitment of the Extra Temporary Establishment Clerks took place in very large numbers and by a Government of India despatch, dated August 6, 1941, the Master-General of Ordinance in India was permitted to recruit for the period of the war in the Indian Army Ordinance Corps Establishments clerical staff on monthly rates of pay instead of on daily wages. They were to be of three categories—Grade A, Grade B and Grade C with differential pay and differential qualifications for recruitment and this order of the Government of India stated :

“The pay of these men will continue to be debited in the same heads of the E.T.E. (Extra Temporary Establishment) budget as at present. They will be subject to a month’s notice on either side except in the case of misconduct when they will be liable to immediate dismissal after investigation by Chief Ordinance Officers.”

A further paragraph of the same order recited :

“These Extra Temporary Clerks would not be liable to transfer from one station to another except on their own request”,

and their scales of pay having been converted from daily into monthly rates, they were debarred from making claims for overtime pay. This order of August 6, 1941, was clarified by a later order of July 25, 1942, conveying the sanction of the Governor-General in Council to the maintenance of the Extra Temporary Establishments of Clerks on two distinct terms of service : (1) on daily rates of pay, and (2) on monthly rates, the former being entitled to overtime which the latter were denied. This later order retaining the qualifications and the other conditions of service which had been prescribed for these Extra Temporary Clerks by the order, dated August 6, 1941, also provided for an appreciable improvement in the rates of monthly wages sanctioned for Grade A over those that then prevailed and instead of a minimum or starting salary of Rs. 65 provided for in the earlier order this was raised to Rs. 85 under the later.

We have already pointed out that there was a large volume of Temporary staff, as distinguished from the Extra Temporary Establishment, referred to just now which had been recruited from 1925 onwards. As regards the Temporary Establishment there appeared to have been large variations in the methods of recruitment, scales of pay, conditions of service, etc. which came in as a result of the heavy recruitment which took place after the commencement of the Second World War, when the need for a large staff in these establishments became imperative. Towards the close of the war and when it was about to end the conditions of service of the Temporary Clerks were rationalised and unified scales of pay were introduced, this being effected by Army Instructions India No. 676 of 1945 passed by the Government of India. These Instructions or decisions were to have effect from September 1, 1944. The matters specially provided for by this order of 1945 were : (1) the clerical staff were divided into three grades—A, B and C, Grade A corresponding to the Upper Division Clerks and B and C to the Lower Division. The method of recruitment to each of these grades, the educational qualifications to be satisfied and the proportions in which Grades B and A were to be filled by promotion from the grades just below were all laid down. (2) All clerks were required to undertake liability for service anywhere in India and were to be enrolled as non-combatants and for accepting this liability they were to receive an additional remuneration. (3) Their scales of pay were unified and rationalised, and house-rent allowance was made payable for personnel serving at specified places. Having thus provided for unification of the scales of pay, these Instructions made provision for persons already in service to exercise their option to be governed by the new rules, the option having to be exercised within three months from the date of the issue of the Instructions and if exercised was to be effective retrospectively from September 1, 1944 from which date, as stated earlier, the Instructions were to have effect. Having thus provided for the Temporary Clerks, the Instructions recited that

“separate orders will be issued regarding the option to elect the revised terms by the E.T.E. personnel who are serving at present on the rates of pay fixed under rule 25 F.R.I.”

—a rule whose terms we have already extracted.

Temporary Clerks had both, grade for grade, the same qualifications, were performing duties of an identical nature, were governed by practically the same service conditions and that in these circumstances it was not proper that for reckoning seniority *inter se* between members of these two Services the service of the members of the Extra Temporary Establishment before August 1, 1949 should be ignored and that it was only on the date when these persons were brought into the common pool that they should be treated as having joined the Service. These representations were considered by Government and they passed an order on April 20, 1955 in these terms :

"In modification of the orders contained in para. 5 of the above CPRO—the order dated 7th June, 1951—in so far as Clerks (ex ETE) are concerned, half of the continuous ETE service rendered by them prior to 1st August, 1949 in the grade concerned, and/or in equivalent grades, shall count for seniority in the case of those whose seniority in the amalgamated roster of ex ETE and ex ISP employees has been fixed as from 1st August, 1949. This implies that half of the period from the date of seniority amongst ETE prior to 1st August, 1949 shall also be taken into account in addition to service w.e.f. 1st August, 1949 for the purpose of fixing their seniority in the amalgamated roster. . . . . The revised seniority lists of clerical cadre will be drawn up immediately on the basis of these orders."

It is the constitutional validity of this last order that is challenged in these proceedings.

The contentions urged on behalf of the petitioner may be briefly stated thus. The Extra Temporary Clerks and the Temporary Clerks possessed the same qualifications, grade for grade, discharged the same duties, and were governed by substantially similar service conditions. While so, under the impugned order of 1955 while a Temporary Clerk has a right to have his seniority based on the length of his actual service, in the case of Extra Temporary Clerks like the petitioner, though he had been in service since 1942 that entire service is not taken into account in fixing the seniority in the amalgamated roll, but only half the period between 1942 to 1949, and so persons who entered service long after him as Temporary Clerks have now been given places of seniority above him with the result that these others are entitled to be promoted to higher grades much earlier than the petitioner. In saying this he is voicing not merely his own complaint but that of the entire class of Extra Temporary Clerks *vis-a-vis* the Temporary Clerks. The submission is that such a discriminatory treatment of one set of employees as against another rests on no valid or reasonable basis and the fact that in the case of the member of one Service his pay was debited to one head while in the case of the other to a different head—which is stated to be a justification for the differentiation, could not serve as any ground for classification and is consequently violative of the equal protection guaranteed by Article 14 of the Constitution as well as of the guarantee of equal opportunity for employment contained in Article 16 (1). In this connection learned Counsel relied on the decision of this Court in *General Manager, Southern Railway v. Rangachari*<sup>1</sup>, in which this Court held that Article 16 (1) guaranteed not merely an equality in regard to initial employment *i.e.*, recruitment but also ensured that there shall be equality throughout the length of the service including the right to promotions. It was strongly urged that the order of the Government of India of 1955 violated the rights guaranteed by these two Articles and that consequently we should strike down the order and direct Government to proceed by taking into account the actual entry into service of the petitioner and of other members of the Extra Temporary Establishment in computing their seniority *vis-a-vis* the Indian Superior Personnel in the amalgamated group of Temporary and Extra Temporary Clerks.

It was further submitted by Mr. Sastri, learned Counsel for the petitioner that no doubt, to start with, the Extra Temporary Clerks and the Temporary Clerks really formed members of different Services, so that no question of *inter se* seniority between the members of these two Services arose. By Army Instructions 676 of 1945 an uniform scale of pay and allowances was brought into effect in regard to the Temporary Clerks. Up to that stage the Extra Temporary Clerks continued to form a separate Service. These Instructions however, contemplated that an

<sup>1</sup>. (1961) 2 S.C.J. 424 : (1961) 2 M.L.J. (S.C.) S.C. 36.  
71 : (1961) 2 An.W.R. (S.C.) 71 : A.I.R. 1962

unification on similar lines would be effected of the Extra Temporary Clerks and it was in view of this contemplated result that in paragraph 3 it recited :

"Separate orders will be issued regarding the option to elect the revised terms by those E.T.E. personnel who are serving at present on the rates of pay fixed by Rule 25 F. R. I."

The promised notification was issued in 1946—Army Instructions 458 of 1946. Just as in the case of the Temporary Clerks, an option was given to the Extra Temporary Clerks to opt for the new scales and similarly when such personnel opted, the new scales were to have effect from the same date—September 1, 1944. Paragraph 7 of these Instructions of 1946 expressly provided :

"In all other respects the terms and conditions laid down in Army Instructions 676 of 1945 will apply,"

which went very near unification of the two Services. Even if, however, it be considered that the two Services of the Temporary and Extra Temporary Clerks continued as distinct Services each with its own roll of seniority, though their conditions of services were identical, the amalgamation of the two Services took place by virtue of the letter 10955 dated 14th August, 1946 from the AOC Records, Jubbalpore addressed to the other Army Establishments. We have already extracted the material portions of this order and we are therefore not repeating them. Learned Counsel's point was that by this communication of 14th August, 1946 the distinct identity of the two Services, as stated above, was done away with and there was thereafter only one Service which would necessitate a common roll being prepared for determining *inter se* seniority between Clerks in the combined roll.

It was further urged that this amalgamation or unification was brought one stage nearer accomplishment by the order of Government dated 19th August, 1949, so that on the date of the Constitution there was an unified Service comprising both the Temporary as well as the Extra Temporary Clerks. The order of the Government dated 20th April, 1955, was thus a reversal of the policy which had progressed in one direction from 1945 to 1949 and which involved as a necessary and logical corollary an amalgamated roll in which seniority was to be determined by the date of a person's entry into service and would be independent of his having been originally or historically a member of either the Temporary or the Extra Temporary Establishment. By the order now impugned the Government had deprived a large number of employees of the seniority and chances of promotion to which they were entitled before then, and the deprivation of these rights could not be justified on any reasonable or rational grounds and was therefore in violation of Articles 14 and 16 (1) of the Constitution.

No doubt, if Counsel is right in his submission that on the date the Constitution came into force, a class of employees of the Government were entitled to certain rights, the deprivation of those rights by an order passed by Government might in conceivable cases give rise to a complaint of a violation of Article 14 or Article 16 (1). The Constitution, however, is not retrospective and if before 26th January, 1950, by reason of orders passed by Government, the rights of the petitioner and those like him had become settled, the petitioner cannot invoke the constitutional guarantees under Part III of the machinery for their enforcement, for challenging the legality of the orders passed before the Constitution. The entire foundation of the argument has to be, and in fact was, that the petitioner and the Extra Temporary Clerks of whom he is one, had a right to seniority based upon their length of service at the date of the Constitution. In order to establish this Mr. Viswanatha Sastri, when he opened his case, laid great stress on the communication dated 14th August, 1946 as effecting an amalgamation between the two Services. By its terms it certainly renders such an argument possible and if the scheme contained in it continued there might be a great deal of force in the argument of learned Counsel that an unification of the two Services had been effected and that the later order of Government of 19th August, 1949 completed this process. The hurdle in the way of learned Counsel however, is that the scheme of unification contemplated by the communication of 14th August, 1946 was given up in February 1947 and this communication was formally cancelled.

The communication dated 15th February, 1947, by which that of August, 1946, was cancelled was not referred to in the petition, and when the Union of India relied on it in the counter-statement filed by it, the reply of the petitioner in his rejoinder was, that this communication was issued because of pressure and that no regard should be paid to it because it was based on no principle or reason and was bad as being arbitrary. This was not the line, however, that learned Counsel adopted in his arguments. First learned Counsel faintly suggested that the later letter could not possess the same validity or force as that of 14th August, 1946. This submission is entirely without foundation. Both are communications from officers of the Defence Services to other officers and they possess equal weight. If the order dated 14th August, 1946, could confer rights, that dated 15th February, 1947 could deny those rights. In fact, from the correspondence it looks as if the first, was more a tentative order passed at a time when experiments were being made in an attempt to unify the two Services.

If therefore the communication dated 14th August, 1946, has to be ignored, the position resolves itself into this : Under the Army Instructions of 1945 the Temporary Clerks were between themselves unified into one Service with common service conditions, common grades of pay, etc., the members of that Service being granted an option to elect to be governed by the revised conditions which, if opted for would have effect from 1st September, 1944. Similarly, the Extra Temporary Establishment came by reason of the Army Instructions of 1946, in regard to their own service, to be governed by uniform conditions of service, grades of pay, allowances etc. with a similar option to the members of that Service to opt for the new conditions which would have effect, again from 1st September, 1944, in the event of their so opting. The words in paragraph 7 of the Army Instructions of 1946 in relation to the Extra Temporary Clerks, that the other conditions of service personnel would be the same as the Temporary Clerks would mean, in the context, that as regards provident fund, leave, etc. governed by similar rules but the effect of the two Army Instructions were that the two Services remained separate and were not amalgamated into an unified Service.

Mr. Sastri, when he found that the communication dated 14th August, 1946, which purported to amalgamate the two Services had been cancelled by the later communication dated 15th February, 1947, relied on the order of the Government of India, dated 19th August, 1949, as the one which effected a complete amalgamation of the two Services and that thereafter the seniority of the Temporary as well as the Extra Temporary Clerks had to be computed on an identical basis, namely, the commencement of the service of each individual employee. Before considering this argument it is necessary to bear in mind two considerations :

(1) The order of 19th August, 1949, does not in terms make any provision for the determination of the *inter se* seniority between members of the two Services which it was bringing into one fold.

(2) The two Services had started as parallel Services, recruited on different bases and to whom different conditions of service were applicable. Substantial, though far from complete, uniformity had been effected in the conditions of service of the two groups by separate orders passed in 1945 and 1946 relating to them. An attempt was made to unify the two Services in August, 1946, but difficulties were met and the experiment was abandoned and by the communication dated 15th February, 1947, the earlier ROC, dated 14th August, 1946, was cancelled. It is with this background that one had to examine to scope and effect of the order of the Government of India dated 19th August, 1949.

In this connection Mr. Sastri urged two contentions which require to be considered. The first was that the order of Government dated 19th August, 1949 when properly construed drew no distinction between the clerical staff who are classified as non-industrial belonging to the Ex-Temporary Clerks or Ex Extra-Temporary Clerks and that these two categories were treated alike and amalgamated into a new unified Service. He further submitted that having regard to the purpose of the unification, viz., the elimination of every difference in the service

conditions of the two groups, it was implicit that the determination of the seniority of the personnel should be based on identical considerations unless there was any specific or express provision in that regard in the order, and admittedly there was none.

The second was that the clarification effected on 4th January, 1950, by the answer to question 15, was not in fact a "clarification", but a radical departure from the policy and decision contained in the order, dated 19th August, 1949 and that the opinion there expressed could have validity as a service condition only when embodied in a formal order, and that in fact this step was taken only on 7th June, 1951, when Government passed an order which has been numbered as CPRO 513 of 1951. This last order which was passed after the Constitution came into force was therefore impugned as violating the freedoms guaranteed by Articles 14 and 16 (1). In short, the contention was twofold : (1) that the order dated 19th August, 1949, was not merely not neutral but provided for equality between the two groups in the matter of the principle that should govern the reckoning of seniority, and (2) that this equality was departed from and an unfair discrimination made against the Extra Temporary Clerks only by the Government order dated 7th June, 1951, and that the petitioner was therefore entitled to challenge CPRO 513 of 1951 as unconstitutional and void for violation of Articles 14 and 16 (1).

We consider that these contentions are without force and have to be rejected. In the first place, it must be mentioned that neither in the petition nor in the rejoinder-affidavit filed by the petitioner was the constitutional validity of CPRO 513 of 1951 challenged. But even if this matter of want of pleading be ignored, the entire argument proceeds on the basis that the Government order dated 19th August, 1949, had effected not merely an amalgamation of the two Services of the Temporary Clerks and Extra Temporary Clerks but that it had further positively laid down a rule of *inter se* seniority under which the entire length of service of each employee was to determine his seniority in the common roster. There are no express words making a provision on these lines in the Government order. The inference, if any, has therefore to be drawn from the absence of a specific reference to the relative seniority of the two groups in the combined roll. Before drawing an inference on the line suggested by learned Counsel for the petitioner regard must be had to the antecedent matters which have already been stated but which we shall summarise for the purpose of convenience. (1) The two Services had no common origin, but were recruited on different bases and originally on very different rates of pay and conditions of service; though there was no doubt great similarity between the qualifications for recruitment and the nature of the duties performed. (2) Even among the members of the two parallel Services there had been great disparities in the rates of pay and conditions of service and these had been unified within each group by separate orders therefor passed in 1945 and in 1946. Besides, as a result of the changes effected by these two orders in the two groups, a substantial amount of uniformity in the conditions of the service of each group compared with the other had also been achieved. (3) An attempt had been made to bring into a common roll members of the two Services by the communication dated 14th August, 1946, and after a good deal of experiment, cogitation and correspondence that communication had been withdrawn and the distinctness between the two Services had been maintained as it originally existed by the cancellation on 15th February, 1947, of the communication dated 14th August, 1946. (4) Before 19th August, 1949, the Temporary Clerks, as we have already pointed out, held their employment as against sanctioned posts, while the Extra Temporary Clerks were *ad hoc* employees recruited on a temporary basis and not against any sanctioned post—permanent or temporary. Thus on the date of the amalgamation when the Services of the Extra Temporary Clerks were regularised and they were brought to a common establishment the position was that whereas the Temporary Clerks along with the permanent establishment were members of the ISP or IPE, the Extra Temporary Clerks did not fall within this category and were made part of it only from and after 1st August, 1949, under the order dated 19th August, 1949. Looked at from this

point of view it would appear that whereas the Temporary Clerks could claim to have been in the same Service from even before 1st August, 1949, the Extra Temporary Clerks could claim to belong to that Service only from and after 1st August, 1949. Of course, if the Government order had specifically fixed the basis of *inter se* seniority that would be another matter. But in the absence of any express provision on that point the natural result of the previous history would obviously be that the Extra Temporary Clerks could claim to belong to the unified Service only from and after 1st August, 1949. It is in the light of this background that one has to approach the intentions of those who passed the order of 19th August, 1949. It therefore appears to us that in the absence of an express provision providing for a common basis of seniority based on length of service of the personnel falling under the two groups there was no intention of providing a common rule for determining seniority. On the other hand the Government order of 1949 not having made any specific provision for the allocation of seniority to Extra Temporary Clerks, calculated on the basis of their service as Extra Temporary Clerks as distinct from their membership of the IPE the inference would be that this could date only from 1st August, 1949.

The next matter to be noticed is that the ambiguity arising from the absence of any specific mention of the principles upon which the relative seniority of the two groups had to be determined immediately cropped up and the clarification of 4th January, 1950, should in the circumstances be deemed to be a part and parcel of the Government order of August, 1949. It should be remembered that the clarification was necessitated by questions which were immediately raised as to the interpretation of the order and in those circumstances we hold, without any hesitation, that the order of August, 1949 has to be read in the light of the clarification. Besides it appears to us that the answers thus given were implicit even in the order of 1949 when one bears in mind that the Temporary Clerks were already in the IPE and the Extra Temporary clerks came into that Service by reason of the order. But anyway that matter was clarified and the clarification dated 4th January, 1950 has to be read as part and parcel of the order of Government dated 19th August 1949. If the position were thus understood it is manifest that CPRO 513 of 1951 was no more than a formal declaration of what Government intended in 1949 and which they had already explained earlier. We need only add that the petitioner in his petition understood the function of the clarification of 4th January, 1950, in the same manner as we have done, and did not, as stated already, impugn the validity of CPRO 513 of 1951; in fact, he did not refer to it at all. On the other hand, the challenge in this part of the petition was to an unfair and improper discrimination alleged to have been made between industrial workers and non-industrial workers of whom the petitioner was one by the clarification of 5th January, 1950—a matter which was not even adverted to by learned Counsel in his arguments before us. In our opinion, CPRO 513 of June, 1951 did not alter or affect any rights which the petitioner, and along with him the Extra Temporary Clerical staff, had under the orders dated 19th August, 1949.

We consider therefore that on the date when the Constitution came into force the position was that for the determination of the relative seniority between the Extra Temporary Clerks and the Temporary Clerks while in the case of the former the date from which they should be deemed to have come into the regular establishment and the common roll was 1st August, 1949, in the case of the latter it was from the date when they entered service. On this basis the petitioner could obviously not claim that any rights as to seniority which he possessed on the date when the Constitution came into force were, in any way, restricted or denied to him by the impugned order of 20th April, 1955. It would be apparent that the order of Government of 20th April, 1955, now impugned is really a concession in favour of the petitioner and not any detraction from the rights that he possessed at the commencement of the Constitution. If the impugned order should now be vacated the result would be that the petitioner would be relegated to the rights that he possessed under the orders of Government dated 19th August, 1949, read with the clarification dated 4th January,

1950. Obviously, that is not the relief which the petitioner seeks by this petition. In the circumstances the allegation that there has been an infringement of the fundamental right of the petitioner to equal protection of the laws under Article 14 or equality of opportunity for employment under Article 16 (1) must be held to have no factual basis. The fact was that the position of the petitioner was improved and he was given a limited amount of seniority by the impugned order as compared to the rights which he possessed on 26th January 1950. The impugned order, therefore, far from adversely affecting the petitioner, really conferred upon him larger rights than he previously possessed.

The petition therefore fails and is dismissed with costs.

*Special Leave Petition No. 786 of 1961.*—The petitioner in Writ Petition No. 264 of 1961 just now disposed of filed a petition under Article 226 of the Constitution before the High Court, Punjab, on substantially the same allegations as in the petition to this Court and praying for similar reliefs. The learned Judges dismissed the petition *in limine* and thereupon the petitioner has filed the application for the grant of Special Leave to appeal to this Court from this judgment. In view of our decision in Writ Petition 264 of 1961, the petition for Special Leave is rejected.

K. S.

*Petitions dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR, A. K. SARKAR, K. C. DAS GUPTA, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Shalig Ram

.. Appellant\*

v.

Firm Daulatram Kundanmal

.. Respondent.

*Civil Procedure Code (V of 1908), section 13—Foreign Decrees—Obtaining leave to defend is submission to jurisdiction—Ex parte decree transferred for execution to Hyderabad State from Bombay after Civil Procedure Code became applicable to whole of India including former territories of Hyderabad State—Executability.*

A person who appears in obedience to the process of a foreign Court and applies for leave to defend the suit without objecting to the jurisdiction of the Court, when he is not compelled by law to do so, must be held to have submitted voluntarily to the jurisdiction of such Court. Therefore, it cannot be said that the decree in the present case suffered from the defects which a foreign *ex parte* decree without such submission would suffer from. The order for transfer was made at a time when the Code of Civil Procedure (V of 1908) became applicable to the whole of India including the former territories of Hyderabad State. Hence the order of transfer of the decree for execution to Hyderabad State from Bombay was valid and effective and the decree could be executed.

*Shaikh Atham Sahib v. Davud Sahib*, I.L.R. 32 Mad. 469 : 19 M.L.J. 457, approved.

Appeal from the Judgment and Order dated the 24th October, 1958, of the Bombay High Court in L.P.A. No. 50 of 1958.

Ganpat Rai, Advocate, for Appellant.

M. S. K. Sastri and M. S. Narasimhan, Advocates, for Respondent.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal on a certificate of the High Court under Article 133 (1) (c) of the Constitution against the judgment and order of the High Court of Bombay. The appellant was the judgment-debtor and the decree-holder is the respondent.

The decree was passed on 26th August, 1931, in Summary Suit No. 2437 of 1930 by the High Court of Bombay against three defendants who were residents of Parbhani District in the former State of Hyderabad. Before the decree was passed the appellant had applied for leave to defend and leave was conditionally granted on his depositing Rs. 5,000 within four weeks. This, he did not do and on his failure to do so an *ex parte* decree was granted for Rs. 52,032-7-0 including costs and future interest at 6% per annum. The appellant did not file any written

statement. The decree was transferred for execution to the District Judge, Bhir, in Hyderabad State. The respondent took out execution on 18th June, 1954, in the Court of the District Judge, Bhir, to which objection was taken by the appellant, *inter alia*, on the ground that he had not submitted to the jurisdiction of the Bombay High Court which was a foreign Court and therefore the decree was a foreign decree and could not be executed in the Court at Bhir. This objection was overruled. Against that order an appeal was taken to the High Court and it was held by that Court on 29th July, 1958, that the appellant had submitted to the jurisdiction of the Bombay High Court and the appeal was therefore dismissed and the order of the Executing Court upheld. The Letters Patent Appeal against that judgment was dismissed *in limine* on 24th October, 1958. It is against that order that the appeal has been brought on the certificate of the High Court under Article 133 (1) (c).

A person who appears in obedience to the process of a foreign Court and applies for leave to defend the suit without objecting to the jurisdiction of the Court when he is not compellable by law to do so must be held to have voluntarily submitted to the jurisdiction of such Court. *Shaikh Atham Sahib v. Davud Sahib*<sup>1</sup>. Therefore it cannot be said that this decree suffered from the defects which a foreign *ex parte* decree without such submission would suffer from. The order for transfer was made at a time when the Indian Code of Civil Procedure became applicable to the whole of India including the former territories of Hyderabad State. The order of transfer was therefore valid and effective and the decree could therefore be executed.

The appeal, in our opinion, is without merit and is therefore dismissed with costs.

K.L.B.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR, A. K. SARKAR, K. C. DAS GUPTA, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Firm Hansraj Nathuram

.. Appellant\*

v.

Firm Lalji Raja & Sons

.. Respondent.

*Civil Procedure Code (V of 1908), sections 38, 39, 40, 42 and 43—Applicability—“Court”—Meaning of—Transfer of decree from the Court at Bankura to the Court at Morena—Legality—Whether the decree sought to be executed was a foreign decree.*

At the relevant time (in 1949 and 1950) in sections 40 and 42 of the Civil Procedure Code (V of 1908) the word “Court” necessarily meant a Court to which the Code applied (*i.e.*) a Court in what was British India. The Court at Morena not being such a Court the decree could not be transferred to it under the Code and sections 38 and 39 of the Code were inapplicable to justify such a transfer.

In the instant case the decree was not transferred to a Court which at the time of the transfer was governed by the Code and therefore the transfer was ineffective for the purpose of execution and section 43 of the Code was inapplicable before Act II of 1951 to the State of Madhya Bharat.

*Manavala Goundan v. Kumarappa Reddy*, I.L.R. 30 Mad. 326 : 17 M.L.J. 313, distinguished.

Appeal from the Judgment and Order dated the 15th November, 1954, of the former Madhya Bharat High Court at Gwalior in C.F.A. No. 9 of 1951.

Ganpat Rai, Advocate, for Appellant.

N. S. Bindra, Senior Advocate (D. D. Sharma, Advocate, with him), for Respondent.



The Judgment of the Court was delivered by

*Kapur, J.*—This is an appeal against the judgment and order of the High Court of Madhya Bharat at Gwalior on a certificate of that Court under Article 133 (1) (c) and like Civil Appeal No. 24 of 1960, raised the question of the applicability of the Indian Code of Civil Procedure and the question whether the decree sought to be executed was a decree of a foreign Court or not. It is a reverse case in the sense that the decree sought to be executed was passed by a Court in West Bengal—a province of what was British India. In this appeal the appellant is the judgment-debtor and the decree-holder is the respondent.

On 3rd December, 1949, a decree was passed in favour of the respondent by the Subordinate Judge, Bankura, in West Bengal and a certificate of transfer was applied for on 27th July, 1950, granted on 8th August, 1950, and was transferred for execution on 28th August, 1950. On 25th September, 1950, the decree-holder took out execution in the Court of the Additional District Judge, Morena, in what was Gwalior State and subsequently became a part of the United State named Madhya Bharat and after the Constitution the Part B State of Madhya Bharat. On the judgment-debtor's objection the application for execution was dismissed on 29th December, 1950, but the appeal against that order was allowed by the High Court on 15th November, 1954.

It is unnecessary to set out the various sections of the Indian Code of Civil Procedure or to trace the various steps by which sections 43 and 44 were amended in that Code; that we have done in C.A. No. 24 of 1960 decided to-day. It was contended before us by the judgment-debtor that the Court had no power to transfer the decree under section 38 to the Court in Morena. On the date when the decree was transferred the Courts in Madhya Bharat were governed by the Indian Code of Civil Procedure as adapted by the Madhya Bharat Adaptation Order of 1948 but the power of transfer by the Court at Bankura was governed by sections 38 and 39 of the Indian Code of Civil Procedure. Under that Code, the Court to which the decree could be transferred was one established in what was British India because the Code extended to the territories of what was British India and it was not till the coming into force of Act II of 1951 on 1st April, 1951, that the Indian Code was applied to the "Territories of India" which comprised Parts A, B and C States.

It was contended by Mr. N. S. Bindra, Counsel for the respondent that under sections 38 and 39 of the Indian Code of Civil Procedure a decree could be sent for execution to any Court, the expression "Court" being understood as a place where justice was administered and for this reliance was placed on *Manavala Goundan v. Kumarappa Reddy*<sup>1</sup>, where the word "Court" in section 622 of the old Civil Procedure Code was defined as a place where justice is judicially administered; but that was in a case where it had to be determined whether a District Registrar was a Court for the purpose of Civil Procedure Code. The definition as given in that case is not of any help in determining the question now before us because what we have to see is whether the Court at Morena even though it administered justice judicially was covered by the word "Court" in section 38 or not. As we have said above "Court" in the section means a Court to which the Indian Code of Civil Procedure applies and not any Court. Similarly at the relevant time in sections 40 and 42 of the Indian Code of Civil Procedure "Court" necessarily meant a Court to which Indian Civil Procedure Code applied *i.e.*, a Court in what was British India. The Court at Morena not being such a Court the decree could not be transferred to it under the Indian Code of Civil Procedure and sections 38 and 39 were inapplicable to justify such a transfer.

The decree, it was then argued, was executable under section 43 of the Indian Civil Procedure Code as amended by the Adaptation of Laws Order of 5th June, 1950, which had retrospective effect as from 26th January, 1950. After the amendment that section reads :—

"Section 43 Any decree passed—

(a) by a Civil Court in Part B State, or

(b) .....

(c) .....

may if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in the State.

The argument was that in the present case the expression "in a Part B State" should be read as if the expression was "in a Part A State". This again is not permissible for us. Section 43 has to be interpreted as it is and a Court cannot read it as if its language was different from what it actually is. It is not permissible for this Court to amend the law as suggested. Besides the Indian Civil Procedure Code was not extended to Madhya Bharat till 1st, April 1951, by Act II of 1951. The decrees of foreign Courts were, under the Gwalior Code of which Morena was a part, not executable under section 233 which required a suit to be brought on the basis of foreign decrees nor under the Madhya Bharat Code of Civil Procedure. The decree therefore could not be executed in Morena under section 43 of the Indian Code of Civil Procedure.

It was next argued that the appellant firm was not a foreigner because it did not fall under the Foreigner's Act (XXXI of 1946) and reference was made to section 2 (a) (iii) which was amended by Act XXXVIII of 1947 on 15th December, 1947 ; but this Act is not relevant for the purpose of finding out whether the decree was a foreign decree or not because the execution of decrees is governed by the provisions of the Code of Civil Procedure and not by the Foreigners Act. Under the former a decree can be executed by a Court which passed the decree or to which it was transferred for execution and the decree which could be transferred has to be a decree passed under the Code and the Court to which it could be transferred has to be a Court which was governed by the Indian Code of Civil Procedure. But in the present case it was not transferred to a Court which at the time of the transfer was governed by the Indian Code of Civil Procedure and therefore the transfer was ineffective for the purpose of execution and as we have said above, section 43 of the Indian Code was inapplicable before Act II of 1951 to the State of Madhya Bharat. It is not necessary to go into the other questions raised if the above two questions are decided against the respondent.

We therefore allow this appeal, set aside the judgment and order of the High Court and restore that of the executing Court. The appellant will have its costs in this Court.

K.L.B.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, N. RAJAGOPALA AYYANGAR AND T. L. VENKATARAMA Aiyar, JJ.

The Collector of Customs, Calcutta

*Appellant\**

v.

The East India Commercial Co., Ltd., Calcutta and Others

*Respondents*

*Constitution of India (1950), Article 226—High Court if an issue a writ against the Collector of Customs in spite of the fact that his order imposing penalty under Sea Customs Act (VIII of 1878) was taken in appeal to the Central Board of Revenue against which the High Court could not issue a writ and the appeal had been dismissed.*

On principle, when once an order of an original authority is taken in appeal to the appellate authority which is located beyond the territorial jurisdiction of the High Court, it is the order of the latter authority which is the operative order after the appeal is disposed of ; and as the High Court cannot issue a writ against the appellate authority for want of territorial jurisdiction it would not be open to it to issue a writ to the original authority which may be within its territorial jurisdiction once the appeal is disposed of, though it may be that the appellate authority has merely confirmed the order of the original authority and dismissed the appeal. The decree of the lower Court merges in the decree of the appellate Court whatsoever its decision—whether of reversal or modification or mere confirmation.

Thus, in the instant case, since no writ could be issued to the appellate authority the Central Board of Revenue (being outside the territorial jurisdiction it would not be open to the High Court to issue a writ to the original authority (the Collector of Customs) who

is within its jurisdiction and passed orders of confiscation and imposed fines under the Sea Customs Act.

*A. Thangal Kunju Musaliar v. M. Venkitachalam Potti*, (1956) S.C.J. 323 : (1955) 2 S.C.R. 1196 and *Commissioner of Income-tax v. Messrs. Amritel Bhoglal & Company*, (1958) S.C.J. 1007 : (1958) 2 M.L.J. (S.C.) 174 : (1958) 2 An.W.R. (S.C.) 174 : (1959) S.C.R. 713, followed.

Appeal from the Judgment and Order, dated the 21st July, 1959, of the Special Bench of the Calcutta High Court in Matter No. 76 of 1952.

*D. R. Prem* Senior Advocate (*R. H. Dhebar* with him), for Appellant and Respondents Nos. 2 and 3.

*S. T. Desai*, Senior Advocate (*B. P. Maheshwari*, Advocate, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

*Wanchoo, J.*—This is an appeal on a certificate granted by the Calcutta High Court. The brief facts necessary for present purposes are these. The respondent had imported 2,000 drums of mineral oil. Out of this quantity, the appellant, the Collector of Customs, Calcutta, confiscated 50 drums by order dated 20th September, 1950. He also imposed a personal penalty of Rs. 61,000 on the respondent under the Sea Customs Act, No. VIII of 1878 (hereinafter referred to as the Act). The respondent appealed to the Central Board of Revenue under section 188 of the Act, and his appeal was dismissed in April, 1952. Thereupon the respondent filed a petition under Article 226 of the Constitution in the High Court. We are in the present appeal not concerned with the merits of the case put forward by the respondent, for the matter has not yet been heard on the merits. When the petition came up before a learned Single Judge a question was raised as to the jurisdiction of the High Court to hear the petition in view of the decision of this Court in *Election Commission, India v. Saka Venkata Subba Rao*<sup>1</sup>. As the learned Single Judge considered the point important, he referred the matter to a larger Bench; and eventually the question was considered by a Full Bench of the High Court. The Full Bench addressed itself two questions in that connection, namely, (i) whether any writ could issue against the Central Board of Revenue which was a party to the writ petition and which was permanently located outside the jurisdiction of the High Court, and (ii) whether if no writ could issue against the Central Board of Revenue any writ could be issued against the appellant, which was the original authority to pass the order under challenge, when the appellate authority (namely, the Central Board of Revenue) had merely dismissed the appeal.

The Full Bench held on the first question that the High Court had no jurisdiction to issue a writ against the Central Board of Revenue in view of the decision in the case of *Saka Venkata Subba Rao*<sup>1</sup>. On the second question, it held that as the Central Board of Revenue had merely dismissed the appeal against the order of the Collector of Customs, Calcutta, the really operative order was the order of the appellant, which was located within the jurisdiction of the High Court, and therefore it had jurisdiction to pass an order against the Collector of Customs in spite of the fact that that order had been taken in appeal (which was dismissed) to the Central Board of Revenue to which no writ could be issued. The Full Bench further directed that the petition would be placed before the learned Single Judge for disposal in the light of its decision on the question of jurisdiction. Thereupon there was an application for a certificate to appeal to this Court, which was granted; and that is how the matter has come up before us.

The only question which falls for decision before us is the second question debated in the High Court, namely, whether the High Court would have jurisdiction to issue a writ against the Collector of Customs, Calcutta, in spite of the fact that his order was taken in appeal to the Central Board of Revenue against which the High Court could not issue a writ and the appeal had been dismissed. There seems to have been a difference of opinion amongst the High Courts in this matter. The Rajasthan High Court in *Barkatali v. Custodian-General of Evacuee Property*<sup>2</sup>, held that where the original authority passing the order was within the jurisdiction of the High Court but the appellate authority was not within such jurisdiction,

<sup>1</sup>. (1953) S.C.J. 293 : (1953) 1 M.L.J. 702 : (1953) S.C.R. 1144.

<sup>2</sup>. A.I.R. 1954 Raj. 214.

the High Court would still have jurisdiction to issue a writ to the original authority, where the appellate authority had merely dismissed the appeal and the order of the original authority stood confirmed without any modification whatsoever. On the other hand, the PEPSU High Court in *Joginder Singh Waryam Singh v. Director, Rural Rehabilitation, Pepsu, Patiala*<sup>1</sup>, the Nagpur High Court in *Burhanpur National Textile Workers Union v. Labour Appellate Tribunal of India at Bombay*<sup>2</sup>, and the Allahabad High Court in *Azmat Ullah v. Custodian, Evacuee Property*<sup>3</sup>, held otherwise, taking the view that even where the appeal was merely dismissed, the order of the original authority merged in the order of the appellate authority, and if the appellate authority was beyond the territorial jurisdiction of the High Court, no writ could issue even to the original authority. It may be mentioned that the Rajasthan High Court had occasion to reconsider the matter after the decision of this Court in *A. Thangal Kunju Musaliar v. M. Venkitachalam Potti*<sup>4</sup>, and held that in view of that decision, its earlier decision in *Barkatali's Case*<sup>5</sup>, was no longer good law. The High Court has however not noticed this later decision of the Rajasthan High Court to which the learned Chief Justice who was party to the earlier Rajasthan case was also a party. The main reason which impelled the High Courts, which held otherwise, was that the order of the original authority got merged in the order of the appellate authority when the appeal was disposed of and therefore if the High Court had no territorial jurisdiction to issue a writ against the appellate authority it could not issue a writ against the original authority, even though the appellate authority had merely dismissed the appeal without any modification of the order passed by the original authority.

The question therefore turns on whether the order of the original authority becomes merged in the order of the appellate authority even where the appellate authority merely dismisses the appeal without any modification of the order of the original authority. It is obvious that when an appeal is made, the appellate authority can do one of three things, namely, (i) it may reverse the order under appeal, (ii) it may modify that order, and (iii) it may merely dismiss the appeal and thus confirm the order without any modification. It is not disputed that in the first two cases where the order of the original authority is either reversed or modified it is the order of the appellate authority which is the operative order and if the High Court has no jurisdiction to issue a writ to the appellate authority it cannot issue a writ to the original authority. The question therefore is whether there is any difference between these two cases and the third case where the appellate authority dismisses the appeal and thus confirms the order of the original authority. It seems to us that on principle it is difficult to draw a distinction between the first two kinds of orders passed by the appellate authority and the third kind of order passed by it. In all these three cases after the appellate authority has disposed of the appeal, the operative order is the order of the appellate authority whether it has reversed the original order or modified it or confirmed it. In law, the appellate order of confirmation is quite as efficacious as an operative order as an appellate order of reversal or modification. Therefore, if the appellate authority is beyond the territorial jurisdiction of the High Court it seems difficult to hold even in a case where the appellate authority has confirmed the order of the original authority that the High Court can issue a writ to the original authority which may even have the effect of setting aside the order of the original authority when it cannot issue a writ to the appellate authority which has confirmed the order of the original authority. In effect, by issuing a writ to the original authority setting aside its order, the High Court would be interfering with the order of the appellate authority which had confirmed the order of the original authority even though it has no territorial jurisdiction to issue any writ to the appellate authority. We therefore feel that on principle when once an order of an original authority is taken in appeal to the appellate authority which is located beyond the territorial jurisdiction of the High

1. A.I.R. 1955 Pepsu 91.  
2. A.I.R. 1955 Nag. 148.  
3. A.I.R. 1955 All. 435.

4. (1956) S.C.J. 323 : (1955) 2 S.C.R. 1196.  
5. A.I.R. 1954 Raj 214.

Court, it is the order of the latter authority which is the operative order after the appeal is disposed of; and as the High Court cannot issue a writ against the appellate authority for want of territorial jurisdiction it would not be open to it to issue a writ to the original authority which may be within its territorial jurisdiction once the appeal is disposed of, though it may be that the appellate authority has merely confirmed the order of the original authority and dismissed the appeal.

It is this principle, *viz.*, that the appellate order is the operative order after the appeal is disposed of, which is in our opinion the basis of the rule that the decree of the lower Court merges in the decree of the appellate Court, and on the same principle it would not be incorrect to say that the order of the original authority is merged in the order of the appellate authority whatsoever its decision—whether of reversal or modification or mere confirmation. This matter has been considered by this Court on a number of occasions after the decision in *Saka Venkata Subba Rao's case*<sup>1</sup>. In *A. Thangal Kunju Musaliar's case*<sup>2</sup>, though the point was not directly in issue in that case, the Court had occasion to consider the matter (*see* page 1243) and it approved of the decisions of the PEPSU, Nagpur and Allahabad High Courts (referred to above). Then in *Commissioner of Income-tax v. Messrs. Amritlal-Bhagilal & Company*<sup>3</sup>, a similar question arose as to the merging of an order of the Income-tax Officer into the order of the Appellate Assistant Commissioner passed in appeal in connection with the powers of the Commissioner of Income-tax in revision. Though in that case the order of registration by the Income-tax Officer was held not to have merged in the order of the Assistant Commissioner on appeal in view of the special provisions of the Income-tax Act, this Court observed as follows in that connection at page 720 :—

“There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmation of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement.”

The matter was considered again by this Court in *Madan Gopal Rungta v. Secretary to the Government of Orissa*<sup>4</sup>, in connection with an order of the Central Government in revision under the Mineral Concession Rules, 1949, framed under the Mines and Minerals (Regulation and Development) Act (No. LVIII of 1948), and it was held that when the Central Government rejected the review petition against the order of the State Government under the Mineral Concession Rules it was in effect rejecting the application of the appellant of that case for grant of the mining lease to him. The question of the merger of the original order with the appellate order was also considered in that case, though it was pointed out in view of rule 60 of the Mineral Concession Rules that it is the Central Government's order in review which is the effective and final order. Learned counsel for the respondent sought to distinguish *Madan Gopal Rungta's case*<sup>4</sup>, on the ground that it was based mainly on an interpretation of rule 60 of the Mineral Concession Rules, 1949, though he did not pursue this further when section 188 of the Sea Customs Act was pointed out to him.

The main reliance however of the respondent both in the High Court and before us is on the decision in the *State of Uttar Pradesh v. Mohammed Nooh*<sup>5</sup>. That was a case where a public servant was dismissed on 20th April, 1948, before the Constitution had come into force. His appeal from the order of dismissal was dismissed in May, 1949 which was also before the Constitution came into force. His revision against the order in appeal was dismissed on 22nd April, 1950, when the Consti-

1. (1953) S.C.J. 293 : (1953) 1 M.L.J. 702 : (1959) S.C.R. 713.

(1953) S.C.R. 1144.

4. A.I.R. 1962 S.C. 1513.

2. (1956) S.C.J. 323 : (1955) 2 S.C.R. 1196.

5. (1958) S.L.J. 242 : (1958) M.L.J. (Cri.)

3. (1958) S.C.J. 1007 : (1958) 2 M.L.J.

197 : (1958) S.C.R. 595.

((S.C.) 104 : (1958) 2 An.W.R. (S.C.) 174 :

tution had come into force, and the question that arose in that case was whether the dismissed public servant could take advantage of the provisions of the Constitution because the revisional order had been passed after the Constitution came into force. In that case, this Court certainly held that the order of dismissal passed on 20th April, 1948, could not be said to have merged in the orders in appeal and in revision. It was pointed out that the order of dismissal was operative of its own strength as from 20th April, 1948, and the public servant stood dismissed as from that date and therefore it was a case of dismissal before the Constitution came into force and the public servant could not take advantage of the provisions of the Constitution in view of the fact that his dismissal had taken place before the Constitution had come into force. As was pointed out in *Madan Gopal Rungta's case*<sup>1</sup>, *Mohammad Nooh's case*<sup>2</sup>, was a special case, which stands on its own facts. The question there was whether a writ under Article 226 could be issued in respect of a dismissal which was effective from 1948. The relief that was being sought was against an order of dismissal which came into existence before the Constitution came into force and remained effective all along even after the dismissal of the appeal and the revision from that order. It was in those special circumstances that this Court held that the dismissal had taken place in 1948 and it could not be the subject-matter of consideration under Article 226 of the Constitution, for that would be giving retrospective effect to the Article. The argument based on the principle of merger was repelled by this Court in that case on two grounds, namely, (i) that the principle of merger applicable to decrees of Courts would not be applicable to departmental tribunals, and (ii) that the original order would be operative on its own strength and did not gain greater efficacy by the subsequent order of dismissal of the appeal or revision. In effect, this means that even if the principle of merger were applicable to an order of dismissal like the one in *Mohammad Nooh's case*<sup>2</sup>, the fact would still remain that the dismissal was before the Constitution came into force and therefore the person dismissed could not take advantage of the provisions of the Constitution, so far as that dismissal was concerned. That case was not concerned with the territorial jurisdiction of the High Court where the original authority is within such territorial jurisdiction while the appellate authority is not and must therefore be confined to the special facts with which it was dealing. We have therefore no hesitation in holding consistently with the view taken by this Court in *Musalier's case*<sup>3</sup>, as well as in *Messrs. Amrital Bhagilal's case*<sup>4</sup> that the order of the original authority must be held to have merged in the order of the appellate authority in a case like the present and it is only the order of the appellate authority which is operative after the appeal is disposed of. Therefore, if the appellate authority is beyond the territorial jurisdiction of the High Court it would not be open to it to issue a writ to the original authority which is within its jurisdiction so long as it cannot issue a writ to the appellate authority. It is not in dispute in this case that no writ could be issued to the appellate authority and in the circumstances the High Court could issue no writ even to the original authority. We therefore allow that the appeal, set aside the order of the High Court and dismiss the writ petition with costs.

K.L.B.

Appeal allowed.

1. A.I.R. 1962 S.C. 1513.  
 2. (1958) S.C.J. 242 : (1958) M.L.J. (Grl.) 197 : (19-8) S.C.R. 595.  
 3. (1956) S.C.J. 323 : (1955) 2 S.C.R. 1196.  
 4. (1958) S.C.J. 1007 : (1958) 2 M.L.J. (S.C.) 174 : (1958) 2 An.W.R. (S.C.) 174 : (1959) S.C.R. 713.

# THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P.B. GAJENDRAGADKAR, K. N. WANCHOO, N. RAJAGOPALA AYYANGAR AND T. L. VENKATARAMA Aiyar, JJ.

The Collector of Customs, Madras

— Appellant\*

*v.*

K. Ganga Setty

.. Respondent.

*Sea Customs Act (VIII of 1878), section 19 read with section 3 (2) of the Imports and Exports Control Act (XVIII of 1947).—Contravention under and imposition of fine—Import Trade Control Circular current for the period July to December, 1952, Items 32 and 42—Import of whole grain "feed-oats" without a licence for the import—Whether a special licence was necessary under Item 32—Whether the decision of Customs Authority as regards Import Trade Circular open to Judicial Review.*

If there were two constructions which an entry in the Import Trade Control circular could reasonably bear, and one of them which is in favour of Revenue was adopted, the Court has no jurisdiction to interfere merely because the other interpretation favourable to the subject appeals to the Court as the better one to adopt. Therefore in the instant case, the decision of Customs Authorities holding that the oats imported fell within Item 32 of the Import Trade Circular could not be said to be a view which on no reasonable interpretation could be entertained.

The mere fact that a grain is capable of being used as horse or other cattle feed does not make it 'fodder' excluding it from the category of grain to which it admittedly belongs. Thus, the decision of the Assistant Collector and of the Collector on appeal holding the oats imported by the respondent to be grain cannot be characterised as perverse or *mala fide*. The High Court erred in interfering with the order of the appellant.

Appeal from the Judgment and Order dated the 6th April, 1956, of the Madras High Court in O.S. A. No. 147 of 1953.†

*H. N. Sanyal*, Additional Solicitor-General of India (*Dr. V. D. Mahajan* and *P. D. Menon*, Advocates, with him), for Appellant.

*R. Ganapathy Iyer*, *M.S.K. Sastri* and *M.S. Narasimhan*, Advocates, for Respondent.

The Judgment of the Court was delivered by

*Rajagopala Ayyangar, J.*—The point involved in this appeal which comes before us on a certificate of fitness under Article 133 (1) (c) granted by the High Court of Madras is a very short one and relates to the nature and extent of the jurisdiction possessed by the High Court in considering the validity of an order of the Customs Authorities interpreting the provisions of the entries in the Tariff Schedule as regards the imposition of duties.

The respondent imported from Australia a quantity of oats which was described in the indent, contract, and shipping documents as "standard feed-oats" The commodity imported consisted of oats in whole grain. The question raised related to the proper classification of the goods imported under the Import Trade Control Schedules current during the period July to December, 1952, when the consignment reached India. The controversy centered round the point whether the "feed-oats" fell within Item 42 or within Item 32 of the Circular. Item 42 ran :

"Fodder, bran and pollards—G. O.L. Soft"

*i.e.*, this item was covered by an open general licence and so no special import licence was necessary for the import of these goods from a soft currency area, while as regards Item 32 the entry ran :

"Grain, not otherwise specified, including broken grain but excluding flour :—

(a) oats

(b) others

—Ports Nil A.U.

which meant that a licence was necessary for the importation of the goods specified in it which would be granted by the Joint Chief Controller of Imports and Exports at Calcutta and Bombay, if they were the ports of entry, and by the Deputy Chief Controller of Imports and Exports, Madras, if they were to be imported through Madras; "nil" that no quotas were specified limiting the quantity to be imported and that actual users (A.U.) could apply for the licence.

The respondent who carried on business in fodder under the name and style of Balakrishna Flour Mills placed an order with an Australian firm for the supply of whole grain "feed-oats" without obtaining any licence for the import. The goods arrived in Madras on 1st August, 1952, and when the respondent attempted to clear the goods, the Customs Authorities insisted on the production of a licence before he would be permitted to do so. The Assistant Collector held that the goods imported fell within Item 32 and as admittedly the respondent held no licence from the Deputy Chief Controller of Imports and Exports, Madras, covering the import, there had been a contravention of section 19 of the Sea Customs Act read with section 3(2) of the Import and Export Control Act, 1947, and so proceeded to deal with the violation under section 167 (8) of the Sea Customs Act. He directed the confiscation of the goods and imposed a fine of Rs. 5,000 in lieu of confiscation, if the respondent desired to clear the goods. An appeal filed to the Collector of Customs was rejected and thereafter the respondent moved the High Court for the issue of a writ of *mandamus* under section 45 of the Specific Relief Act.

In his affidavit in support of the application the respondent besides contending that oats in full-grain fell within the head 'fodder' under Item 42, set out earlier, because (1) he had imported them for being made available solely for feeding race-horses at Bangalore, (2) that in South India oats was not used as human food but only as feed for horses, and (3) that in any event, he had been misled by an answer that he received from the Deputy Chief Controller of Imports, Madras, of whom he had made an enquiry as to whether feed-oats could be imported under an open general licence under Serial No. 42 and had received an affirmative answer. The learned Single Judge who heard the application dismissed it on the ground that the order of the Customs Authorities classifying uncrushed feed-oats as grain and not as fodder could not be said to be either perverse or *mala fide* and that consequently the Court could not interfere with the decision of the authorities. An appeal was preferred therefrom to a Division Bench and the learned Judges allowed the appeal and issued a direction prohibiting the Collector and his subordinates from collecting or taking steps to recover the fines and penalties imposed on the respondent. It is the correctness of this order of the Division Bench that is challenged in this appeal.

Shortly stated the ground on which the learned Judges allowed the respondent's appeal were: (1) that the decision of the Customs Authorities as regards the entry of the Tariff classification within which an imported commodity fell was not final but was open to judicial review and had ultimately to be decided by the Courts (2) in the case before the Court, Entry 32 reading "grain" had, in the absence of, any specific entry regarding oats to be read as excluding all grains which would be "fodder" i.e., which were usually used as cattle or animal feed, and that as the respondent had imported the oats for use as horse-feed the proper item within which the goods imported fell was Item 42—"Fodder, etc."

In arriving at this conclusion the learned Judges referred to the answer of the Deputy Chief Controller to the query by the respondent to which we have adverted earlier, as a circumstance indicative of the doubts entertained by the departmental authorities themselves on this matter.

With very great respect to the learned Judges we are unable to agree with them both as regards the function and jurisdiction of the Court in matters of this type, as well as in their actual construction of the relevant entries in the Import Trade Circular. As regards the limits of the jurisdiction of the Court it is sufficient to



refer to the decision in *Venkateswaran v. Wadhvani*.<sup>1</sup> That was a case where a party moved the High Court under Article 226 of the Constitution, and not as here under section 45 of the Specific Relief Act under which the power of the Court to interfere is certainly narrower and not wider. This Court proceeded on the basis that it is primarily for the Import Control Authorities to determine the head or entry under which any particular commodity fell; but that if in doing so, these authorities adopted a construction which no reasonable person could adopt i.e., if the construction was perverse then it was a case in which the Court was competent to interfere. In other words, if there were two constructions which an entry could reasonably bear, and one of them which was in favour of Revenue was adopted, the Court has no jurisdiction to interfere merely because the other interpretation favourable to the subject appeals to the Court as the better one to adopt.

In the present case it could not be contended that uncrushed oats did not answer the description of "grain" and therefore the decision of the Customs Authorities holding that the oats imported fell within Item 32 could not be said to be a view which on no reasonable interpretation could be entertained. In other words, the conclusion or decision of the Customs Authorities was rationally supportable. We consider that even if there was no specific reference to "oats" in Entry 32, any particular species of grain cannot be excluded merely because it is capable of being used as cattle or horse feed. The word "fodder" is defined in the Oxford Dictionary as "dried food, hay, straw, etc., for stall feeding cattle." Without resorting to Johnson's famous definition of "oats" in his Dictionary, it is sufficient to point out that oats, though they may serve as food for horses is, also used as human food: in other words it is not by its nature or characteristic capable of serving solely as food for animals and incapable of use in the human dietary. For instance, all coarse grains—like *Ragi* and *Khambu*—serve as food for man as well as for cattle. The mere fact therefore that a grain is capable of being used as horse or other cattle feed does not make it "fodder" excluding it from the category of grain to which it admittedly belongs. The decision of the Assistant Collector on appeal holding the oats imported by the respondent to be grain cannot therefore be characterised as perverse or *mala fide* and in the circumstances we consider that the learned Judges of the High Court erred in interfering with the order of the appellant.

In this particular case however, the matter is placed beyond the pale of controversy by the specific reference to "oats" in Entry 32 where "grain" is classified into two categories "oats" and "other" grains. It is apparent that unfortunately the attention of the learned Judges was not drawn to the entry in full, because, in the course of the judgment they point out that the construction of Entry 42 would be different if there had been a specific reference to oats in Entry 32.

Learned counsel for the respondent laid some stress on the respondent having been misled by the answer of the Deputy Chief Controller of Exports to a query as regards the scope of Entry 42. The answer which was stated to have misled was in these terms:

"Feed oats classifiable under serial 42 of Part IV can be imported under Open General Licence No. XXIII."—

an answer by no means a model of clarity. This letter is dated 14th September, 1951, and it is the case of the respondent that he placed an order for the import of "feed-oats" because he was led to believe that for its import no licence was necessary. The contract for the purchase of the goods for import was entered into in the beginning of June, 1952, but before that date the Deputy Chief Controller wrote a further letter to the respondent on 1st January, 1952, clarifying the answer he gave in his earlier letter, and pointing out that whereas if the oats were in whole-grain it would fall within Item 32, but if the same was crushed, it would be 'fodder' within Item 42. The respondent however, denied having received this letter and there is no specific finding on this point by the learned Judges of the High Court.

1. (1962) 1 S.C.J. 170 : (1962) 1 M.L.J. (S.C.) S.C. 1056.  
83 : (1962) 1 An.W.R. (S.C.) 83 : A.I.R. 1961

We do not propose to record any finding either. We are drawing attention to this matter merely for pointing out that it is a matter which the authorities could properly take into account in modifying, if they consider that the respondent has really been misled, the quantum of penalty imposed on the respondent.

The appeal is accordingly allowed and the order of the Division Bench of the High Court set aside. The application filed by the respondent under section 45 of the Specific Relief Act will stand dismissed. In the circumstances of the case we direct that the parties bear their own costs in this Court.

K.L.B.

*Appeal allowed*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, K. SUBBA RAO AND J. R. MUDHOLKAR, JJ.

The Workmen of Western India Match Co., Ltd.

.. *Appellants\**

*v.*

The Western India Match Co., Ltd.,

.. *Respondent.*

*Industrial Dispute—Dearness allowance—Employees (clerical section) in factory—If can claim at the same rates as in sales section and complain of discrimination—Discretion of Tribunal in not awarding uniform dearness allowance—Not a ground for interference under Article 136 of the Constitution of India, (1950).*

There is no identity in the work of the clerical staff in the factory and those in the sales offices. Therefore it would be open to the employer to place different values on them. The same thing could be said of the subordinate staff. If under these circumstances the employer agreed to adopt a different mode of computation of dearness allowance in respect of the employees in the sales office from the offered by it to the employees in the factory it cannot be said that the employer was making invidious distinction. The sales office being a mercantile office the employer had to fall in line with other similar establishments and pay to the employees in the sales office the same dearness allowance as other mercantile firms were paying to their employees. In the circumstances the factory employees cannot as of right demand that the benefit of the rates fixed by the Bengal Chamber of Commerce be also given to them though those rates were not intended to be applied to them. The circumstance that the factory employees and also the sales office employees were living within the limits of the Corporation of Calcutta though relevant is not itself sufficient to justify payment to them of the same rate of dearness allowances as the offices employees.

Even assuming that an Industrial Tribunal has exercised its discretion wrongly in not awarding uniform dearness allowance to all the employees of the same employer but who are working in different establishments that is no ground for interference under Article 136 of the Constitution of India.

There is no valid reason for compelling employers to offer uniform terms of employment to their employees working in different establishments because various considerations must enter into the question such as the value of their work to the employer, the employer's ability to pay, the cost of living, the availability of persons for doing the particular kind of work and so on.

Appeal by Special Leave from the Award dated the 16th September, 1958, of the Fourth Industrial Tribunal, West Bengal, in Cases Nos. VIII-107 of 1958 and VIII- II of 1958.

*N. C. Chatterjee*, Senior Advocate (*A. N. Sinha* and *Dipak Datta Choudhri*, Advocates, with him,) for Appellants.

*C. K. Daphary*, Solicitor-General of India and *B. Sen*, Senior Advocate (*B. N. Ghosh*, Advocate, with them), for Respondent.

The Judgment of the Court was delivered by

*Mudholkar, J.*—This is an appeal by Special Leave against an award made by the Court of Industrial Tribunal, West Bengal, Calcutta.

The relevant facts are these : The Western India Match, Co., (respondent) has got a factory with an office attached thereto in Alambazar, which is a suburb of Calcutta. It has also got a sales office at Calcutta which is situate in the commercial area. Certain disputes arose between the factory employees and the respondent, pursuant upon the presentation of a charter of demands by them to the respondent on 25th January, 1957. These demands were seven in number. The demands included enhancement of the dearness allowance and alteration of

the basis of computing it. They also included a demand for the revision of pay scales. The respondent was unwilling to concede the demands and thereupon the appellant-union approached the Labour Commissioner, West Bengal. Apparently on his suggestion certain conferences were thereafter held between the parties and the Conciliation Officer with a view to arrive at a settlement. During those conferences certain counter-proposals were put forward by the respondent but they were not accepted by the Union. Eventually the Government of West Bengal by its order dated 14th January, 1958 referred the dispute relating to the dearness allowance alone to the Fourth Industrial Tribunal at Calcutta but not the other disputes. Conciliation proceedings regarding other disputes were resumed after the aforesaid reference was made and on 23rd, May, 1958 a settlement was reached between the Union and the respondent on all issues excepting the one relating to grades and scales of pay. It was agreed that this issue be referred for adjudication to the same tribunal which was dealing with the question of dearness allowance. Upon this the Government of West Bengal referred that issue to the Fourth Industrial Tribunal, West Bengal by order dated 3rd June, 1958.

Before dealing with the contentions of the parties it would be desirable to set out some more facts. The Western India Match Co., has got factories not only at Alambazar but also at Bareilly in Uttar Pradesh, Ambernath in Maharashtra, Tiruvottiyur in Madras and at Port Blair. The factory at Alambazar was established in the year 1930. Besides these factories the respondent maintains separate sales offices at various places in India to push sales and execute orders. One of such sales offices is located in the city of Calcutta.

At the time of the reference 1,866 persons were employed in the factory at Alambazar. Out of them 1,504 were daily-rated or piece rated employees and the remaining 362 were monthly rated employees. Amongst them 27 were officers, 67 clerks and 32 supervisors. The rest were bearers, watchmen, malis, fitters etc., Apart from the officers all the monthly-rated employees admittedly fall within the definition of workers under the Factories Act.

In the year 1946 a Union called the Wimco Mazdoor Union was formed comprising only of the daily-rated and piece-rated workers. This Union was given recognition by the respondent. In the year 1950 another Union called the Wimco Employees' Union comprising solely of the monthly-rated employees, other than officers, was formed and was duly recognised by the respondent. One of the conditions under which the recognition was given was that its membership should consist only of monthly-rated employees of the factory except the officers.

Shortly after the recognition of this Union it entered into an agreement with the management of the respondent company whereby the scales of pay, dearness allowance and various conditions of service of the monthly paid employees at Alambazar factory were settled. The date of this agreement is 29th September, 1951.

Certain disputes arose between the Union and the respondent in the year 1954 which were referred by the Government of West Bengal by its order dated 1st September, 1954 to the Second Industrial Tribunal, West Bengal, for adjudication. In the course of the proceedings, however, an agreement was reached between the appellant-union and the respondent on 29th April, 1955. Eventually on 15th September, 1955 an award made in pursuance of the settlement arrived at was published in the Calcutta Gazette. It may be mentioned that the settlement related to various matters relating to the conditions of service of employees including pay and dearness allowance. Further, under this agreement the production bonus which the monthly-rated workmen received was merged in their basic pay. The aforesaid award was terminable upon giving two months' notice commencing after 31st December, 1956. Without giving a formal notice terminating the agreement the appellant-union made fresh demands on 25th January, 1957, pertaining to the same matters which were covered by that agreement.

What happened thereafter has already been indicated by us above.

The main ground on which the appellant-union sought revision of the previous award and the alteration of the basis of computation of the dearness allowance

and alteration of the scales of pay is that what the respondent is paying to the factory employees works out to something very much below what corresponding employees at the sales office get. This, they say, is unfair. The second ground on which their claim with respect to these two matters is based is that other comparable concerns give better terms to their employees than the respondent. The third is that the present rates are inadequate in view of the rise in the cost of living and the fourth, that the respondent is making large profits and can easily afford an upward revision in dearness allowance and scales of pay.

On behalf of the respondent a preliminary objection was taken to the effect that the Tribunal had no jurisdiction to proceed with the reference because no notice terminating the settlement as contemplated by section 19, sub-section (2) of the Industrial Disputes Act, 1947 was given by the appellant. On merits its contentions were :

(1) that the conditions of service of employees of the sales office are different from those working in the factory ;

(2) that there has been no material change of circumstances since the making of the previous award justifying any revision of the scales on the lines suggested ;

(3) that the conditions of service with reference to scales of pay and dearness allowance prevailing in the factory at Alambazar are as good, if not better, than those of employees of other concerns such as Bridge & Roof Co., Imperail Chemical Industries, Hindusthan Lever and Marshall & Sons which are in fact much larger concerns and cannot be compared with the respondent-company ;

(4) that the respondent has not the capacity to pay higher dearness allowance to its monthly-rated employees in the factory due to increase in the cost of production, labour charges enhancement of excise duty and keen competition of the products which have together resulted in reducing the percentage of profits.

The preliminary objection was overruled by the Tribunal. It, however, held that the employees at the factory were not entitled to a higher dearness allowance or to the alteration of the basis of computation of the dearness allowance but that there has been a change in the circumstances which justified a revision in the scales of pay. The Tribunal accepted the contention and adopted the revised scales of pay offered by the respondent-company to the appellant-union during the conciliation proceedings.

Mr. B. Sen for the respondent-company reiterates the objection based on section 19 (2) of the Industrial Disputes Act, 1947. That provision is to the effect that a settlement arrived at between the employer and the employees shall be binding for such period as is agreed upon by them and if no such period is agreed upon for a period of six months from the date of the settlement and shall continue to be binding on them after expiry of that period until the expiry of two months from the date on which a notice in writing of his intention to terminate the settlement is given by one of the parties to the other party. Unquestionably the parties had arrived at a settlement on 29th April, 1955 relating, amongst other things, to dearness allowance and the scales of pay and no formal notice as contemplated by sub-section (2) of section 19 was given. In our opinion, however, it is not open to the respondent-company to raise this contention in so far as revision of pay scales is concerned because in the memorandum of settlement dated 23rd May, 1958 signed by the representatives of the parties to this appeal it is clearly provided that the revision of scales of pay be referred for adjudication to the same Industrial Tribunal which was dealing with the question of dearness allowance. Besides that, this memorandum contains the following recital :

"Parties were met jointly on several occasions as a result of which the entire dispute, except the issues of (1) Dearness allowance (which has already been referred to the Fourth Industrial Tribunal for adjudication) and (2) Revision of scales of pay, has been settled on the following terms ;....." This recital shows that the respondent was agreeable to refer to the Tribunal not only the issue relating to revision of pay scales but also that dealing with dearness allowance. Further, in paragraph 37 of its written statement the respondent-company clearly accepted the position that the Tribunal had jurisdiction to deal

with the issue of dearness allowance. This circumstance precludes the respondent from now objecting to the jurisdiction of the Tribunal. Apart from that we may point out that in its reply dated March 29, 1957 to the charter of demands sent on behalf of the appellant-union it was stated that the previous settlement had not been validly terminated and in answer to that the General Secretary of the Union wrote on 8th April 1957 saying that the various representations made by the Union to the respondent and the presentation of the charter of demands amounts to a notice of termination of the settlement. Thus, though no formal notice under section 19 (2) was given this letter can itself be construed as notice within the meaning of that provision. It may be noted that the representation was made long after the expiry of two months from this date. For these reasons we overrule the contention of Mr. Sen.

Now, coming to the merits, the main point urged by Mr. Chatterjee on behalf of the union is that there has been discrimination between the employees of the respondent in the Alambazar factory and their counterparts in the sales office in Calcutta. According to him even though these persons do the same kind of work they are given different grades and scales of pay and different scales of dearness allowance. He contends that the employees of the same employer doing the same kind of work in the same city ought not to be differentiated in this manner and that the decision of the Tribunal denied the members of the appellant-union equality with their counterparts in the sales office and is contrary to the principles of industrial law. We may, however, point out that the appellant-union claimed parity with the sales office employees only in the matter of dearness allowance and have referred to the existence of different pay scales in the sales office only in support of their claim for an upward revision of the present pay scales. It is, therefore, not open to learned Counsel now to urge that the pay scales also should be the same for the factory employees as for the sales office employees. We shall, therefore, consider the argument based on the ground of unwarranted discrimination only in so far as it relates to the question of dearness allowance.

For considering this argument it is desirable to bear in mind the history of industrial adjudication in Bengal and also the precise reason why a different basis for computing dearness allowance is applied to the respondent's employees in the sales office from that applied to its factory employees. Towards the end of the year 1945 the Bengal Chamber of Commerce made an enquiry as to the cost of living of the clerical staff employed in mercantile firms in the city of Calcutta. On the basis of that enquiry it fixed a certain amount as dearness allowance for these employees. It also fixed for the employees what it called the middle class cost of living index and recommended acceptance of its findings to its constituent members. Mr. Sen stated that the respondent's sales office is a member of the Bengal Chamber of Commerce but its factory in Alambazar is not a member of the Chamber of Commerce and this was not contravened by Mr. Chatterjee.

In the year 1948 disputes arose between the employees and employers of engineering firms in Calcutta as well as employees and employers of mercantile concerns in Calcutta. These disputes were referred to separate Industrial Tribunals. The first Engineering Tribunal was appointed on 3rd July 1948 to which disputes relating to 119 companies, including the respondent's factory, were referred. The award made by it was eventually published in the Calcutta Gazette and effect was given to it. Further disputes arose between some engineering concerns and their employees. These were referred to a second Engineering Tribunal on 31st August 1950 and effect was given to its award. It would, therefore, appear that members of a union like the one of employees of the respondent's factory at Alambazar have been dealt with on a different footing from the employees of a sales office in Calcutta, the former being employees of an engineering concern and the latter of a mercantile one. It was, however, contended before us that they are not two independent undertakings but parts of the same one, that is, Western India Match Co., and,

therefore, in the matter of payment of dearness allowance at least they should be dealt with on the same footing.

As we have already pointed out the employees in the sales office are governed by the recommendations of the Bengal Chamber of Commerce which the respondent was more or less bound to accept to be in line with other similar establishments and therefore, the case of the factory employees cannot be equated with that of the sales office employees. In *Clerks of Calcutta Tramways v. Calcutta Tramways Co., Ltd.*<sup>1</sup>, the clerical staff of the Calcutta Tramways claimed that since they belonged to the middle class they should be paid dearness allowance on the basis of the finding of the Bengal Chamber of Commerce. Their plea was negatived by this Court on the ground that in the matter of grant of dearness allowance no hard and fast rule is applicable to all kinds of employees, that there are different grades amongst middle classes and the clerical staff of the Calcutta Tramways cannot claim to be awarded dearness allowance at the rates fixed by the Bengal Chamber of Commerce for mercantile firms. It may further be pointed out that the factory employees cannot all claim to belong to the middle class because admittedly two-thirds of them belong to what is known as the subordinate staff.

It may be that the clerical staff both in Calcutta proper and in Alambazar does desk work. But the work which one set of clerks does is not the same as that of the other set. Clerks in the factories have to do work in connection with the manufacturing processes in the factory, the labour employed in the factory, raw materials arriving in the factory, the finished products of the factory and so on and so forth. The work which the clerical staff in the sales office has to do is connected with the marketing of the finished product, dealing with other firms, carrying on correspondence with the head office and other units and so on and so forth. There is no identity in the work of the two sets of clerical staff though there may be similarity. It is said that the work they do carries more responsibility. That may or may not be so but clearly if the work each set of employees does is not identical, it would be open to the employer to place different values on them. The same thing could be said about the work of the subordinate staff. If under these circumstances the respondent agreed to adopt a different mode of computation of dearness allowance in respect of the employees in the sales office from that offered by it to the employees in the factory, could it be said that the respondent was making invidious distinction? The sales office being a mercantile office the respondent had to fall in line with other similar establishments and pay to the employees in the sales office the same dearness allowance as other mercantile firms were paying to their employees. In the circumstances the factory employees cannot as of right demand that the benefit of the rates fixed by the Bengal Chamber of Commerce be also given to them though those rates were not intended to be applied to them.

Moreover it has to be borne in mind that in the previous settlement the appellant-union was content to accept the working class cost of living index as the basis for determining their dearness allowance and even in their present demands they have alternatively suggested that the same be adopted with certain variations in the rates in three slabs.

It is true that the employees in Alambazar as well as in Calcutta are living within the limits of the Corporation of Calcutta. But that circumstance though relevant is not by itself sufficient to justify payment to them of the same rate of dearness allowance as the sales office employees. We cannot ignore the fact that the employees of other factories situate in that area are not paid dearness allowance at the rates formulated by the Bengal Chamber of Commerce and, therefore, if those rates are adopted by the respondent with respect to the factory employees the existing industrial peace in that region may be destroyed. The tribunal must, therefore,

1. (1957) S.C.J. 23: (1957) 1 An.W.R. (S.C.) 23 : (1957) 1 M.L.J. (S.C.) 23 : (1956) S.C.R. 772.

be said to have exercised its discretion properly in not acceding to the appellant's demand in this respect.

We may also point out that the employees in the factory have been recruited on terms and conditions which from the beginning are different from those that govern the sales office employees. It is not disputed that certain benefits such as those relating to rations, free quarters, gratuity, etc., which are extended to the factory employees are not extended to the sales office employees. What is, said, however, is that the sum total of these considered along with the pay and dearness allowance of the factory employees still place them at a disadvantage as compared to the sales office employees. It is true that the sales office employees are, by and large, in a comparatively better position ; but that again is due to the fact that recruitments in the two establishments have all along been made on different terms and conditions.

We do not think that there is any valid reason for compelling employers to offer uniform terms of employment to their employees working in different establishments because various considerations must enter into the question such as the value of their work to the employer, the employer's ability to pay, the cost of living, the availability of persons for doing the particular kind of work and so on. Indeed, the Minimum Wages Act itself proceeds on the basis that the employer has large discretion in so far as the most important condition of service is concerned, that is, pay, so long as it is not below the minimum wage prescribed. It is a well-known fact that the biggest employer, the State, does not offer uniform conditions of service to all employees doing work which, broadly speaking, may be called similar. Thus to take one illustration, the clerical staff and the menial staff—now called Class IV staff—employed in the Secretariat are governed by terms and conditions of service different from those prevailing in other offices such as those under the Delhi Administration. High powered Pay Commissions have not regarded this as discriminatory treatment or breach of a principle of industrial law. In the *State of Madhya Pradesh v. G. C. Mandawar*<sup>1</sup>, it was contended on behalf of the clerical staff in the State of Madhya Pradesh that they should be paid dearness allowance at the same rate as the Central Government employees posted in Madhya Pradesh on the ground that they were doing similar work at the same place. Their contention was, however, rejected by this Court.

Looking at the matter thus we cannot say that the Industrial Tribunal in refusing to extend to the employees of the respondent in the factory in Alambazar the benefit of dearness allowance formulated by the Bengal Chamber of Commerce has contravened any principle of natural justice or any important principle of industrial law. In this connection we may refer to the decision in *Bengal Chemical & Pharmaceutical Works, Ltd., Calcutta v. Their Workmen*<sup>2</sup>, where at page 140 Gajendragadkar, J., who spoke for the Court observed :

“ Though Article 136 is couched in widest terms, it is necessary for this Court to exercise its discretionary jurisdiction only in cases where awards are made in violation of principles of natural justice causing substantial and grave injustice to parties or raises an important principle of industrial law requiring elucidation and final decision by this Court or discloses such other exceptional or special circumstances which merit the consideration of this Court.”

Therefore, even assuming that an Industrial Tribunal has exercised its discretion wrongly in not awarding uniform dearness allowance to all the employees of the same employer but who are working in different establishments, that is no ground for interference under Article 136.

The second ground on which the Tribunal's decision regarding dearness allowance is challenged is that even at the stage of giving evidence Mr. Wasmouth, the General Manager of the respondent said that the respondent still sticks to the offer regarding dearness allowance but despite that the Tribunal did not make

1. (1954) S.C.J. 503 : (1954) 2 M.L.J. 51 : 2. (1959) S.C.J. 647 : (1959) M.L.J. (Cr.) 370 : (1959) Supp. 2 S.C.R. 136. (140).  
(1955) 1 S.C.R. 599.

any change in the dearness allowance. It is contended on the basis of this stand of Mr. Wasmouth that the respondent accepted the position that there was scope for raising the dearness allowance. In answer to this argument Mr. B. Sen urged that the offer which the company had made was a package deal but since the appellant-union was not willing to accept the whole of the respondent's offer, the Tribunal was right in not granting any increase in the dearness allowance. We may point out, however, that the only outstanding questions between the parties were two—one relating to the dearness allowance and the other relating to the scales of pay. A comparative chart showing the union's demand and the company's offer of the existing scales of pay, dearness allowance, superannuation, casual leave, sick leave and overtime has been placed on record and is Annexure G-1. We are not concerned with matters other than the first two and we, therefore, reproduce below only that portion of the chart which relates to the first two of these matters :

	Union's demand.		Company's offer.	
1. Grade & scales of pay.	A 1	Rs. 35/-18/-	Rs. 65/-(20 yrs.)	Rs. 30/-14/-50-E.B. 1/4-55/-
	A 2	40/-28/-	90/- "	35/-14/-55-E.B. 1/4-60/-
	A 3	60/-38/-	130/- "	60/-2/-80/-
	B 1	65/-5/-	115/-E.B. 7/-	55/-4/-95-E.B. 5/-125/-no offer.
			185/-(20 yrs.)	
	C 1	75/-6/-	135/-E.B. 8/-	70/-58/-125-E.B. 7/-
			215/-(20 yrs.)	167/-E.B. 78/-195/-
	C 2	95/-8/-	175/-E.B. 12/-	857/-8/-160/-E.B. 10/-
			295/-(20 yrs.)	220/-E.B. 10/-260/-
	C 3	120/-12/-	240/-E.B. 18/-	110/-10/-210/-E.B. 16/-
			420/-(20 yrs.)	306/-E.B. 16/-370/-
	C. 4 Upto a limit of Rs. 650/.			Upto a limit of Rs. 500/-
2. Dearness allowance.	A. As per sales office	Employees	No offer	
		or		
	B. Rs. 1 to 50/-basic	125%	Rs. 1 to 25/-basic 125% *	
	51 to 100 "	25%	26 to 50 " 40%	
	101 to 150 "	17%	51 to 150 " 30%	
	151 to 200 "	12%	151 to 200 " 12%	
	201 to 250 "	7%	201 to 250 " 7%	
	251 to 300 "	5%	251 to 300 " 5%	
	In addition 3% for every 5 pts. rise or fall of working class index figure.		In addition 3% for every 5 pts. rise or fall of working class index figure.	
			*Adjusting the existing R. B. with this slab.	

It will be clear from this that the union had made alternative demands in respect of dearness allowance, one was that the same scale as that for sales office should be adopted and the other was variation in three slabs of the present scheme accepting as the basis the working class cost of living index figure. The company refused to make any counter-offer with regard to the primary demand of the appellant-union. But in regard to the alternative demand it made a counter-offer. If we understand Mr. Wasmouth right the respondent-company stood by its counter-offer based on the working class cost of living index figures before the Tribunal even though the conciliation proceedings broke down. During these proceedings this counter-offer was linked with the counter-offer pertaining to grades and scales of pay. Presumably, therefore, the company regarded the package deal not merely as a concession made for putting an end to disputes but also because it regarded it as fair and the financial commitment entailed by it to be within its means. No doubt in the evidence Mr. Wasmouth has said that the respondent-company does not stick to its offer relating to grades and scales of pay. But that would not render what was a fair and reasonable offer during the stage of negotiations, no longer fair and reasonable or necessary. The Tribunal has revised the pay scales on the basis of the respondent's offer. If, therefore, dearness allowance is revised on the basis of the respondent's offer what would in effect be done would be only that which the respondent-company during the conciliation proceedings had itself offered to do, a thing which was considered to be fair and reasonable and also necessary. In these circumstances we find it difficult to understand the principle



on which the Tribunal proceeded in refusing to revise the scales of dearness allowance on the basis of the respondent-company's offer.

Though, therefore, we reject the contention of the appellant-union that the dearness allowance should be fixed on the same basis as that obtaining in the sales office we think that in view of the stand taken by the respondent-company throughout the proceedings dearness allowance should be revised in accordance with the company's offer. The fact that it made such an offer is indicative of two things : the necessity and propriety of revision of the dearness allowance as well as the ability of the respondent-company to pay higher dearness allowance. It was no doubt contended before us that the offer was made during negotiations and was without prejudice and we should, therefore, keep it out of our mind. But we cannot overlook the fact that Mr. Wasmouth stuck to that offer even after the conciliation proceedings had ended infructuously and thus in effect revived the original offer.

Mr. Sen, however, argued that on the basis of the decision in *Burn & Co., Ltd. v. Their Employees*<sup>1</sup>, that an award of Industrial Tribunal cannot be reopened unless it is established that there has been a change in the circumstances on which the award is based and that since there has been no such change the award of 1955 pertaining to dearness allowance ought not to be revised. It is true that an award cannot ordinarily be revised unless there is a change of circumstances. But here, there has been a change of circumstances because cost of living has admittedly gone up since then. This is so notorious a fact that we are entitled to take notice of it. The object of awarding dearness allowance is to neutralise, at least partially, the rise in the cost of living and in the circumstances the factory employees are entitled to say that the old basis needs to be revised. There is thus no substance in Mr. Sen's argument.

On the question of the grades and scales of pay the contention of learned counsel is that the Tribunal has not applied its mind to the question but has mechanically accepted the respondent's offer. This statement is not wholly accurate. No doubt the Tribunal has accepted as reasonable the offer which the respondent has made ; but it has given reasons for doing so. In its award the Tribunal has stated :

"The principal point made in support of the demand is that the grades and scales of pay are too short and that they should be extended with such modifications as may appear necessary in the circumstances of the case."

Then after comparing the existing grades with the company's offer the Tribunal observed :

"It would appear at a glance at this chart that the existing rates provide for scales of pay in the case of six grades upto 16 years and in the case of one it provides for ten years only. The Union's demand is for extending the scales upto 20 years in place of ten and sixteen years, and both the minimum and maximum limit of the scales of pay would be raised in all cases. The company's offer except in the case of grade B (1) is much in advance of the existing grades and scales of pay. There are good justifications for revision of the grades and scales of pay, and the Company's offer, in my opinion, should have been accepted by the Union. The revision of the grades and scales of pay as in the Company's offer will, to a great extent, remove the hardships of the employees, who, for the present, must remain satisfied with such revision."

It has, therefore, applied its mind to the company's offer and also borne in mind the demand made by the union. Upon consideration of these matters the Tribunal came to the conclusion that the company's offer is a reasonable one. Its finding in this regard is one of fact and cannot be permitted to be challenged in an appeal under Article 136.

In this view we allow the appeal partly and direct that the award be modified by providing for a revision of the dearness allowance on the basis of the company's offer. Subject to this modification, the appeal will be dismissed. In view of the partial success of the parties we make no order as to costs.

K. S.

*Appeal partly allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, N. RAJAGOPALA AYYANGAR AND T. L. VENKATARAMA AYYAR, JJ.

Sree Raghuthi lakathirtha Sreepadangalavaru Swamiji

... Appellant\*

v.

The State of Mysore and others

... Respondents.

*Mysore Tenancy Act (XIII of 1952), section 6—Validity—Preamble to the Act—Scope—Policy of social justice—Prescription of maximum rent payable by tenant of land without classification—If bad—Section 6 (1) and 6 (2)—Construction—Different and independent provisions.*

*Interpretation of status—Exception—Cannot swallow the general provision.*

Section 6 of the Mysore Tenancy Act (1952) is constitutionally valid.

It is true that the Preamble to the Act merely says that the Act was passed because it was thought necessary to regulate the law which governs the relations of the landlords and tenants of agricultural lands and it does not refer to the requirement of social justice or does not specifically mention the object of ensuring the full and efficient use of land for agriculture. But in dealing with a law which has been passed for the purpose of effecting an agrarian reform it would be pedantic to ignore the essential basis of its material provisions merely on the ground that the concept of social justice on which the said provisions are based has not been expressly stated to be one of the objects of the Act in the Preamble. The important provisions of the Act are intended to improve the economic and social conditions of the agricultural tenants and so the policy of social justice can be safely said to be writ large on the face of the Act.

What section 6 (2) of the Act does is to prescribe the maximum and not to provide for a minimum. In prescribing a maximum it may be open to the Legislature to provide for a maximum which would be common to all lands whether irrigated or not. No importance can be attached to the point that in the absence of classification of lands while prescribing a maximum section 6 (1) suffers from any infirmity.

Section 6 (1) declares a maximum beyond which no landlord can recover rent from his tenant.

Sub-section (2) is so worded that in terms it cannot be said to be proviso to sub-section (1) and in substance it is not such a proviso nor is it an exception to sub-section (1). Having prescribed the maximum beyond which agricultural rent cannot go under section 6 (1) the Legislature has permitted the Government to fix a lower rate of the maximum rent in respect of lands situated in particular areas. The Government has also been authorised to fix the payment of rent on any other suitable basis as it thinks fit. In other words, the authority conferred on the Government is either to fix a lower rate or to fix any other basis on which the rent could be fixed. This provision is an independent provision and so the two sub-sections must be read as different, independent, though co-ordinate, provisions of the Statute.

What section 6 (1) has done is to fix a general ceiling apart from the areas and without considering the special factors appertaining to them. Having thus fixed a general ceiling the Legislature realised that the ceiling may have to be changed from area to area and so power was conferred on the Government to fix the ceiling at a lower rate. The Government having examined the matter came to the conclusion that the more equitable and reasonable course to adopt would be to divide the agricultural lands into two well-known categories and fix the ceiling by reference to them. Now in the very nature of things, the Legislature must have anticipated that the exercise of the power under section 6 (2) might cover all the areas in the State and that may mean that the general ceiling prescribed by section 6 (1) is not a general rule and section 6 (2) is not an exception to it, then the consequence flowing from the issue of the impugned notification cannot be characterised as an exception swallowing up the general rule.

Appeal from the Judgment and Order dated the 23rd December, 1959, of the Mysore High Court, in Writ Petition No. 229 of 1955.

S. S. Shukla and Mrs. E. Udayarathnam, Advocates of *M/s. Shukla & Co.*, for Appellant.

H. N. Sanyal, Additional Solicitor-General of India (*R. Gopalakrishnan* and P. D. Menon, Advocates, with him), for Respondents Nos. 1 and 2.

R. Gopalakrishnan, Advocates, for Respondent. No. 3

The Judgment of the Court was delivered by

*Gajendragadkar, J.*—This appeal arises from a writ petition filed by the appellant, Raghutilaka Tirtha Sripadangalavaru Swamji, in the Mysore High Court challenging the validity of section 6 (2) of the Mysore Tenancy Act, 1952 (XIII of 1952) hereafter called the Act and the notification issued under the said section on 31st March, 1952.

The appellant's case as set out in his writ petition before the High Court was that the impugned section as well as the notification issued under it infringed his fundamental rights guaranteed under Articles 14, 19 (1) (f), 26, 31 and 31-A of the Constitution. This contention has been rejected by the High Court and it has been held that the section and the notification under challenge are valid and constitutional. The appellant then applied for a certificate from the High Court both under Article 132 and Article 133 of the Constitution. The High Court granted him a certificate under Article 133, but refused to certify the case under Article 132. Thereafter the appellant applied to this Court for liberty to raise a question about the interpretation of the Constitution and permission has been accorded to the appellant. That is how the present appeal has come to this Court.

The appellant owns 6 acres and 30 ghuntas of garden land in village Mulbagilu in Taluka Thirthahalli in the district of Shimoga. Respondent No. 3, Ramappa Gowda, is his tenant in respect of this land. A registered lease deed was executed in favour of respondent No. 3 by the appellant on 11th March, 1943; under this document respondent No. 3 undertook to pay 82½ maunds of *areca* in addition to Rs. 17-12-0 in cash as rent per year. In 1955 respondent No. 3 filed an application before respondent No. 2., the Tehsildar of Thirthahalli, under section 12 of the Act and claimed that the standard rent payable by him to the appellant should be fixed (Tenancy Case No. 85 of 1955-56). Meanwhile respondent No. 1, the Government of Mysore, had, in exercise of the powers conferred on it by section 6 of the Act, issued a notification No. R. 9-10720 L.S. 73-54-2 on 28th/29th, March, 1955. This notification purported to fix the standard rent for lands of the category to which the appellant's land belong at one third of the produce. Feeling aggrieved by this notification the appellant filed the present writ petition in the High Court on 16th December, 1955. His case was that section 6 (2) as well as the notification issued under it were *ultra vires*, invalid and inoperative.

Before dealing with the contentions raised before us by Mr. Shukla on behalf of the appellant it would be necessary to consider very briefly the scheme of the Act. The Act has been passed by the Mysore Legislature because it was thought necessary to regulate the law which govern the relations of landlords and tenants of agricultural lands and to regulate and impose restrictions on the transfer of agricultural lands, dwelling houses, sites and lands appurtenant thereto belonging to or occupied by agriculturists in the State of Mysore except Bellary District and to make provisions for certain other purposes appearing in the Act. That is the recital contained in the Preamble to the Act. It would thus be seen that the primary object of the Act is to afford much needed relief to the agricultural tenants by regulating their relations with their landlords and in that respect the Act bears a very close resemblance to the provisions of the Bombay Tenancy and Agricultural Lands Act (LXVII of 1948). Indeed, the material provisions of the Act with which we are concerned are substantially similar.

Chapter I of the Act deals with the preliminary topic of defining the relevant terms used in the Act. Chapter II contains general provisions regarding tenancies. Section 4 defines persons who are deemed to be tenants. Section 5 provides that no tenancy would be for less than five years. Section 6 deals with the maximum rent payable by the tenants. Section 8 provides for the calculation of rent payable in kind in the manner indicated by clauses (i) and (ii) and prohibits the landlord from recovering or receiving rent calculated in any other manner. Under section 9 receipt of rent in terms of service or labour is prohibited. Section 11 abolishes all cesses and section 10 enables the tenants to claim a refund of rent which has been recovered in contravention of the provisions of the Act. Section 12 then deals with

enquiries with regard to reasonable rent. Sub-section (3) of section 12 lays down five factors which have to be borne in mind by the authority dealing with an application for the fixation of reasonable rent. Section 13 is a corollary of section 12 and authorises the reduction of rent after reasonable rent has been determined under section 12. Section 14 deals with suspensions or remissions of rent. Section 15 provides for termination of tenancy. Under section 18 a statutory bar is created against the eviction of a tenant from a dwelling house and under section 19 the tenant has the first option of purchasing the site on which he has built a dwelling house. Similarly, under section 22 the tenant is given an option of purchasing the land leased out to him. Section 24 deals with some cases where relief can be granted against termination of tenancy and section 25 with relief against termination of tenancy for non-payment of rent. Section 30 provides for the procedure to recover rent and section 31 protect the tenant's rights under any other law. Chapter III deals with the procedure and jurisdiction of Amildar and provides for appeal against the decisions of the Amildar, Chapter IV deals with offences and prescribes penalties for them and Chapter V contains miscellaneous provisions. That, in its broad outlines, is the nature of the provisions made by the Act in order to give relief to the agricultural tenants.

Section 6 with which we are directly concerned in the present appeal reads thus :

"6. (1) Notwithstanding any agreement, usage, decree or order of a Court or any law, the maximum rent payable in respect of any period after the date of coming into force of this Act by a tenant for the lease of any land shall not exceed one-half of the crop or crops raised on such land or its value as determined in the prescribed manner :

Provided that where the tenant does not cultivate the land the rent payable shall be the reasonable rent to be fixed by the Amildar.

(2) The Government may, by notification in the Mysore Gazette, fix a lower rate of the maximum rent payable by the tenants of lands situate in any particular area or may fix such rate on any other suitable basis as they think fit."

As we have already indicated, the provisions of the two sub-clauses of section 6 are substantially similar to the provisions of section 6 (1) and (2) of the corresponding Bombay Act. Indeed, it would be correct to say that the Act with which we are concerned has been modelled on the pattern of the Bombay Act and had adopted most of its important provisions. The validity of section 6 of the Bombay Act was challenged before this Court in "*Vasantlal Maganbhai Sanjanwala v. The State of Bombay and others*" and it has been held that the said section is valid. The reasons given by this Court apply with equal force in support of the validity of section 6 of the Mysore Act and so the point raised by the appellant in challenging the validity of the impugned section is really covered by the earlier decision of this Court.

Mr. Shukla, however, contends that the Preamble to the Act differs from the Preamble of the Bombay Act inasmuch as the latter Preamble refers to the fact that that Act was passed *inter alia* for the purpose of improving the economic and social conditions of peasants and ensuring the full and efficient use of land for agriculture and so considerations of social justice on which the validity of the corresponding provision of the Bombay Act was sought to be sustained cannot be invoked in dealing with the present appeal. We are not impressed by this argument. It is true that the Preamble to the Act merely says that the Act was passed because it was thought necessary to regulate the law which governs the relations of landlords and tenants of agricultural lands and it does not refer to the requirement of social justice or does not specifically mention the object of ensuring the full and efficient use of land for agriculture. But in dealing with a law which has been passed for the purpose of effecting an agrarian reform it would be pedantic to ignore the essential basis of its material provisions merely on the ground that the concept of social justice on which the said provisions are based has not been expressly stated to be one of the objects of the Act in the Preamble. We have already examined briefly the broad scheme of the Act and it is obvious that the important provisions of the Act are

intended to improve the economic and social conditions of the agricultural tenants and so the policy of social justice can be safely said to be writ large on the face of the Act. Therefore, we do not think that the argument based upon the fact that the Preamble does not refer to social justice distinguishes section 6 of the Act from the corresponding section of the Bombay Act.

Then it is urged that unlike the Mysore Act, the Bombay Act has distinguished between irrigated land and non-irrigated land and has provided by section 6 (1) that the maximum rent payable in the case of irrigated land shall not exceed one-fourth and in the case of other lands shall not exceed one-third of the crop of such land or its value as determined in the prescribed manner. It is true that section 6 (1) of the Act makes no such distinction between irrigated and non-irrigated lands. But that, in our opinion, is not a matter of essential importance. Like section 6 (1) of the Bombay Act, section 6 (1) of the Act also intends to provide for a maximum ceiling beyond which agricultural rent will not be allowed to soar and so far as the fixation of a maximum ceiling of rent is concerned it is not essential that a distinction must necessarily be made between irrigated lands and non-irrigated lands. It must be borne in mind that what the section does is to prescribe the maximum and not to provide for a minimum. In prescribing a maximum it may be open to the Legislature to provide for a maximum which would be common to all lands whether irrigated or not. That is why we are not inclined to attach any importance to the point that in the absence of classification of lands while prescribing a maximum section 6 (1) suffers from any infirmity.

Then it is argued that the Bombay Act while prescribing a maximum has taken the precaution of also prescribing a minimum and the absence of the latter provision makes a material difference. This argument is clearly misconceived. It is true that section 8 of the Bombay Act which had been inserted by the Bombay Legislature in 1956 did provide for the maximum and the minimum rent, but as the decision of this Court in the *Case of Sanjanwala*<sup>1</sup> shows in upholding the validity of the impugned provision of the Bombay Act no reliance was placed upon the fixation of the minimum rent. Indeed, the minimum rent was fixed subsequent to the decision of the High Court which was under appeal before this Court in that case and the fact that a minimum had been prescribed subsequently has been only incidentally mentioned in the judgment. Therefore the absence of a provision fixing the minimum rent does not introduce any infirmity in the impugned provision. We are, therefore, satisfied that the case of the impugned section is substantially similar to the case of section 6 of the Bombay Act with which this Court was concerned in the *Case of Sanjanwala*<sup>1</sup>, and the challenge to the validity of the section in the present appeal must, therefore, be held to be covered by the said decision.

That takes us to the question as to whether the impugned notification is invalid. This notification has been issued in exercise of the powers conferred on the State Government by section 6 (2) and it provides that the rate of maximum rent payable by the tenants of lands situated in the area specified in Schedule I and Schedule II to the notification shall be one-third and one-fourth respectively of the crop or crops raised on such lands with effect from the year commencing on 1st April, 1955. Schedule I deals with Maidan areas in which the maximum rent or rents shall be one-third of the crop or crops and Schedule II deals with Malanad areas in which the maximum rate of rent shall be one-fourth of the crop or crops raised.

It appears that the classification of lands between Maidan and Malanad lands is well-known in Mysore. Maidan lands are lands on the plains, whereas Malanad are lands on hilly tracts. The distinction between the two categories of lands takes into account the different conditions of rainfall, the different nature of the cultivation, the difference in the living conditions and the availability of labour and the difference in the quantity and the quality of the produce. It is true that the notification does not prescribe the lower rate of the maximum rent area by area in

the sense of district by district, but it purports to prescribe the said maximum by classifying the land in the whole of the State in the two well-known categories of Maidan and Malanad lands.

It is urged by Mr. Shukla that the impugned notification is invalid, because it is inconsistent with the provisions of section 6 (1). The argument is that section 6 (1) lays down a general rule and section 6 (2) provides for an exception to the said general rule. On that assumption it is contended that an exception cannot be allowed to swallow up the general rule and that is precisely what the notification purports to do. This argument is based on the decision of the House of Lords in *Macbeth v. Ashley*<sup>1</sup>. It would be noticed that this argument raises the question about the construction of the two sub-clauses of section 6. Before addressing ourselves to that question, however, we may refer to the decision of the House of Lords on which the argument is based.

It appears that 11 o'clock at night was the hour appointed for closing public-houses in Scotland, although in special cases, and for well considered reasons, a deviation was allowed with reference to any particular locality really requiring it. The Magistrates of Rothesay had ordered for closing at 10 instead of 11 and the effect of the order was that it embraced every public-house in the burgh. The House of Lords held that the Magistrates' order was *ultra vires*. The statutory provision with which the House of Lords was concerned was contained in the Act of Parliament, 25 and 26 Vict. c. 35. As a result of these provisions 11 o'clock at night was appointed to be the hour for closing public-houses. There was, however, a proviso which said *inter alia* that in any particular locality requiring other hours for opening and closing inns, hotels and public-houses it shall be lawful for such Justices and Magistrates respectively to insert in the schedule such other hours, not being earlier than six or later than eight o'clock in the morning for opening, or earlier than nine o'clock or later than eleven o'clock in the evening for closing the same as they shall think fit. It is in pursuance of the authority conferred on them by the said proviso that the Magistrates of Rothesay passed an order embracing every public-house in the burgh by which a deviation from the statutorily fixed hour was effected.

In dealing with the validity of the order issued by the Magistrates Lord Chancellor Lord Cairns expressed his opinion that if the exception is to swallow up the rule it ceases, of course, to be an exception at all and that which might fairly have been an exercise of discretion becomes no exercise of the kind of discretion mentioned in the Act of Parliament. It was for this reason that the order issued by the Magistrates was declared to be *ultra vires*. It was conceded that the Magistrates had a discretion, but the Lord Chancellor observed that the words "conferring discretion" expressly bear with reference to a particular locality and not with the whole burgh. What should be true about the whole burgh had been treated as a matter reserved for and determined by the consideration of the Imperial Parliament. The Lord Chancellor did not express any opinion on the question as to whether the discretion vested in the Magistrates can be exercised by them more than once but without deciding that point he held that the order of the Magistrates really amounted to evading an Act of Parliament. In substance, the Magistrates had once for all attempted with regard to all the public-houses in their district to change the rule laid down by the Act of Parliament. Lord Chelmsford, who concurred with the opinion expressed by the Lord Chancellor, rested his conclusion on the ground that it was impossible to say that the limits which the Magistrates had defined could be called a particular locality within burgh and so it appeared that what the Magistrates had done was something very like an attempt to evade the Act of Parliament. According to Lord Selborne, the participle "requiring" is connected with the substantive "locality" and therefore it must be a requirement arising out of the particular circumstances of the place. That is why Lord Selborne thought that the Magistrates must, in exercise of an honest and *bona fide* judgment, be of opinion that the particular locality which they except from the

ordinary rule is one which, from its own special circumstances, requires that difference to be made.

It would thus be seen that though the general basis of the decision, as it has been expressed by Lord Cairns, appears to be that the exception cannot swallow up the rule one of the reasons which ultimately influenced the decision was that the discretion had to be exercised *bona fide* and after due deliberation in respect of a particular locality and that the manner in which the order was issued indicated that the requirements of the particular localities had not been duly examined by the Magistrates. It is significant that though Lord Cairns posed the question as to whether the discretion in question can be exercised more than once, he did not choose to answer it ; but the trend of the opinions expressed by the Law Lords during the course of their speeches may seem to suggest that the discretion cannot be exercised more than once and in any case, it must be exercised by special reference to the particular locality as indicated by the proviso. If an order is made in respect of the whole of the burgh, it cannot be said that it has been passed after exercising due discretion in respect of the requirements of each particular locality. With respect, if the discretion is given to the Magistrates to provide for a departure from the rule prescribed by the general provision by reference to particular localities, it is not easy to see why the said discretion cannot be exercised more than once. Indeed, situations may arise when the Magistrates may have to consider the matter from time to time in respect of different localities and if it appears to the Magistrates considering the cases of different localities that in regard to each one of them a departure from the general rule should be made, it is not easy to follow why the proviso does not justify different orders being passed by the Magistrates in respect of different but particular localities. On the other hand, if the main provision is construed to mean that the time prescribed by it was to apply generally only with certain exceptions contemplated by the proviso, that would be a different matter. However, it is not necessary for us to pursue this point further and to express a definite opinion on the general proposition that an exception cannot swallow the general rule, because, as we will presently show, this rule cannot be applied to the provisions of section 6 at all. In this connection, we may, however, point out that both in Maxwell and in Craies, the decision in *Macbeth's case*<sup>1</sup> appears to have been treated as an authority for the proposition that an order like the one passed by the Magistrates in that case amounted to an evasion of the Parliamentary statute, because it was not in honest and *bona fide* exercise of the discretion vested in them. (Maxwell on Interpretation of Statutes, 11th Edition, p. 121 and Craies on Statute Law, 5th Edition, p. 75.)

But assuming that the proposition for which Mr. Shukla contends on the authority of the decision in *Macbeth's case*<sup>1</sup> is sound, does it apply to section 6 at all and the answer to this question will depend upon the construction of the provisions contained in the two sub-clauses of section 6. It would be noticed that section 6 (1) declares a maximum beyond which no landlord can recover rent from his tenant. In other words, as soon as the Act came into force a ceiling was fixed beyond which the landlord cannot recover rent from his tenant even though it may be justified by agreement, usage, decree or order of a Court or any other law. The provisions of this sub-section apply individually and severally to all agricultural leases and govern the relations of individual landlords and tenants in respect of payment of rent by the latter to the former. The fixation of the maximum by sub-section (1) is really not intended to lay down a general rule as to what a landlord should recover from his tenant and it is in that sense alone that its relation to the provisions of sub-section (2) must be judged. In that connection we may point out that there is one proviso to section 6 (1) which deals with cases of tenants who do not cultivate the land and it lays down that in their case the rent shall be reasonable rent to be fixed by the Amildar.

Sub-section (2) is so worded that in terms it cannot be said to be a proviso to sub-section (1) and in substance it is not such a proviso nor is it an exception to

sub-section (1). Having prescribed the maximum beyond which agricultural rent cannot go under section 6 (1) the Legislature has permitted the Government to fix a lower rate of the maximum rent in respect of lands situated in particular areas. The Government has also been authorised to fix the payment of rent on any other suitable basis as it thinks fit. In other words, the authority conferred on the Government is either to fix a lower rate or to fix any other basis on which the rent could be fixed. This provision is an independent provision and so the two sub-sections must be read as different, independent, though co-ordinate provisions of the Statute. It would, we think, be erroneous to treat sub-section (2) as a proviso or exception to sub-section (1). Whereas sub-section (1) deals with and applies to all leases individually and prescribes a ceiling in that behalf, sub-section (2) is intended to prescribe a maximum by reference to different areas in the State. The object of both the provisions is no doubt similar but it is not the same and the relation between them cannot legitimately be treated as the relation between the general rule and the proviso or exception to it.

The argument that by issuing the notification the Government has purported to amend section 6 (1) is in our opinion, not well-founded. As we have already seen section 6 (1) is intended to apply to all the agricultural leases until a notification is issued under section 6(2) in respect of the areas where the leased lands may be situated. It is not suggested that under section 6(2) it is necessary that the Government must fix the lower rates by reference to individual lands and so there can be no doubt that even on the appellant's argument it would be competent to the Government to fix lower rents, say districtwise. If instead of prescribing the lower rates districtwise after classifying the lands into two categories which are well recognised, the Government prescribed the rates by reference to the said categories of lands throughout the State, we do not see how the said notification can be said to be inconsistent with section 6 (2) or with section 6 (1) either. The scheme of section 6 does not seem to postulate that after the notifications are issued under section 6 (2) some area must inevitably be left to be covered by section 6 (1). Such an assumption would be inconsistent with the object underlying the said provision itself. What section 6 (1) has done is to fix a general ceiling apart from the areas and without considering the special factors appertaining to them. Having thus fixed a general ceiling the Legislature realised that the ceiling may have to be changed from area to area and so power was conferred on the Government to fix the ceiling at a lower rate. The Government having examined the matter came to the conclusion that the more equitable and reasonable course to adopt would be to divide the agricultural lands into two well-known categories and fix the ceiling by reference to them. Now in the very nature of things the Legislature must have anticipated that the exercise of the power under section 6 (2) might cover all the areas in the State and that may mean that the general ceiling prescribed by section 6 (1) may not apply to any land which is covered by the notification. If section 6 (1) is not a general rule and section 6 (2) is not an exception to it, then the consequence flowing from the issue of the impugned notification cannot be characterised as an exception swallowing up the general rule. That, in substance, is the view which the Mysore High Court has taken in the matter and we think that the said view is right.

In the result, the appeal fails and is dismissed with costs.

V.S.

*Appeal dismissed.*



## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, N. RAJAGOPALA AYYANGAR AND T. L. VENKATARAMA AYYAR, JJ.

The State of Madhya Pradesh

.. Appellant\*

v.

Yakinuddin

.. Respondent, etc.

*Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (I of 1951), sections 3, 4(1) and 6—Scope and effect—Leases by proprietor granting right to propagate lac, right to collect tendu leaves and right to fruits and flowers of mahua—If binding on the State after notification and taking over of estate.*

On the taking over of estates after notification under section 3 of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, the State refused to recognise the rights claimed by persons holding grants from the proprietors of the right to propagate lac, the right to collect tendu leaves and the right to collect fruits and flowers of mahua.

*Held* : On a bare reading of clause (a) of section 4 (1) of M. P. Act (I of 1951), it is clear that whatever rights the proprietor or a person claiming interest through him, had in the trees, scrub jungle, forest, etc., ceased on the vesting of the estate in the State. The transfers which have been saved by section 6 (1) of the Act from being void may be recognised by the State for which the transferee may be entitled to claim some compensation in accordance with the provisions of the Act. But section 6 does not save that interest from being vested in the State as a result of the notification under section 3 read with section 4 (1) (a).

Appeal by Special Leave from the Judgment and Decree, dated the 13th October, 1958, of the Madhya Pradesh High Court in First Appeal No. 133 of 1955, and Appeals from the Judgment and Orders, dated the 20th February, 1958, of the Madhya Pradesh High Court in Miscellaneous Petitions Nos. 500 and 524 of 1954 and 419 of 1955.

*I. N. Shroff*, Advocate, for Appellant (in all the appeals).

*S. N. Kherdekar*, *R. N. Srivastava*, *N. K. Kherdekar* and *Ganpat Rai*, Advocates, for Respondent (in C.A. No. 229 of 1961).

*G. C. Mathur*, Advocate, for Respondent (in C.A. No. 281 of 1961).

*H. N. Sanyal*, Additional Solicitor-General (*G. C. Mathur*, Advocate, with him) for Respondent (in C.A. No. 282 of 1961).

*W. S. Barlingay*, Senior Advocate (*A. G. Ratnaparkhi*, Advocate, with him), for Respondent (in C.A. No. 283 of 1961).

The Judgment of the Court was delivered by

*Sinha, C.J.*—In these appeals the common question of law that arises for determination is whether the respective grants made by the outgoing proprietors in favour of the respondents convey any rights to them, which could be enforced against the appellant, the State of Madhya Pradesh, after the coming into effect of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (Madhya Pradesh Act I of 1951)—which will be referred to hereinafter as the Act.

It is not necessary to state the facts of each case in any detail because they are not disputed, and nothing turns on the difference in facts. In Civil Appeal No. 229 of 1961, the respondent obtained, by virtue of registered documents, the grant of 24 villages in Balaghat and Mandla Districts, for propagating lac, the lease to expire on 31st July, 1955. In Civil Appeal No. 281 of 1961, by virtue of two unregistered agreements, the respondent obtained the right to collect *tendu* leaves in 37 villages up to 31st July, 1963. In Civil Appeal No. 282 of 1961, the respondent obtained similar rights from the proprietor by virtue of registered agreements, extending up to the end of the year 1962. In Civil Appeal No. 283 of 1961, the respondent obtained the right to collect fruits and flower of *Mahua* trees from the proprietor, extending down to the year 1969, by virtue of three registered leases.

On the coming into effect of the Act and the issue of the necessary notifications under section 3 of the Act, the appellant, the State of Madhya Pradesh, took possession of all the villages comprised in the respective estates of the proprietors, who were the grantors of the several interests indicated above in favour of the respondents. The State refused to recognise the rights claimed by the respondents by virtue of the transactions aforesaid in their favour.

In each case, the High Court relying upon the decision of this Court in *Chhotabhai Jethabai Patel & Co. v. The State of Madhya Pradesh*<sup>1</sup>, granted the relief claimed by the respondents, and held that the several interests claimed by the respondents had not been affected by the coming into force of the Act. The High Court did not accept the contention raised on behalf of the State that as a result of the coming into operation of the Act, all these interests which were the subject-matter of dispute in all these cases had been extinguished, in view of the provisions of section 4 (1) (a) of the Act. Soon after the decision aforesaid of this Court, the matter was re-examined by this Court in the case of *Shrimati Shantabai v. State of Bombay*<sup>2</sup>, and in the case of *Mahadeo v. The State of Bombay*<sup>3</sup>.

The earliest decision of this Court with reference to the Act is a decision of the Division Bench of three Judges in *Chhotabhai Jethabai Patel & Co. v. The State of Madhya Pradesh*<sup>1</sup>. In that case, which was a petition under Article 32 of the Constitution, the petitioners had entered into various contracts and agreements with the proprietors of the estates, before the dates on which the estates vested in the State, under the Act, under which they were entitled to pluck, collect and carry away *tendu* leaves, and to cultivate, culture and acquire lac, as also to cut and carry away teak and timber. The petitioners had complained to this Court that the State of Madhya Pradesh had been interfering with their rights thus acquired from the outgoing proprietors. This Court held, on a construction of the contracts, that the grants in essence and effect were licences to the petitioners who were neither proprietors, not persons having any interests in the proprietary rights through the proprietors, nor were their interests 'encumbrances' within the meaning of that expression in section 3 (1) of the Act. In that view of the matter, the Court granted the writs in favour of the petitioners. Naturally, the High Court granted appropriate reliefs to the respondents in this batch of cases, relying upon this decision of this Court.

In the case of *Shrimati Shantabai v. State of Bombay*<sup>2</sup>, the same question came up to be re-examined by a Constitution Bench of this Court. The petitioner in that case had obtained from the proprietor the right to take and appropriate all kinds of wood from certain forests in his estate, by an unregistered document. On the coming into effect of the Act, the State authorities interfered with the petitioner's rights under the grant from the proprietor. The petitioner moved this Court under Article 32 of the Constitution, complaining of interference by the State with those rights. This Court held that if the grant purported to transfer any proprietary interest in land, it would be ineffective because it was not evidenced by a registered document, and that under section 3 of the Act all proprietary interest vested in the State. If it was a grant of *profits a prendre* it would partake of the nature of immovable property and would not be effective without a registered document evidencing the grant. If on the other hand it was a mere contract creating personal rights, the petitioner could not complain of any act on behalf of the State officials because the State had not taken possession of the contract, which remained the petitioner's property. The State not being a party to that contract, would not be bound by it, and that, alternatively, if the State were bound by the terms of the contract, the petitioner's remedy lay by way of suit for the enforcement of the contract. Hence, it was held that there was no question of the infringement of any fundamental right in that case.

1. (1953) S.C.J. 96: (1953) S.C.R. 476.

2. (1958) S.C.J. 1078: (1959) S.C.R. 265.

3. (1959) S.C.J. 1021: (1959) (Suppl.) 2 S.C.R. 339.

The provisions of the Act also came in for consideration in the case of *Mahadeo v. The State of Bombay*<sup>1</sup>. In that case, the petitioners had obtained from the outgoing proprietors the right to collect *tendu* leaves and other forest produce in villages which formed part of the proprietors' estates, before the coming into effect of the Act. Some of the agreements were registered whereas others were not. The State did not respect those grants and put those rights to auction, after having taken possession of those estates, when they had vested in the State under section 3 of the Act. The petitioners then moved this Court under Article 32 of the Constitution, complaining of the infringement of their rights to property. It was held by this Court that the agreements required registration, and in the absence of registered documents could not confer any rights, which were some interest in land. It was also held that rights conveyed to the petitioners under the agreements were proprietary rights which, under the provisions of sections 3 and 4 of the Act became vested in the State. Alternatively, if the interests created by the agreements were not in respect of proprietary rights, it was held that in those interests the State was not interested, as the State was not bound by the agreements entered into by the outgoing proprietors.

It would thus appear that in view of the two later decisions of this Court, the High Court was in error in granting any relief to the respondents. But it has been contended on behalf of the respondents that certain aspects of the controversy had not been brought to the notice of the Court on the previous occasion, and that the respondents were entitled to the benefit of section 6 of the Act. It was contended that the respondents' rights were not in the nature of mere licences, but were in the nature of *profits a prendre*, which were saved to them in view of the provisions of section 6.

In our opinion, there is no substance in the contention raised on behalf of the respondents. Under section 3 of the Act, from the date of the notification by the State, all proprietary rights in an estate vesting in a proprietor of such an estate or in a person having interest in such proprietary rights through the proprietor, shall vest in the State for the purposes of the State, free from all encumbrances. The consequences of such a vesting are laid down in section 4, which runs into several clauses and sub-sections. Section 4 (1) (a) is the relevant provision of the Act which determines this controversy entirely against the respondents. It provides that

"when the notification under section 3 in respect of any area has been published in the Gazette, then, notwithstanding anything contained in any contract, grant or document or in any other law for the time being in force, and save as otherwise provided in this Act, the consequences as hereinafter set forth shall. .... ensue, namely, (a) all rights, title and interest vesting in the proprietor or any person having interest in such proprietary right through the proprietor in such area including land (cultivable or barren), grass land, scrub jungle, forest, trees, ..... shall cease and be vested in the State for the purposes of the State free of all encumbrances. ...." (We have omitted the words which are not necessary for the purposes of the present appeals).

It is clear on a bare reading of the provisions of clause (a) of section 4 (1) that whatever rights the proprietor, or a person claiming interest through him, had in the trees, scrub jungle, forest, etc., ceased on the vesting of the estate in the State.

But it was contended on behalf of the respondents that section 6 (1) saves their rights from the operation of section 4 (1) (a), because, it is argued, section 4 (1) (a) is subject to the provisions of section 6 (1). Section 6 (1) runs as follows :

"6. (1) Except as provided in sub-section (2), the transfer of any right in the property which is liable to vest in the State under this Act made by the proprietor at any time after the 16th March, 1950 shall, as from the date of vesting, be void."

In our opinion, there is no substance in this contention. Section 6 refers to those transactions of transfer of any right which is liable to vest in the State as being void. It does not lay down that a transfer made before 16th March, 1950, shall be binding upon the State. The transfers which have been saved by section 6 (1) from being void may be recognised by the State for which the transferee may be

entitled to claim some compensation in accordance with the provisions of the Act. But section 6 does not save that interest from being vested in the State as a result of the notification under section 3, read with section 4 (1) (a). The scheme of the Act is that it provides for the acquisition by the State of all interests in the estate of the proprietor himself or of an intermediary, except the tiller of the soil. This it does by vesting all proprietary rights in the State, of whatever grade, by issuing the notification under section 3, vesting it in the State for the purposes of the State free from all encumbrances. Section 4 lays down in great detail the rights which become extinguished on the vesting of the estate as aforesaid. What is saved to the proprietor or any other person claiming through him is set out in section 5, clause (a) to (h), on such terms and conditions as may be determined by the State. Hence any person claiming some interest as a proprietor or as holding through a proprietor in respect of any proprietary interest in an estate has got to bring his interest within section 5, because on the date of vesting of the estate, the Deputy Commissioner takes charge of all lands other than occupied lands and homestead, and of all interests vesting in the State under section 3. Upon such taking over of possession, the State becomes liable to pay the compensation provided for in section 8 and the succeeding sections. The respondents have not been able to show that their interests come under any of the clauses aforesaid of section 5.

A great deal of argument was advanced on behalf of the respondents showing the distinction between a bare licence and a licence coupled with grant or *profits a prendre*. But, in our opinion, it is not necessary to discuss those fine distinctions because whatever may have been the nature of the grant by the outgoing proprietors in favour of the respondents, those grants had no legal effect as against the State, except in so far as the State may have recognised them. But the provisions of the Act leave no manner of doubt that the rights claimed by the respondents could not have been enforced against the State, if the latter was not prepared to respect those rights and the rights created by the transactions between the respondents and their grantors did not come within any of the saving clauses of section 5.

In view of these considerations, it must be held that these cases are equally governed by the decisions aforesaid of this Court, which have overruled the earliest decision in the case of *Chhotabhai Jethabai Patel & Co. v. The State of Madhya Pradesh*<sup>1</sup>. The appeals are accordingly allowed with costs throughout, hearing fee one set in this Court.

K.S.

*Appeals allowed.*

### THE SUPREME COURT OF INDIA.

PRESENT :—A. K. SARKAR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Kalwa Devadattam and others

.. *Appellants\**

v.

The Union of India and others

.. *Respondents.*

*Income-tax Act (XI of 1922), section 67—Bar of suit—Tax arrears—Sale of properties—Suit to set aside sale—Maintainability.*

A Hindu undivided family held immovable properties and also carried on business. It was claimed in the course of its assessments for 1943-44 to 1946-47 that the family had been partitioned between the Kartha and his minor sons under a deed dated 14th March, 1947. The Income-tax Officer, however, did not record the partition, but completed the assessments in the status of a Hindu undivided family. The tax demand levied on the basis of the said assessments remained unpaid, and the revenue authorities sold several items of the immovable properties for recovery of the tax arrears. Before the sales could be confirmed in favour of the purchasers, the minor sons of the Kartha represented by their mother as next friend sued the Union of India, the revenue recovery authorities and the purchasers for a declaration that the sales were invalid and that some of the items of properties standing in the names of the minors had ever belonged to the family, they having been purchased out of the funds of the maternal grandmother. The trial Court dismissed the suit on the

1. (1953) S.C.J. 96 : (1953) S.C.R. 476.

\* C.As. Nos. 641 and 642 of 1961.

main ground that it was barred under section 67 of the Indian Income-tax Act, 1922, but it also held that there was no evidence to show that the properties in the name of the minors were acquired out of family funds. On appeal by the plaintiffs the High Court held that the partition was sham and that the assessments in the status of a Hindu undivided family were valid in the absence of order recording the partition. On further appeal by the plaintiffs,

*Held*, (1) that the suit, which was in substance one for setting aside an assessment, was in law not maintainable, because of section 67 of the Indian Income-tax Act, 1922.

In the absence of an order under section 25-A of the Act, the assessment of the Hindu joint family was properly made.

Even if an order recording partition was made, the liability of the plaintiffs to pay income-tax assessed on the family could still be enforced against them jointly and severally under section 25-A, Proviso.

(2), that the properties having been purchased in the name of the plaintiffs the burden *prima facie* lay upon the taxing authorities to establish that the sale deed was taken for and on behalf of the joint family or with the aid of joint family funds. But evidence having been led by the contesting parties on the question in issue, abstract considerations of onus are out of place and the truth or otherwise of the case must always be adjudged on the evidence led by the parties.

Appeal from the Judgment and Decree dated 11th April, 1957 of the Andhra Pradesh High Court in A.S. Nos. 95 and 520 of 1952.†

*A. V. Visvanatha Sastri*, Senior Advocate (*P. Chalapathi Rao* and *S. N. Andley* and *Rameshwarnath* of *M/s. Rajinder Narain & Co.* with him) for Appellants in both appeals.

*K. N. Rajagopala Sastri* Senior Advocate (*R. N. Sacathey*, Advocate. with him), for Respondents 1 to 4 in C.A. No. 641 of 1961.

*C. Kandiah*, *M. Rajagopalan* and *K. R. Chaudhurl*, Advocates for Respondent No. 1 (in C.A. No. 642 of 1961.

The Judgment of the Court was delivered by

*Shah, J.*—Nagappa, son of Pullanna, resident of Nandyal, carried on business in yarn, drugs and forward contracts. He acquired in that business a considerable estate which was treated by him as property of the joint family of himself and his sons. Nagappa and his sons were assessed by the Income-tax authorities to pay income-tax and super-tax in the status of a Hindu undivided family as set out in the following table :—

<i>Year of account ending.</i>	<i>Year of assessment.</i>	<i>Date of order.</i>	<i>Income-tax and Super-tax assessed.</i>
24-3-44	1944-45	25-2-48	Rs. 51,116-7-0
14-3-45	1945-46	25-2-48	Rs. 21,452-1-0
2-4-46	1946-47	31-3-48	Rs. 21,012-13-0

Besides this amount of income-tax and super-tax, he was assessed to pay penalty and excess profits tax aggregating to Rs. 26,602. The total amount of tax due for the three years of assessment 1944-45, 1945-46 and 1946-47 aggregated to Rs. 1,23,233-5. Nagappa did not pay the tax. The revenue authorities of the Province of Madras, at the instance of the Income-tax Department attached 51 items of immovable property as belonging to the joint family of Nagappa and his sons, and put up the same for sale under the Madras Revenue Recovery Act II of 1864. Out of these 38 items were sold and were purchased by certain persons.

Kalwa Devadattam, Kalwa Devarayulu and Kalwa Nandi Sankarappa (sons of Nagappa)—hereinafter called collectively the 'plaintiffs'—through their mother acting as their next friend commenced Suit No. 52 of 1950 in the Court of the Sub-ordinate Judge, Kurnool, against the Union of India, the revenue authorities of the State of Madras, the purchasers of the properties at the auction, and Nagappa, claiming a decree declaring that the assessment orders made by the Income-tax Officer, Kurnool, for the years 1944-45, 1945-46 and 1946-47 were unenforceable against 51 items of property of the plaintiffs described in the schedule and sale of their property by the revenue authorities was "without jurisdiction, void and illegal,"

† (1958) 1 An.W.R. 348.

and an order restraining the Union of India and the authorities of the State of Madras from selling the "scheduled properties" or confirming the sale already held or that may be held after the institution of the suit. It was the case of the plaintiffs that items 46 to 51 did not at any time belong to the joint family, having been acquired by them with funds provided by their maternal grandmother Seshamma, and that the remaining items of property were not liable to be attached and sold since these had been allotted to them on a partition of the joint family estate before the order of assessment was made by the Income-tax authorities.

The suit was resisted by the Union of India and also by the purchasers on diverse grounds. The Union contended, *inter alia*, that the plaintiffs were not entitled to question the correctness of the assessment of tax in a civil Court because the jurisdiction of the Court in that behalf was excluded by section 67 of the Indian Income-tax Act, that the plaintiffs were in any event precluded from setting up the plea of a partition between them and Nagappa as a defence to the enforcement of liability for payment of tax in view of the provisions of section 25-A (3), that the partition was sham and not intended to be operative and that items 46 to 51 were not the separate estate of the plaintiffs as contended by them. The purchasers (who were impleaded as defendants 5 to 28) contended that there was no invalidity in the proceedings for assessment of tax and that they having purchased those properties for the full amounts for which they were sold, sales in their favour though not confirmed were binding upon the plaintiffs.

Suit No. 52 of 1950 was tried with another suit being Suit No. 54 of 1949, of the same Court in which also the validity of the partition dated March 14, 1947 fell to be determined, between the sons of Nagappa and the firm of Kumaji Sare Mal who were creditors under a money decree against Nagappa. The facts which gave rise to that suit are these : Kumaji Sare Mal filed Suit No. 7 of 1944 in the Court of the Subordinate Judge, Anantpur, against Nagappa for a decree for Rs. 10,022-10-6 due on the foot of certain transactions in yarn. This suit was dismissed by the Trial Court on the ground that the contracts for the supply of yarn were wagering contracts, but in Appeal No. 174 of 1945 the High Court of Madras decreed the suit on March 5, 1947 holding that the contracts giving rise to the liability though speculative were not of a wagering character. The High Court passed a decree for Rs. 10,000 with interest at 6 per cent. from the date of suit and costs. This decree was soon followed by the execution of the deed of partition dated March 14, 1947 between Nagappa and the plaintiffs, by which the joint family estate valued approximately at Rs. 1,25,000 was divided into four shares. To Nagappa was allotted under that partition property of the value of Rs. 31,250 and he stood liable to satisfy debts of the value of Rs. 12,236-4-9. In execution of the decree in Suit No. 7 of 1944 Kumaji Sare Mal attached some of the properties that fell to the share of the plaintiffs under the deed of partition dated March 14, 1947. Objections to the attachment preferred under Order 21, rule 58, Code of Civil Procedure by the plaintiffs were dismissed by the executing Court on July 12, 1948. The plaintiffs then filed Suit No. 54 of 1949 for a decree setting aside the summary order passed in the execution proceeding, claiming that the debt incurred by Nagappa being *avyavaharika*, the plaintiffs were not liable to satisfy the debt, and that the firm of Kumaji Sare Mal was incompetent to bring to sale in execution of the decree obtained against Nagappa in his individual capacity, the interest of the plaintiffs in the joint family property after the joint family status was severed and the properties of the family were partitioned. Common evidence was recorded in the two suits.

The trial Judge held that the properties items 1 to 45 belonged in the relevant years of assessment to the joint family of Nagappa and his sons, and in the absence of an order recording partition under section 25-A (1) of the Indian Income-tax Act, the Income-tax Officer was bound to assess the undivided family even after partition, on the footing that the family still continued to be joint. He further held that by virtue of section 67 of the Indian Income-tax Act, no action questioning the assessment could be entertained by the Courts, and that there was no irregularity in the proceedings for sale. But the Court held that on March 14, 1947 division

of property of the undivided family was in fact made between Nagappa and the plaintiffs : that the partition was effected with the object of defeating the claims of the creditors including the Income-tax authorities, but it was nevertheless partition which was intended to be operative. The Court further held that items 46 to 51 were not proved by the defendants to be the joint family property of the plaintiffs and Nagappa. In Suit No. 54 of 1949 the learned Judge held following *Schwebo K. S. RM. Firm through partner Govindan alias Ramanathan Chettiar v. Subbiah alias Shanmugham Chettiar*<sup>1</sup>, that after a partition between members of the joint Hindu family the sons' share in the joint family property cannot be proceeded against in execution so as to enforce the pious obligation of the sons to satisfy their father's debts under a decree passed against the father alone. The learned Judge accordingly decreed Suit No. 54 of 1949 holding that the only remedy of the firm Kumaji Sare Mal was to proceed by a suit to enforce the pious obligation of the plaintiffs to discharge the pre-partition debts.

The plaintiffs appealed against the decree in Suit No. 52 of 1950 to the High Court of Madras and the Union filed cross-objections to the decree appealed from. Firm Kumaji Sare Mal also appealed against the decree dismissing their Suit No. 54 of 1949. The High Court of Andhra Pradesh, to which the appeals stood transferred for hearing under the States Reorganization Act, 1956, held agreeing with the trial Court that a suit to set aside the assessment of income-tax was not maintainable against the Union, and that in any event in the absence of an order under section 25-A, (1) of the Indian Income-tax Act, recording a partition, the Income-tax authorities were bound to assess tax on the Hindu undivided family as if that status continued. The High Court also held that the partition set up by the plaintiffs was a transaction which was nominal and sham, and that the evidence established that items 46 to 51 were purchased with the aid of joint family funds and not with the funds supplied by Seshamma, and therefore all the properties items 1 to 51 were liable to satisfy the tax liability of the joint family. The High Court also held that the firm Kumaji Sare Mal was entitled to recover the debt due to them in execution proceeding, there being no real partition between Nagappa and the plaintiffs prior to the date of attachment. The High Court accordingly dismissed both the suits.

We will reserve for separate consideration the common question which arose in these two appeals, namely, whether the partition by the deed dated March 14, 1947 between Nagappa and his sons the plaintiffs was a sham transaction. Even on the footing that the partition was real and intended to be operative, Suit No. 52 of 1950 filed by the plaintiffs against the Union was bound to fail for more reasons than one. For the assessment year 1943-44 the Hindu undivided family of Nagappa and his sons was assessed to income-tax. In the years 1944-45, 1945-46 and 1946-47 the family was also assessed to pay income-tax, super-tax and excess profits tax, as set out herein before. Nagappa maintained his accounts according to the Telugu year, and the last year of account corresponding to the assessment year 1946-47 ended on April 2, 1946. Under the Indian Income-tax Act liability to pay income-tax arises on the accrual of the income, and not from the computation made by the taxing authorities in the course of assessment proceedings : it arises at a point of time not later than the close of the year of account. As pointed out by the Judicial Committee of the Privy Council in *Wallace Brothers & Co., Ltd. v. The Commissioner of Income-tax, Bombay City and Bombay Suburban District*<sup>2</sup> :

"The general nature of the charging section is clear. First, the charge for tax at the rate fixed for the year of assessment is a charge in respect of the income of the 'previous year', not a charge in respect of the income of the year of assessment as measured by the income of the previous year. \* \* \* \* \*

Second, the rate of tax for the year of assessment may be fixed after the close of the previous year and the assessment will necessarily be made after the close of that year. But the liability to tax arises by virtue of the charging section alone, and it arises not later than the close of the previous year though quantification of the amount payable is postponed".

1. I.L.R. (1945) Mad. 138 : (1944) 1 M.L.J. (1948) 16 I.T.R. 240 : 52 C.W.N. 620 : A.I.R. 384. 1948 P.C. 142.

2. (1948) 2 M.L.J. 242 : L.R. 75 I.A. 86 :

Liability of the Hindu undivided family of Nagappa and his sons therefore arose not later than the close of each account year and account period for which the tax was assessed, and it is not the case of the plaintiffs that the family estate was partitioned before the liability of the undivided family to pay tax arose. There is no dispute in the suit filed by the plaintiffs against the Union that the business carried on by Nagappa was the business of the joint family. It is on the footing that the business carried on by Nagappa was of the joint family, and the income earned in the conduct of the business and the property was joint family income that the plaintiffs have filed this suit. Under section 25-A of the Income-tax Act, if at the date when the liability to pay tax arose there was in existence a joint family which has subsequently disrupted, the tax will still be assessed on the joint family. The machinery for recovery of the tax however differs according as an order recording partition is made or not made. If the Income-tax Officer is satisfied on a claim made by a member of the family that the joint family property has, since the close of the year of account been partitioned among the various members or groups of members in definite portions, he must record an order to that effect and thereupon, notwithstanding anything contained in sub-section (1) of section 14 of the Act, each member or group of members is liable, in addition to any income-tax for which he is separately liable, for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it. But even after this apportionment of liability for the tax assessed on the total income of the joint family, the members of the family or groups thereof remain jointly and severally liable for the tax assessed on the total income received by the family as such. If no order is recorded under sub-section (1) of section 25-A, by virtue of sub-section (3) the family shall be deemed, for the purposes of the Act, to continue to remain a Hindu undivided family. Section 25-A merely sets up machinery for avoiding difficulties encountered in levy and collecting tax, where since the income was received the property of the joint family has been partitioned in definite portions, while at the same time affirming the liability of such members or group of members, jointly and severally to satisfy the total tax in respect of the income of the family as such. The section seeks to remove the bar imposed by section 14 (1) against recovery of tax from an individual member of a joint Hindu family in respect of any sum which he receives as a member of the family, and to ensure recovery of tax due, notwithstanding partition. The incidence of tax, but not the quantum is re-adjusted to altered conditions.

The Judicial Committee of Privy Council in *Sir Sunder Singh Majithia v. Commissioner of Income-tax, United and Central Provinces*<sup>1</sup>, analysed the scheme of section 25-A as follows :

"Section 25-A is directed to the difficulty which arose when an undivided family had received income in the year of account but was no longer in existence as such at the time of assessment. The difficulty was the more acute by reason of the provision—an important principle of the Act contained in section 14 (1) : "The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family."

Section 25-A deals with the difficulty in two ways, which are explained by the rule, applicable to families governed by the *Mitakshara*, that by a mere claim of partition a division of interest may be effected among coparceners so as to disrupt the family and put an end to all right of succession by survivorship. It is trite law that the filing of a suit for partition may have this effect though it may take years before the shares of the various parties are determined or partition made by metes and bounds. Meanwhile the family property will belong to the members as it does in a *Dayabhaga* family-in effect as tenants in common. Section 25-A provides that if it be found that the family property has been partitioned in definite portions, assessment may be made, notwithstanding section 14 (1), on each individual or group in respect of his or its share of the profits made by the undivided family, while holding all the members jointly and severally liable for the total tax."

In the present case no order under section 25-A (1) was recorded. It is true that Nagappa had made before the Income-tax Officer on January 19, 1948, the following statement :

"I am at present living singly. My sons divided from me about ten months back. There is document to this effect. The document was registered. My sons are as follows :"

<sup>1</sup>. (1942) 2 M.L.J. 761 : L.R. 69 I.A. 119 : C.W.N. 60 : A.I.R. 1942 P.C. 57 (P.C.).  
(1942) 10 I.T.R. 457 : 45 Bom. L.R. 9 : 47



After recounting the names of his three sons and their respective ages, he proceeded to state :

"The guardian to these minor children is my wife. I divided my family properties between myself and my children. The properties belonged to our joint family. The business also belonged to my joint family."

It may be assumed that by this statement within the meaning of section 25-A it was claimed "by or on behalf of any member of a Hindu family hitherto assessed as undivided", that a partition had taken place among the members of his family and that the Income-tax Officer was bound to make an inquiry contemplated by section 25-A. But no inquiry was in fact made and no order was recorded by the Income-tax Officer about the partition : by virtue of sub-section (3), the Hindu family originally assessed as undivided had to be deemed for the purposes of the Act, to continue to be a Hindu undivided family. If by the assessment of the family on the footing that it continued to remain undivided, Nagappa or his sons were aggrieved, their remedy was to take an appropriate appeal under section 30 of the Indian Income-tax Act and not a suit challenging the assessment. The method of assessment and the procedure to be followed in that behalf are statutory, and any error or irregularity in the assessment may be rectified in the manner provided by the statute alone, for section 67 of the Indian Income-tax Act bars a suit in any civil Court to set aside or modify any assessment made under the Act. The Income-tax Officer made the assessment of tax under the Act: granting that he committed an error in making the assessment without holding an inquiry into the partition alleged by Nagappa, the error could be rectified by resort to the machinery provided under the Act and not by a suit in a civil Court. In *Commissioner of Income-tax, West Punjab, North-West Frontier and Delhi Provinces v. Tribune Trust, Lahore*<sup>1</sup>, the Judicial Committee observed at page 316 :

"\* \* \* \* \* the only remedies open to the tax-payer, whether in regard to appeal against assessment or to claim for refund are to be found within the four corners of the Act. This view of his rights harmonises with the provisions of section 67. \* \* \* \* \* that no suit shall be brought in any civil Court to set aside or modify any assessment made under the Act. It is the Act which prescribes both the remedy and the manner in which it may be enforced."

The suit filed by the plaintiffs against the Union must therefore fail on three independent grounds, each of which is sufficient to non-suit them.

(1) The suit which was in substance one for setting aside an assessment was in law not maintainable because of section 67 of the Indian Income-tax Act ;

(2) That in the absence of an order under section 25-A (1) assessment of the Hindu joint family was properly made ; and

(3) Even if an order recording partition was made the liability of the plaintiffs to pay income-tax assessed on the family could still be enforced against them jointly and severally under section 25-A (2), Proviso.

The plea of irregularity in holding the sale proceedings set up in the trial Court was negatived by the trial Court as well as the High Court, and has not been canvassed before this Court.

About the title of the plaintiffs to items 46 to 51 in the schedule annexed to the plaint, the High Court disagreed with the trial Court. These properties were purchased in the names of two of the three plaintiffs by the sale deed Exhibit A-230, dated March 15, 1944. The consideration of the sale deed was Rs. 23,500 of which Rs. 5,019 had been paid in advance in four instalments before March 15, 1944, and the balance of Rs. 18,481 was paid before the Sub-Registrar to the vendors who conveyed the properties to Devadattam and Devarayulu two of the three plaintiffs acting by their mother Narayanamma as their guardian. The properties having been purchased in the names of the two plaintiffs the burden *prima facie* lay upon the taxing authorities to establish that the sale deed was taken for and on

1. (1948) 2 M.L.J. 14 : L.R. 74 I.A. 306 : A.I.R. 1948 P.C. 102 (P.C.).  
I.L.R. (1947) Lah. 809 : (1948) 16 I.T.R. 214 :

behalf of the joint family or with the aid of joint family funds. Evidence was led by both the sides to support their respective versions. The trial Court held that the plaintiffs' case that their grandmother Seshamma provided the consideration was not proved, but there was also no evidence to show that the consideration was provided by the joint family, and as the burden of proof lay upon the Union, their case must fail. The High Court however held that the burden which lay upon the Union to prove that the properties were purchased out of the joint family funds was duly discharged. The question of *onus probandi* is certainly important in the early stages of a case. It may also assume importance where no evidence at all is led on the question in dispute by either side; in such a contingency the party on whom the *onus* lies to prove a certain fact must fail. Where, however, evidence has been led by the contesting parties on the question in issue, abstract considerations of *onus* are out of place; truth or otherwise of the case must always be adjudged on the evidence led by the parties.

But in support of the case that Seshamma had provided the consideration, three witnesses P.W. 4, P.W. 5, and P.W. 8 were examined. Seshamma had died a few months before evidence was recorded in the suit. That evidence was found by the trial Court as well as the High Court to be discrepant and in essential particulars so improbable that it could not be relied upon. P.W. 4 Narayanamma—plaintiffs' mother—deposed that the properties had been purchased for the plaintiffs by her mother Seshamma "with the money given to Seshamma" by her husband. This money according to Narayanamma was given to Nagappa and Nagappa paid it to the vendors in the presence of the Sub-Registrar. But this story stands wholly discredited by her admission that Seshamma's husband and his brothers were joint in business and estate till the former's death. Again there is on the record a statement made by Seshamma, before the Income-tax authorities, wherein she had stated that when her husband died, she might have had with her about Rs. 4,000 to Rs. 5,000 which she gave to her daughter. Nagappa was questioned in regard to this statement and he suggested that the statement was obtained by coercion from Seshamma by the Income-tax authorities. The story that Seshamma owned a large amount of cash, is not supported by any documentary evidence and it is difficult to believe that a trading family would not have invested the amount, if it was in truth devised to Seshamma by her husband. In cross-examination Narayanamma altered her version. She stated that Seshamma's uncle had left everything to her as he had no children or family, but he did not execute any document in favour of Seshamma and that at the time of his death he stated orally that Seshamma should take all the properties and that Seshamma and her brother knew about what she received from her paternal uncle. P.W. 5 Venkatasami who was originally a clerk of Nagappa, said that he was acting as a clerk in the employment of Narayanamma. He swore that he had seen Seshamma giving Rs. 6,000 to Narayanamma about four years ago and that a month later Seshamma brought Rs. 3,000 and gave them to Narayanamma and that about ten days thereafter Seshamma brought Rs. 12,000 and gave them to Nagappa and Narayanamma. He admitted that Seshamma had no immovable property other than a house which she had bequeathed to her daughter under a will. The witness did not know how Seshamma got the amount. He, however, stated somewhat inconsistently under cross-examination that on the date of registration of Exhibit A-230 Seshamma had asked her daughter "Narayanamma to bring the money". On that day the key of the iron safe was with Narayanamma and that Narayanamma brought some cash which was counted and paid over to the vendors. Both the Courts found that this witness was unreliable and a bare reading of his recorded testimony confirms that view. Nagappa said that Seshamma had paid the consideration for the sale-deed, but in cross-examination he made diverse statements which threw doubt upon the truth of that story. He was interested in devising ways and means for saving the properties for the benefit of his sons. It was he who had instigated and had prosecuted the suits. His bare statement that the consideration for the sale-deed was advanced by Seshamma not supported by any documentary evidence is unreliable, especially having regard to the statement which Seshamma had made before the Income-tax authorities. It must

therefore be held that the Courts below were right in holding that the plaintiffs have failed to establish that the properties conveyed by the sale-deed were purchased with the funds supplied by Seshamma. It is common ground that the plaintiffs had no other source of income. As admitted by Nagappa and his clerk Venkata-sami, Nagappa made large profits in his business, and Rs. 18,481 out of the consideration payable under Exhibit A-230 were actually paid to the vendors by Nagappa. There were before the Court two versions—one by the plaintiffs who alleged that the consideration for the sale-deed was supplied by Seshamma. That version, for reasons already stated, cannot be accepted. On the other hand there is the version that the funds belonged to the joint family of which Nagappa was the Manager and that Nagappa paid the consideration. No documentary evidence in support of either version is forthcoming: even Nagappa's accounts have not been produced. But if the monies were actually paid by Nagappa and the story about Seshamma having provided the amount be disbelieved, it would be a legitimate inference consistent with probability that Nagappa had for purchasing the property provided the funds out of the joint family earnings. It appears that Kumaji Sare Mal, who are the respondents in Appeal No. 642 of 1961, had in the suit filed by them in 1942 obtained an order for attachment before judgment over the immovable property of the joint family in the hands of Nagappa. This attachment before judgment was outstanding at the date of the sale-deed Exhibit A-230. This order for attachment before judgment was vacated when the suit was dismissed by the trial Court on August 31, 1944. This circumstance in the context of the other evidence strongly supports the contention of the Union that with a view to protect the properties from his creditors Nagappa thought of purchasing the properties in the names of his sons the plaintiffs and the consideration was advanced by him. The High Court was therefore right in holding that the properties items 46 to 51 were of the joint family and liable to be attached and sold in enforcement of the liability for payment of income-tax. Civil Appeal No. 641 of 1961 must therefore fail.

We may now deal with the questions which fall to be determined in Civil Appeal No. 642 of 1961 one of the questions being common in Appeals Nos. 641 and 642 of 1961. Suit No. 7 of 1944 was filed by the firm Kumaji Sare Mal for damages for breach of contract. That suit was decreed by the High Court on March 5, 1947. Within nine days thereafter the deed of partition came into existence. The plaintiffs contended that the debts due by Nagappa to Kumaji Sare Mal being immoral or *avyavharika*, their share in the properties was not liable to be sold. In any event, they contended, the shares allotted to them under the deed of partition were not liable to be attached and sold in execution proceeding in enforcement of the decree against their father Nagappa, and the remedy of the creditor even if the debts were not *avyavharika* was to file a suit to enforce the pious obligation of the plaintiffs and not in execution of the decree obtained against Nagappa alone. The creditors contended that the deed of partition was a sham transaction and therefore they were entitled to proceed in execution. Alternatively, it was contended that even if the deed of partition did not evidence a sham transaction, it was open to them as holders of a decree obtained before the partition to enforce the pious obligation of the plaintiffs to discharge the debts of their father in execution of the decree, and it was not necessary for them to file a separate suit. On the question as to the proper procedure for enforcement of the liability of a Hindu son to discharge the debts of his father which are not *avyavharika* where since the passing of the decree on the debt against the father there has been a partition between the father and son there has arisen difference of opinion. The Madras High Court in *Schwebo K. S. RM. Firm v. Subbiah*<sup>1</sup>, held that the son's share in the property cannot be proceeded against in execution, as the division of status brought about by the partition will stand, notwithstanding the avoidance of the partition as a fraudulent transfer. This was re-affirmed in a Full Bench judgment of the Madras High Court in *Kartagadda China Ramayya v. Chiruvella Venkanraju and another*,<sup>2</sup> where the Court held:

1. I.L.R. (1945) Mad. 138:5(1944) 1 M.L.J. 384. (F.B.).  
2. A.I.R. 1954 Mad. 864: (1954) 2 M.L.J. 176

"A son, under the Hindu law is undoubtedly liable for the pre-partition debts of the father which are not immoral or illegal. If a decree, however, is obtained against the father alone, and there is a partition of the family properties, in execution of such a decree, the son's share cannot be seized by the creditor as by reason of the partition the disposing power of the father possessed by him over the son's share under the pious obligation of the son to discharge the father's debts can no longer be exercised. With the partition, the power comes to an end. The liability thereafter can be enforced only in a suit. After partition, the son's share can no longer be treated as property over which the father had a disposing power within the meaning of section 60, Civil Procedure Code."

On the other hand, the Bombay High Court has held in *Ganpatrao Vishwanathappa v. Bhimrao Sahibrao*<sup>1</sup>, that a decree obtained against the Hindu father may after partition be executed against the son's interest by impleading the son as a party to the execution proceeding against the father.

There is no clear expression of opinion by this Court on this question, though in *S. M. Jakati and another v. S. M. Borkar and others*<sup>2</sup>, this Court has held that the liability of a Hindu son to discharge the debts of his father which are not tainted with immorality or illegality is founded on the pious obligation of the son which continues to exist in the life time and even after the death of the father and which does not come to an end as a result of partition of the joint family property; all that results from partition is that the right of the father to make an alienation comes to an end. In that case the property of the family was sold in execution of a money decree against the father, and the sons sued to set aside the sale in so far as it affected their interest in the property and for a decree for possession of their share. The Court held that it was not proved that the liability which was incurred by the father was illegal or immoral, and the sale of the joint family property including the share of the sons for satisfying the debts was valid notwithstanding the severance of the joint family status effected before the sale was held through Court. We do not think it necessary to express our opinion on the question whether the remedy of the creditor is to file a separate suit to enforce the pious obligation of a Hindu son to discharge the debts of his father, where since the decree against the father on a debt there has been a severance of the joint family status, or whether he can proceed to execute the decree against the son's interest in the property, after impleading him as a party to the execution proceeding, for we are definitely of the opinion that the High Court was right in holding that the partition was a sham transaction which was not intended to be operative.

On March 14, 1947 the deed of partition was executed and registered. The object of this partition, it is alleged, was to protect the interest of his minor sons against their father who was acting to the detriment of his sons and was not even living with the family. The High Court relied upon a large number of circumstances in support of its view that the partition was nominal. The deed was executed within a week after the decree was passed by the High Court in Kumaji Sare Mal's suit. Nagappa had acquired an extensive property which was on acquisition treated as joint family property and there was nothing to show that Nagappa was ill-disposed towards his sons or was actuated by any desire to harm their interest. The real purpose of the partition was to save as much property as possible and to preserve it for his children. The deed of partition showed apparently an equal distribution of property valued at Rs. 1,24,600 into four shares each of the value of Rs. 31,150 but the properties allotted to the share of Nagappa were in reality not worth that amount. Nagappa had also to discharge a debt for Rs. 12,236-4-9 for which he was rendered liable under the deed and that debt could not be satisfied out of the property allotted to him. Again immediately after the deed of partition, Nagappa settled upon his wife Narayanamma a major fraction of that share and sold away one of his houses. The intention of Nagappa to make it appear to the Income-tax Department that no useful purpose would be served by taking coercive steps as the property allotted to him and remaining after disposal of a good part of it as indicated above was wholly insufficient to meet the demands of the Department, is indeed clear. It was Nagappa who had instigated and prosecuted the suits. Narayanamma was,

1. I.L.R. (1950) Bom. 414.

2. (1959) S.C.R. 1384: 1959 S.C.J. 719.

an illiterate and an ignorant woman, who knew nothing about Nagappa's transactions and dealings. She did not even know what property had fallen to the share of her sons. Admissions made by her disclose that she did not manage the property, though apparently she was treated as the guardian of her sons in the partition deed. The story that Nagappa was living with a mistress, and was not looking after the education and welfare of his minor sons does not appear to be supported by any reliable evidence. The eldest son was at the date of the alleged partition 14 years of age, and the youngest was three years old, and in the absence of any serious cause for the differences between Nagappa and Narayanamma, partition of the estate could not have been thought of. Witness Singari Seshanna D. W. 1 has deposed that Nagappa, his wife and children were living together in the family house even at the date of the suit and that Nagappa was collecting rents from all the houses. This statement does not appear to have been challenged in cross-examination. P.W. 5 Venkatasami the clerk of Narayanamma, who claimed to be looking after the management of the properties on behalf of Narayanamma, admitted that he could not say which of the houses were leased and to whom; he was unable to give any particulars with regard to some of the houses. This ignorance on the part of the alleged manager lends support to the testimony of Singari Seshanna D. W. 1 that it was Nagappa who remained in management of the property, and that the family lived together and in fact there was no disruption of the joint family. It is true that many documents were produced to show that the properties were entered in the names of the sons after the deed of partition. It also appears that taxes were paid separately in respect of the houses to the local Municipality and receipts were issued in the names of persons in whose names they stood in the municipal records. But these receipts do not show the names of the persons by whom the amounts acknowledged in the receipts were paid. The High Court has believed the evidence of Singari Seshanna D.W. 1 that it was Nagappa who continued to remain in management. It is true that the plaintiffs have led evidence of two witnesses P.W. 6 and P.W. 7 who have deposed that they had assisted in making the partition. The deed of partition was undoubtedly executed and was registered, but the mere execution of the deed is not decisive of the question whether it was intended to be effective. The circumstances disclosed by the evidence clearly show that there was no reason for arriving at a partition. Counsel for the plaintiffs practically conceded that fact, and submitted that Nagappa's desire to defeat his creditors, and to save the property for his sons, was the real cause for bringing the deed of partition into existence. Counsel claimed, however, that Nagappa had adopted the expedient of effecting a partition with the object of putting the property out of the reach of his creditors, and the genuineness of that partition should not be permitted to be blurred by the unmeritorious object of Nagappa. But the continued management of the property by Nagappa since the partition, and the interest shown by him in prosecuting the suits, do clearly support the inference that the deed of partition was a nominal transaction which was never intended to be acted upon and was not given effect to. If it be held that the partition was a sham transaction the plaintiff's suit for setting aside the summary order passed in execution proceeding on the application filed by the plaintiffs for setting aside the attachment must fail. The Appeal No. 642 of 1961 must therefore also fail.

Both the appeals are therefore dismissed with costs.

V.B.

*Appeals dismissed.*

## THE SUPREME COURT OF INDIA.

PRESENT:—S. K. DAS, A. K. SARKAR AND M. HIDAYATULLAH, JJ.

Sitalpur Sugar Works Ltd.

.. Appellant\*

v.

The Commissioner of Income tax, Bihar and Orissa, Patna

.. Respondent.

*Business expenditure—Factory building and plant—Expenses of removal to more favourable location—Whether allowable—Enduring benefit to trade.**Income-tax Act (XI of 1922), section 10 (2) (vi) and 10 (2) (xv) and Income tax Rules, 1922, Rule 19—Form A—Form of Return—Part V.*

A sugar manufacturing company dismantled its factory buildings, plant and machinery from its original site, which was affected by floods and dearth of quality sugarcane, and removed them to a more favourable location, where they were re-erected with the object of improving the business. The expenses of dismantlement, transportation and re-erection incurred by the company were disallowed in the relevant income-tax assessment as capital expenditure. The alternative claim for depreciation allowance on that expenditure was also rejected. The High Court on Reference upheld the assessment. On appeal,

*Held*, (1) that the expenditure was a capital expenditure and not a revenue expenditure. It was not incurred in earning any profit, but only for putting the factory in better shape so that it might produce larger profit when worked.

There is no distinction between an expenditure incurred for acquiring a material capital asset or a legal right in the nature of capital and an expenditure incurred for acquiring any other advantage of an enduring nature for the benefits of trade. It is not necessary for an advantage to be for the permanent and enduring benefit of the trade that it must be the acquisition of a material asset or a chose in action ;

(2) that no depreciation could be claimed on the expenditure because no tangible asset had been acquired by the expenditure which could be said to have depreciated. The assessee cannot claim depreciation on the amount spent for acquiring an advantage.

In order to be entitled to deduction on account of depreciation under Part V of the Form of Return given in the Indian Income-tax Rules, 1922, there has to be an improvement of the capital asset, an increase in its value.

Appeal by Special Law from the Judgment and Decree dated 30th November, 1960 of the Patna High Court in Miscellaneous Judicial Case No. 799 of 1958.

G. S. Patak, Senior Advocate (G. C. Mathur, Advocate, with him) for Appellant.

N. D. Karkhanis and R. N. Sachthey, Advocates, for Respondents.

The Judgment of the Court was delivered by

Sarkar, J.—This case does not seem to us to present any real difficulty. It arises out of a Reference to the High Court of Patna of two questions both of which were answered by the High Court against the assessee, the appellant in this Court.

The appellant is a company manufacturing sugar. It had its factory originally at a place called Sitalpur. That place was found to be disadvantageous for the appellant's business as sugarcane of good quality was not available in sufficient quantity in the neighbourhood and also as it suffered from ravages of flood. With a view to improve its business the appellant removed its factory from Sitalpur to another place called Garaul and in the process of dismantling the building and machinery, transportation from Sitalpur to Garaul and refitting the machinery at the latter place, it incurred a total expense of Rs. 3,19,766 in the year of account. In the assessment of its income-tax, it claimed a deduction of these expenses as revenue expenses. That claim was rejected. The questions referred concern these expenses.

The first question was this :

“Whether the expenditure of Rs. 3,19,766 incurred by the assessee in dismantling and shifting the factory from Sitalpur and erecting the factory and fitting the machinery at Garaul was expenditure of a capital nature and not revenue expenditure within the meaning of section 10 (2) (xv) of the Income-tax Act ?”

Considering the matter apart from the authorities, it seems to us impossible that the expenditure could be revenue expenditure. It was clearly not incurred

for the purpose of carrying on the concern but it was incurred in setting up the concern with a greater advantage for the trade than it had in its previous set up. The expenditure was not incurred in earning any profit but only for putting its factory, that is, its capital, in better shape so that it might produce larger profits, when worked. It really went towards effecting a permanent improvement in the profit making machinery, that is, in the capital assets. It was, therefore, a capital expenditure and not a revenue expenditure.

The case, furthermore, is completely governed by authorities. We think it comes clearly within the well-known dictum of Viscount Cave in *Atherton v. British Insulated and Helsby Cables Ltd.*<sup>1</sup>, that

“when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.”

The test formulated by Viscount Cave has been accepted by this Court : see *Assam Bengal Cement Co., Ltd. v. The Commissioner of Income-tax, West Bengal*<sup>2</sup>. Here the expenditure produced an enduring advantage in the shape of transfer to a better factory site, an advantage which enabled the trade to prosper and an advantage that could be expected to last for ever. It was an expense properly attributable to capital under Viscount Cave's dictum.

Mr. Pathak did not question the authority of the test laid down in *Atherton's case*<sup>1</sup>, but said that the test had no application in the present case as it would not apply unless by the expenditure a material asset or a covenant or right in the nature of capital was acquired. We find neither principle nor authority to support this contention. If an expenditure incurred, say for acquiring an additional plant, is capital expenditure, an expenditure incurred in dismantling and refitting the existing plant at a better site would be equally capital expenditure. They would both be capital expenditure because both were incurred for increasing the capacity of the profit making machine to earn profits and neither was incurred for earning the profits themselves. In principle, therefore, there is no reason to make a distinction as to the nature of the expense between an expenditure incurred for acquiring a material capital asset or a legal right in the nature of capital and an expenditure incurred for acquiring any other advantage of an enduring nature for the benefit of the trade. It is true that it has been said as Mr. Pathak pointed out, that the advantage acquired by the expenditure must be analogous to an asset (see Halsbury's Laws of England, 3rd ed. Vol. XX p. 162) but that only means advantage of the nature of a capital asset, that is to say, “an advantage to the permanent and enduring benefit of the trade” : see *ibid* p. 161. It is obviously not necessary for an advantage to be of such a nature that it must be the acquisition of a material asset or of a chose in action.

As to the authorities, they are all against the view for which Mr. Pathak contends. We propose to refer to two of them only. First, there is the case of *Granite Supply Association Ltd. v. Kitton*<sup>3</sup>. The assessee was a company whose business was to buy and sell granite. It found it necessary to shift to a larger yard and in doing so incurred expenses for removal of stones and cranes from the old to the new yard and for re-erecting the cranes in the latter yard. It was held that the Company was not entitled to a deduction for these expenses. It was said that the expenses were of the same kind as those which might have been incurred in the buying of new cranes. Lord McLaren said (p. 171),

“I think that the cost of transferring plant from one set of premises to another more commodious set of premises is not an expense incurred for the year in which the thing is done, but for the general interest of the business. It is said, no doubt, that this transference does not add to the capital value of plant, but I think that is not the criterion.”

Lord McLaren's observation is completely against the view advocated by Mr. Pathak that to constitute an enduring benefit a material asset or a right must be created.

1. L.R. (1925) 1 K.B. 431; 10 T.C. 155, 192. (1955) 1 S.C.R. 972.  
2. (1955) S.C.J. 205; (1955) 1 M.L.J. 118 : 3. (1950) 5 T.C. 168.

The above case, furthermore, is indistinguishable from the case in hand. Mr. Pathak sought to distinguish the present case from the *Granite Supply Association Ltd. case*<sup>1</sup>, on the ground that there the business was not running at a loss in the old yard and the expenses were incurred only to enlarge the business and hence were on capital account. We find it difficult to appreciate this distinction. Whether an expense is on capital account or not would not depend on whether it was incurred for earning larger profits than before nor would an expenditure be on revenue account because it was incurred for turning a losing concern into a profitable one.

The other case to which we will refer is *Bean v. Doncaster Amalgamated Collieries Ltd.*<sup>2</sup> The Colliery Company was required by a statute to incur expenses for remedial works necessary to obviate loss of efficiency in an existing drainage system due to subsidence caused by the Company's workings. The Drainage Board formed a general drainage improvement scheme and the Company paid a part of the expenses of the new drainage constructed under the scheme. As a result of the new drainage the Company was enabled to work its seams without incurring the liability under the statute as the new drainage system had been so constructed as to remain unaffected by the Company's workings. It was contended by the Company that the payment for the new drainage was a revenue expenditure as it had not resulted in the acquisition of any capital asset, but this contention was rejected and it was held that the expenditure was on capital account and no deduction for it was allowable. Viscount Simon said (p. 322), that the expenses had been incurred to "secure an enduring advantage" within the proper application of Lord Cave's phrase in *Atherton v. British Insulated and Helsby Cables Ltd.*<sup>3</sup>. He also quoted with approval the observation of Uthwatt, J., in the Court of Appeal that

"The result of the transaction clearly was that the value of the particular coal measures—a capital asset remaining unchanged in character—was increased both for use and exchange. There was, therefore, as the result of the transaction, brought into existence, not indeed an asset, but an advantage for the enduring benefit of the trade of the Company".

Obviously, therefore, there can be an enduring advantage acquired without an addition to or increase in the value of any capital asset.

It is no doubt true that the distinction between revenue expenditure and expenditure on capital is very fine and often it is difficult to decide under which class an expenditure properly falls. No such difficulty, however, arises in the present case. We think, for the reasons earlier mentioned, that the present is a plain case and we feel no doubt that the expenses for shifting and re-erection were incurred on capital account. The first question referred was clearly correctly answered by the High Court.

The appellant's case is even weaker with regard to the other question which was this :

"Whether the assessee was entitled to claim depreciation on the said expenditure of Rs. 3,19,766 ?"

This question was raised presumably on the basis that if in respect of the first question it was held that the expenditure was on capital account, then depreciation should be payable on the amount of the expenditure in the same way as depreciation is allowed on capital. The claim for depreciation was made under section 10 (2) (vi) of the Income-tax Act. But as the High Court rightly pointed out, no such depreciation could be claimed because no tangible asset had been acquired by the expenditure which could be said to have depreciated.

Mr. Pathak, therefore, put the case of the appellant from a slightly different point of view. He referred us to Part V of the Form of Return given in the Rules framed under the Act. That Part deals with a claim for depreciation. Column 3 of this Part requires a statement to be made for "Capital expenditure during the year for additions, alterations, improvements and extensions". Mr. Pathak conten-

1. (1905) 5 T.C. 168.

2. (1894) 2 All E.R. 279; 27 T.C. 296.

3. L.R. (1925) 1 K.B. 431; 10 T.C. 155.



ded that this Part showed that depreciation is allowable on capital expenditure for improvements, and that in view of our answer to Question No. 1 the appellant would be entitled to depreciation on the expense as capital expenses incurred for improvement. This is an obviously fallacious argument. In order to be entitled to deduction on account of depreciation under this Part of the Form, there has to be an improvement of the capital asset, an increase in its value. All that we have here is an expense incurred for acquiring an advantage for the trade. That may or may not be an improvement in the capital assets. The appellant cannot claim depreciation on the amount spent for acquiring an advantage. Whether it could claim depreciation on improvements effected to capital assets is not a question referred to the Court. The second question, therefore, was also correctly answered in the negative by the High Court.

This appeal is dismissed with costs.

V.B.

*Appeal dismissed.*

### THE SUPREME COURT OF INDIA.

PRESENT :—S. K. DAS, A. K. SARKAR AND M. HIDAYATULLAH, JJ.

The New Jehangir Vakil Mills Co., Ltd., Bhavanagar

.. Appellant\*

v.

The Commissioner of Income-tax, Bombay  
North, Kutch and Saurashtra, Ahmedabad

.. Respondents.

*Income-tax—Income—Computation—Profit on sale of shares—Determination of cost—Original purchase price or market value at the beginning of account year?—Previous finding about same shares as investments—Whether decisive.*

*Res Judicata—Estopped by record—Applicability of rule to Income-tax proceedings.*

The assessee, carrying on business in the manufacture and sale of textile piece-goods, held shares in companies upto and including the assessment year 1944-45 relevant to the account year 1943 the shares were regarded by the Income-tax Officer as the assessee's investments. In the next account year 1944, relevant to the assessment year 1945-46, the assessee sold a number of shares and realized a surplus. For purposes of this assessment, the Officer held that the assessee was a dealer in shares and brought to tax Rs. 1,86,931 being the difference between the original purchase price of the shares and the amounts realized on sale. The assessee appealed, but while the Appellate Assistant Commissioner found that the assessee should be assessed as a dealer during the account year 1944, in view of the number and frequency of the sales, he remanded the case to the Income-tax Officer for further materials. On remand, the Officer found that even in respect of the prior years the assessee must be held to be a dealer, and not an investor, in shares. In further proceedings by way of appeal, the assessee accepted the finding that it was a dealer in shares during the relevant account year 1944, but contended that the finding of the Department in regard to the prior assessments, could not be disturbed in the present proceedings, since the said assessments had become final. The assessee accordingly urged that for computing the profit of sale of shares during the account year 1944, the market value as at the beginning of that year must be regarded as the cost. These contentions were negatived by the Income-tax Appellate Authorities as well as by the High Court in Reference. On appeal,

*Held*, (1) that the doctrine of *res judicata* or estoppel by record does not, generally, apply to decision by the Income-tax Officer.

The circumstance that in an earlier assessment relating to 1943 the assessee was treated as an investor would not estop the assessing authorities from considering, for the purpose of computation of profits of 1944, as to when the trading activity of the assessee began.

(2) that if the assessee was a dealer when the shares sold in 1944 were originally purchased, then the profits will be the excess of the sale price over the original cost price. The principle in *Commissioner of Income-tax v. Bai Shirinbai K. Kooka*, (1963) 1 S.C.J. 604 will not apply.

Appeal from the Judgment and Order dated 11th and 12th April, 1960 of the Bombay High Court in Income-tax Reference No. 52 of 1959.

R. J. Kolah and I. N. Shroff, Advocates, for Appellant.

K. N. Rajagopal Sastri, Senior Advocate (R. N. Sachthey, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

*S. K. Das, J.*—This is an appeal on a certificate of fitness granted by the High Court of Bombay under section 66 -A (2) of the Indian Income-tax Act, 1922. The New Jehangir Vakil Mills Co., Ltd., Bhavnagar, appellant before us and called the assessee, carried on the business of manufacturing and selling textile piece-goods at Bhavnagar in the former Bhavnagar State. The present appeal is concerned with the assessment year 1945-46, the account year being the calendar year 1944. In the said assessment year the Income-tax Officer concerned added to the taxable income of the assessee a sum of Rs. 1,86,931 (which was later reduced to Rs. 1,23,840) as a revenue receipt, representing an amount by which the sale price exceeded the original cost of certain shares and securities purchased and sold by the appellant. It was held that in the relevant account year in which the shares were sold and profits made as also in the two preceding years, the assessee was a dealer in shares and securities. In respect of this addition of Rs. 1,23,840 the assessee raised two contentions. The first contention was that it was not a dealer in shares and securities in the relevant account year or in the years past, and that the shares and securities were held by way of investment and the investment surplus was in the nature of a capital receipt. The second contention was that even if the assessee was a dealer in shares and securities in the relevant account year, the Income-tax Officer committed an error in the matter of the computation of profits in not taking the market value of the shares as at the opening day of that year as the cost thereof.

These were the two questions along with a third question which were referred to the High Court under section 66 (2) of the Act. The third question does not now survive, and therefore we set out below the two questions which fall for decision in this appeal :

"1. In the event of the surplus aforesaid being held to be income assessable to income-tax, whether the income should be ascertained by taking the market value of the shares as at the opening day of the year as the cost ?

2. Whether there is any evidence on record to justify the Tribunal's finding that the assessee company was a dealer in shares not only in the year under consideration but in the years past ?"

Now, as to the contention whether the assessee was a dealer or not in shares and securities in the calendar year 1944 the position appears to be that the Income-tax Officer found against the assessee. There was an appeal to the Appellate Assistant Commissioner who remanded the case to the Income-tax Officer on the ground that the materials in the record were not adequate to decide the question. In the remand proceedings, the assessee filed before the Income-tax Officer statements showing the position of transactions relating to shares and securities from 1939 onward. These statements marked as Annexure 'C' form part of the statement of the case. In his remand report dated April 1, 1952 which is also a part of the statement of the case, the Income-tax Officer examined the purchase and sale of shares in different years by the assessee and came to the conclusion that the assessee was a dealer in shares at least from the year 1942 by reason of the frequency and multiplicity of the transactions which the assessee conducted since that year. It further pointed out that the assessee had sold certain shares out of a block of shares in the year 1943, and after taking out the price of the shares realised in 1943, the remaining amount was shown in the balance-sheet as the value of the remaining shares in each block. The value of such shares as shown in the balance-sheet for 1943 was not the cost price of the assessee. In some cases it was below cost. As a result of this valuation in the balance-sheet, the profits from the sale of shares during 1945-46 would be Rs. 1,23,840. If, however, the difference between the sale price and the market value of the shares as on the first day of the account year was taken into account, the results might be different.

On the basis of the aforesaid remand report the Appellate Assistant Commissioner examined the records of the transactions and observed :

"There are five different transactions of purchase and two transactions of sale in 1942. The tempo of purchases and sales goes up from 1943. There are purchases of fifteen or twenty different dates in 1943. There is a similar number of transactions in 1944. Many of the shares purchased

in 1943 have been disposed of in 1944. [Several scripts purchased in 1944 have been sold within the year. The number of transactions is, in my opinion, sufficiently numerous to show that the assessee is a dealer in shares.]

There was an appeal then to the Tribunal. The Tribunal came to the conclusion that so far as Government securities were concerned the assessee was obliged to keep its large cash invested in Government securities and therefore, so far as these securities were concerned, the amount realised by their sale was not a revenue receipt and should not be included in the total income of the assessee. It held, however, that the assessee was a dealer in shares in 1944 and as to the computation of the profits made on the sale of the shares, such profits were correctly computed to be the difference between the original cost price of the shares to the assessee at the time of purchase and the price realised at the time of sale, and the Tribunal significantly added that this computation was correct on the finding that the assessee was a dealer not only in 1944 but from 1942 onward. We may here state that for the years prior to the account year 1944, the Department had treated the assessee as an investor and not a dealer in shares and had made assessments accordingly for those years. Those assessments have now become final.

When the matter went to the High Court on a case stated by the Tribunal, the High Court observed that the crucial year was the year 1943, for if the assessee was a dealer in shares since 1943 and sold some of them in the account year 1944 and made profits thereon, then both the questions referred to the High Court must be answered against the assessee. The High Court re-framed the second question by substituting the words "in the year 1943" for the words "in the years past". The High Court further pointed out that in the exercise of its advisory jurisdiction it did not sit in appeal over the decision of the Tribunal that the assessee was a dealer in shares in the year 1943. It also held that on the materials on record it was open to the Tribunal to come to the conclusion that the assessee was a dealer in shares in 1943 and as to the computation of profits it pointed out that if the assessee was a dealer in 1943 also, then it was not open to the assessee to say that the market value of the shares as on the opening day of the year 1944 should be taken as the cost of the shares. Accordingly, the High Court answered both the questions against the assessee.

Learned counsel for the appellant has addressed us at length on both questions. However, it appears to us that by reason of the re-framing of the second question, the two questions really merge into one, namely, was the assessee a dealer in shares in 1943 and continued to be such a dealer in 1944 which is the relevant account year? The question no doubt has two aspects. Firstly, there is the aspect whether there is any evidence to justify the finding that the assessee was a dealer in shares in 1943. Secondly, there is the aspect as to how the profits made from the sale of shares in 1944 should be computed in the assessment year 1945-46. It is however manifest that if the assessee was a dealer in 1943 also, then the principle laid down by this Court in *Commissioner of Income-tax v. Bai Shirinbai K. Kooka*<sup>1</sup>, will not apply, for that decision proceeded on the footing that the assessee in that case converted her investment shares into a stock-in-trade and carried on a trading activity as from April 1, 1946, the relevant account year being the financial year 1946-47. If the assessee in the present case was a dealer in 1943, then nothing happened on the opening day of the relevant account year, namely, January 1, 1944 and there is no reason why the market value of the shares on that date should be taken into consideration in computing the profits. Learned counsel for the assessee has however pressed an argument which may now be stated. He has submitted that he is not arguing that it was not open to the assessing authorities to consider the question whether the assessee was a dealer in shares in 1944 which was the relevant account year. What he contends is that it was not open to the taxing authorities to consider and find that the assessee was a dealer in shares in 1943 because for all years prior to 1944 the Department had already assessed the assessee on the footing that it was an investor of shares and not a dealer and those assessments having become final could be re-

opened only either under section 34 or section 35 of the Act. The argument is that in assessing the assessee for the account year 1944 it was open to the Department to treat the assessee as a dealer in 1944 but not for any earlier year which was not the subject of the assessment proceedings. Learned counsel states that if he is right in his first contention, then the profits made on the sale of shares in 1944 must be computed in the manner laid down in *Commissioner of Income-tax v. Bai Shirinbai K. Kooka*<sup>1</sup>, because the assessee will be treated as a dealer for the first time in the relevant account year, 1944.

The argument appears plausible at first sight and it may perhaps be conceded that the question of the computation of profits in a case like this is not entirely free from difficulty. However, on a very careful consideration of the argument we have come to the conclusion that it is not worthy of acceptance. As to the first aspect of the question we see no difficulty. The Appellate Assistant Commissioner and the Tribunal have referred to various transactions relating to shares shown in the books of the assessee. From those transactions they came to the conclusion that the assessee was a dealer in 1943. The High Court has also summarised the various transactions in which the assessee indulged in the year 1943. Having regard to the frequency and nature of those transactions it was open to the taxing authorities to come to the conclusion that the assessee was a dealer in shares in 1943. We are not prepared to say that the rule of "no evidence" can be applied to the present case. We therefore consider that the High Court correctly answered the question relating to this aspect of the case.

Now, as to computation of profits. Though it is true that the question which directly arose before the taxing authorities in the present case was whether the assessee was a dealer in 1944, the question of the position of the assessee in 1943 also arose in determining how the profits made in 1944 should be computed. It is not therefore quite correct to say that the position of the assessee in 1943 was completely outside the scope of the assessment proceedings of 1945-46. In determining or computing the profits made by the sale of shares in 1944, the assessing authorities had to go into the question—did the assessee start its trading activity on January 1, 1944 or did it start the trading activity at an earlier date? If the assessee was a dealer when the shares sold in 1944 were originally purchased, then obviously the principle in *Commissioner of Income-tax v. Bai Shirinbai K. Kooka*<sup>1</sup>, will not apply and the profits will be the excess of the sale price over the original cost price.

The extent to which a decision given by an Income-tax Officer for one assessment year affects or binds a decision for another year has been considered by Courts several times and speaking generally it may be stated that the doctrine of *res judicata* or estoppel by record does not apply to such decisions; in some cases it has been held that though the Income-tax Officer is not bound by the rule of *res judicata* or estoppel by record, he can re-open a question previously decided only if fresh facts come to light or if the earlier decision was rendered without taking into consideration material evidence, etc. As to the argument based on sections 34 and 35, it is enough to point out that the assessment relating to the year 1943 is not being re-opened. That assessment stands. What is being done is to compute the profits of 1944, which the assessing authorities could do, by finding out when the trading activity in shares began. The question of the profits in 1944 was not and could not be the subject of any assessment proceeding relating to 1943, for such profits arose only on the sale of the shares in 1944.

In *Broken Hill Proprietary Company v. Broken Hill Municipal Council*<sup>2</sup>, the question was one of the capital value of a mine for rating purposes. This question of valuation as between the parties was determined by the High Court of Australia in a previous year. But it was held that the decision did not operate as *res judicata*. The reason given was:

"The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates

1. (1963) 1 S.C.J. 604.

2. L.R. (1926) A.C. 94.

to a new question.....namely, the valuation for a different year and the liability for that year. It is not *eadem questio*, and therefore the principle of *res judicata* cannot apply."

In another decision reported in the same volume, *Hoystead v. Commissioner of Taxation*<sup>1</sup>, one of the questions was whether certain beneficiaries under a will were joint owners. It was held that although in a previous litigation no express decision had been given whether the beneficiaries were joint owners, it being assumed and admitted that they were, the matter so admitted was so fundamental to the decision then given that it estopped the Commissioner. The latter decision was distinguished in *Society of Medical Officers of Health v. Hope*<sup>4</sup>. Both the decisions were again considered by the Judicial Committee in *Caffoor v. Income-tax Commissioner*<sup>3</sup>. The decision in *Broken Hill Proprietary Company's case*<sup>4</sup>, was approved and the principle laid down was that in matters of recurring annual tax a decision on appeal with regard to one year's assessment is said not to deal with *eadem questio* as that which arises in respect of an assessment for another year and consequently not to set up an estoppel. As to the decision in *Hoystead's Case*<sup>1</sup>, it was stated :

"Their Lordships are of opinion that it is impossible for them to treat *Hoystead's case*<sup>1</sup> as constituting a legal authority on the question of estoppel in respect of successive years of tax assessment. So to treat it would bring it into direct conflict with the contemporaneous decision in the *Broken Hill case*<sup>4</sup> and to follow it would involve preferring a decision in which the particular point was either assumed without argument or not noticed to a decision, in itself consistent with much other authority, in which the point was explicitly raised and explicitly determined."

In *Instalment Supply (P.) Ltd. v. Union of India*<sup>5</sup>, the Court referred to the decisions just mentioned and said that it was well settled that in matters of taxation there would be no question of *res judicata*.

On the principle stated above, it seems to us that it was open to the taxing authorities to consider the position of the assessee in 1943 for the purpose of determining how the gains made in 1944 should be computed, even though the subject of the assessment proceedings was the computation of the profits made in 1944. The circumstance that in an earlier assessment relating to 1943 the assessee was treated as an investor would not in our opinion estop the assessing authorities from considering, for the purpose of computation of the profits of 1944, as to when the trading activity of the assessee in shares began. The assessing authorities found that it began in 1943. On that finding the profits were correctly computed and the answer given by the High Court to the question of the computation of the profits was correctly given.

For these reasons the appeal fails and is dismissed with costs.

V. B.

*Appeal dismissed.*

1. L.R. (1926) A.C. 155.  
2. L.R. (1960) A.C. 551.  
3. L.R. (1926) A.C. 584.

4. L.R. (1926) A.C. 94.  
5. (1962) 2 S.C.R. 644 ; (1961) 2 S.C.J. 625.

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Tulsi Ram, etc.

Appellants \*

v.

The State of Uttar Pradesh (In both the Appeals)

Respondent.

*Penal Code (XLV of 1860), sections 420 and 464—Cheating—Gist of offence—Hundis drawn against railway receipts which had been altered to show larger consignment than actually covered by them—Discounting of such hundis by the consignee—Offence—Section 24—“Dishonestly”—Meaning.*

No doubt, bills or hundis are themselves securities and taking into consideration the credit of the drawer of a hundi a bank may conceivably discount such hundis but where the hundis are themselves supported by railway receipts it would be futile to say that the railway receipts were not intended by the parties to be regarded as further security for discounting the bills. Where a consignee of goods draws a hundi for the price of the consignment on some firm and supports that hundi with the railway receipt obtained by him in respect of the consignment, the party in fact pledges the consignment to the bank discounting the hundi and, therefore, in such a transaction the railway receipt cannot be regarded as anything else than a security for that transaction. If that security turns out to be worthless or practically worthless because the value of the consignment is only a fraction of what it was represented to be, the discounting of the hundi by the party drawing it must necessarily be regarded as unlawful. It would thus follow that the consignee in question made a gain by obtaining credits and that those credits were obtained by them by resorting to unlawful means. The gain they made was, therefore, unlawful.

In an offence under section 420 of the Penal Code, a pecuniary question necessarily arises. Where no pecuniary question arises the element of ‘dishonestly’ need not be established and it would be sufficient to establish that the act was fraudulent and, therefore it may be that where an act is fraudulent the intention to cause injury to the person defrauded must be established.

But where the allegation is that a person has dishonestly induced another to part with property something different has to be considered and that is whether he has thereby caused a wrongful loss to the person who parted with property or has made wrongful gain to himself. These are two facets of the definition of dishonesty and it is enough to establish the existence of one of them. The law does not require that both should be established.

Appeals from the Judgment and Order, dated the 15th April, 1958 of the Allahabad High Court in Criminal Appeals Nos. 1332 and 1476 of 1954.

A. N. Mulla and B. B. Tawakley, Senior Advocates (J. P. Goyal, A. Banerjee and K. P. Gupta, Advocates with them), for Appellants.

G. C. Mathur and C. P. Lal, Advocates, for Respondent (In both the Appeals).

The Judgment of the Court was delivered by

Mudholkar, J.—These are appeals by a certificate granted by the High Court of Allahabad. They arise out of the same trial. The appellants in both the appeals except Chandrika Singh were convicted by the Second Additional District and Sessions Judge, Kanpur, of offences under section 471, Indian Penal Code read with sections 467 and 468, Indian Penal Code, and sentenced variously. Tulsi Ram, Beni Gopal and Babu Lal were each convicted of offences under section 417 read with section 420 and Moti Lal of offences under section 417, Indian Penal Code and Lachhmi Narain of offences under section 420, Indian Penal Code. Separate sentences were awarded to each of them in respect of these offences. All the six appellants were, in addition, convicted under section 120-B, Indian Penal Code and sentenced separately in respect of that offence. In appeal the High Court set aside the conviction and sentences passed on Tulsi Ram, Beni Gopal, Babu Lal and Moti Lal of offences under section 471 read with sections 467 and 468, Indian Penal Code and also acquitted Moti Lal of the offence under section 417, Indian Penal Code. It, however, upheld the conviction of all the appellants under section 120-B, Indian Penal Code as well as the conviction of Tulsi Ram, Beni Gopal and Babu Lal of offences under section 417 read with section 420, Indian Penal Code. As regards Lachhmi Narain it maintained the conviction and sentences passed by the Additional

Sessions Judge in all respects and dismissed the appeal in *toto*. The relevant facts are as follows :—

The appellants, other than Chandrika Singh are members of a Marwari trading family belonging to Rae Bareilly and Chandrika Singh was their employee. The relationship amongst Lachhmi Narain and the first four appellants in Criminal Appeal No. 62 of 1958 would be clear from the following genealogical table :

Bhairo Prasad				
Sri Niwas (accused)				Sagar Mal
Lachhmi Narain	Beni Gopal	Tulsi Ram	Gobardhan Das Babu Lal	Pahlad Rai
Suraj Mal—(minor)				Nand Lal (deceased)
Moti Lal				Parshottamdas (died during pendency of the case).

It is common ground that Lachhmi Narain was the *karta* of the family and the entire business of the family was done under his directions and supervision. This fact is material in view of the defence taken by the first four appellants in Criminal Appeal No. 62 of 1958.

It is common ground that the family carried on business in the names and styles of (1) firm Beni Gopal Mohan Lal with head office at Rae Bareilly, (2) firm Tulsi Ram Sohan Lal with head office at Lalgunj in the district of Rae Bareilly, (3) firm Bhairon Prasad Srinivas with head office at Rae Bareilly, (4) firm Gobardhan Das Moti Lal with head office at Madhoganj in the district of Partabgarh and (5) firm Sagarmal Surajmal with head office at Unchahar in the district of Rae Bareilly. Though different members of the family were shown as partners in these five firms one thing is not disputed and that is that the business of each and every one of these firms was being conducted by and under the orders and directions of Lachhmi Narain though in point of fact he was shown as partner along with his father Sri Niwas and brother Pahlad only in the firm of Bhairo Prasad Srinivas.

It is common ground that in May, 1949 the firm Bhairo Prasad Srinivas was appointed the sole importer of cloth for distribution amongst wholesalers in the Rae Bareilly district. Prior to the appointment of this firm as sole importer a syndicate consisting of four firms of Rae Bareilly was the sole importer of cloth in that district. It would, however, appear that this syndicate failed to take delivery of large consignments of cloth with the result that the Deputy Commissioner discovered that cloth bales valued at about Rs. 2,25,000 were lying at the railway station and demurrage on the consignment was mounting every day. It is not disputed either that it was at the instance of the Deputy Commissioner that the firm Bhairo Prasad Srinivas agreed to act as sole importers, take delivery of the cloth and distribute it amongst wholesalers. They were also required to take delivery subsequently of cloth worth over Rs. 23 lakhs. This firm and one other allied firm were also importers and distributors of foodgrains and salt in the district.

Both the Courts below have held that in order to obtain short term credits the appellants hit upon an ingenious device and succeeded in securing credits to the tune of Rs. 80 lakhs between May, 1949 and December, 1949. While the appellant Lachhmi Narain has throughout admitted that such a device was resorted to, the other appellants denied any knowledge of the aforesaid device.

The particulars of the device adopted are these : A partner or an employee of one of the firms booked small consignments of say two or three bags of rape seed, poppy seed or mustard seed from various stations in Rae Bareilly and Partabgarh

districts to various stations in West Bengal, including the city of Calcutta. The person concerned used to execute forwarding notes and obtain railway receipts in respect of such consignments. These receipts were prepared by the railway authorities in triplicate, one being given to the consignor, one sent to the destination station and one kept on the record of the forwarding station. The consignor's foil of the railway receipt was then taken to Rae Bareilly and there it was tampered with by altering the number of bags, the weight of the consignment and the freight charges. All this was admittedly done by munims under the direction of Lachhmi Narain himself. These forged railway receipts were then endorsed by the consignor in favour of one or other of the firms Beni Gopal Mohan Lal, Tulsi Ram Sohan Lal, Sagarmal Soorajmal or of Bhairo Prasad Srinivas and thereafter these firms drew large sums of money commensurate with the huge quantities of goods specified in the forged railway receipts and on the security of these railway receipts drew demand drafts or hundis in favour of various banks and two firms in Kanpur as payees on a firm styled as Murarka Brothers, Calcutta, as drawee. It may be mentioned that this firm was established by the family in Calcutta about a year or so before the transactions in question were entered into. After this firm was established in Calcutta Lachhmi Narain opened an account in the name of the firm in the Calcutta Branch of the Allahabad Bank and authorised Babu Lal and Chandrika Singh, who was originally an employee of the firm Bhairo Prasad Srinivas and was transferred to Calcutta, to operate on the account. The banks which discounted the hundis and the drafts were the Kanpur branches of the Bank of Bikaner, the Bank of Bihar, the Bank of Baroda and the Central Bank of India and the firms were Mattadin Bhagwandass and Nandkishore Sitaram, both of Kanpur. These payees realised the amounts by presentation of the hundis and railway receipts to Murarka Brothers at Calcutta. The banks obtained payment through their branches in Calcutta while the two firms obtained payments through certain banks. To enable Murarka Brothers at Calcutta to honour the hundis on presentation Lachhmi Narain and Tulsi Ram, the acquitted accused Srinivas and a munim of theirs named Hanuman Prasad, who was also an accused but died during investigation, used to get money transmitted from the firms' account in the Rae Bareilly, Lucknow and Kanpur branches of the Allahabad Bank to the account of Murarka Brothers at Calcutta by telegraphic transfers. Delivery of the consignments despatched by the partners of the employees of the various family firms could obviously not be taken with the help of forged railway receipts because had that been done the fraud would have been immediately discovered. Instead, delivery was taken through commission agents on indemnity bonds on the allegation that the railway receipts had been lost. Such bonds were executed either by one of the partners or by an employee and after getting them verified by the Station Masters and Goods Clerks of the booking stations they were endorsed in favour of the consignees. It has been established by evidence—and it is not disputed before us—that these consignees in fact took delivery of the small consignments at the special request of Lachhmi Narain, disposed of the consignments and credited the sale proceeds to the account of Bhairo Prasad Srinivas or Murarka Brothers at Calcutta. The bulk of these forged railway receipts is not forthcoming, presumably because they have been destroyed after the hundis supported by them were honoured and the receipts received from the banks or the firms which were payees under the hundis. It is the prosecution case that the banks and the firms obtained discount charges of one or two annas per cent. for the amount paid by them, although had the family firms obtained these amounts by way of loan they would have been charged interest at 6 to 9 per cent. on these amounts.

Towards the end of December, 1949 the Kanpur branch of the Bank of Bikaner and the Bank of Bihar received back a number of hundis unhonoured along with corresponding forged railway receipts. The Bank of Bikaner received five hundis for an amount of Rs. 3,52,000 out of which hundis worth Rs. 1,82,000 had been negotiated by the bank directly with the firm Bhairo Prasad Srinivas and hundis worth Rs. 1,70,000 through Nand Kishore, Sitaram. Six hundis were received back by the Bank of Bihar, Kanpur, valued at Rs. 1,92,000. These were



negotiated through Matadin Bhagwandās. The bank adjusted the account by debiting Matadin Bhagwandās with the amount. These unpaid payees instituted inquiries from the consignees and the railways and came to know that the railway receipts offered as security to them were forged. These railway receipts have been exhibited in this case in order to prove the charge of forgery.

After the cheating practised by the family firms and forgeries committed by them came to light, Daya Ram, P.W. 62, a partner in the firm Matadin Bhagwandās filed a complaint before the City Magistrate, Kanpur, on 4th January, 1950 and B. N. Kaul, Manager of the Bank of Bihar lodged a report at the Police Station, Colonelganj, Kanpur, on 13th January, 1950. The appellants, except Chandrika Singh, executed a mortgage deed on 5th January, 1950, in favour of the Bank of Bikaner for Rs. 3,62,000 which included Rs. 3,52,000 due on unpaid hundis, interest and other charges. According to the prosecution Bhairo Prasad Srinivas paid the firm Matadin Bhagwandās Rs. 1,00,000 and that Lachhmi Narain executed a promissory note for the balance of Rs. 92,000 in their favour. According to the defence, however, the criminal case filed by Matadin Bhagwandās was compounded by payment of the amount settled between the parties and that as a result they stood acquitted of the charge contained in the complaint of Matadin Bhagwandās.

The appellant, Lachhmi Narain has taken all the blame upon himself. He not only admitted that he had obtained credit to the tune of Rs. 80 lakhs on the security of railway receipts in which the quantities of goods consigned had been increased, but also admitted that he had got the quantities inflated by his munims Raj Bahadur and Hanumar. Prasad, both of whom are dead. According to him, except for the complicity of the two munims the whole thing was kept a secret from everybody else. His defence further was that he had committed no offence as he intended to pay off and did pay off the entire amount raised. The other appellants admitted that each of them had played some part or other in these transactions but denied having been a member of the conspiracy and contended what each of them did was at the bidding of Lachhmi Narain.

The first point raised by Mr. A. N. Mulla on behalf of the appellants was that no sanction as required by section 196-A of the Code of Criminal Procedure was on the record of the case and, therefore, the entire proceedings are void *ab initio*. He admitted that there is a document on record, Exhibit P-1560, which is a letter addressed by Mr. Dave, Under Secretary to the Government of U. P., Home Department to the District Magistrate, Kanpur, informing him that the Governor has been pleased to grant sanction to the initiation of proceedings against the persons mentioned in that order. But according to Mr. Mulla this communication cannot be treated "either as a valid sanction or its equivalent". He points out that for a sanction to be valid it must be by a written order signed by the sanctioning authority and that no one can function as a substitute for the sanctioning authority nor can oral consent, even if it was given, be deemed in law to be valid. He further contended that the document on record does not show on its face that the facts of the case were considered by the Governor. His argument is that had the true facts of this case been placed before the Governor, that is, that the firm Bhairo Prasad Srinivas never sought its appointment as sole importer of cloth for Rae Bareilly district, that the firm was in fact prevailed upon by the Deputy Commissioner to take up the work and help the Government in a critical situation, that though large credits were undoubtedly obtained by making fraudulent representations and committing forgeries it was never the intention of Lachhmi Narain to cause loss to anyone, that in fact everyone has been paid in full, and that the prosecution was launched not at the instance of any of these persons but at the instance of the railway authorities and that, therefore, no useful purpose would be served by launching a prosecution, sanction would not have been given.

We did not permit Mr. Mulla to raise this point because it is not a pure question of law but requires for its decision investigation of facts. It is not his contention that there was no sanction at all but the gravamen of his complaint is that there is no proper proof of the fact that sanction was given by the authority concerned.

after considering all the relevant facts and by following the procedure as laid down in Article 166 of the Constitution. Had the point been raised by the appellant in the trial Court, the prosecution would have been able to lead evidence to establish that the Governor had in fact before him all the relevant material that he considered the material and after considering it he accorded the sanction and that that sanction was expressed in the manner in which an act of the Governor is required to be expressed. Mr. Mulla, however, says that section 196-A of the Code of Criminal Procedure is a sort of brake on the powers of the criminal Court to enquire into the charge of conspiracy, that the Court does not get jurisdiction to enquire into that charge unless the brake is removed and that it is, therefore, essential for the prosecution to establish that the brake was removed by reason of the fact that the appropriate authority had accorded its sanction to the prosecution after complying with the provisions of law and that it was not obligatory on the defence to raise an objection that there was no proper sanction. There would have been good deal of force in the argument of learned counsel had Exhibit P-1560 not been placed on record. Though that document is not the original order made by the Governor or even its copy, it recites a fact and that fact is that the Governor has been pleased to grant sanction to the prosecution of the appellants for certain offences as required by section 196-A of the Code of Criminal Procedure. The document is an official communication emanating from the Home Department and addressed to the District Magistrate at Kanpur. A presumption would, therefore, arise that sanction to which reference has been made in the document, had in fact been accorded. Further, since the communication is an official one, a presumption would also arise that the official act to which reference has been made in the document was regularly performed. In our opinion, therefore, the document placed on record *prima facie* meets the requirements of section 196-A of the Code of Criminal Procedure and, therefore, it is not now open to the appellants to contend that there was no evidence of the grant of valid sanction. We, therefore, overrule the contention raised by learned counsel.

The next point urged by Mr. Mulla is that the charge as framed jumbles up several offences and, therefore, has led to miscarriage of justice. This also is not a point which had been taken up in the Courts below. That apart, we do not think that there is any substance in this point. The objection is with respect to the first charge which reads as follows :

"That between the months of May, 1949 and December, 1949 both months inclusive in the district of Rae Bareilly, Pratabgarh and Kanpur, Sri Niwas, Lachhmi Narain, Tulsi Ram, Beni Gopal, Babulal, Moti Lal, Brij Lal Goenka, Chajju Lal and Chandrika Singh agreed to do amongst themselves and the deceased Haruman Prasad and Purshottam Das or caused to be done illegal acts viz., the act of cheating the (1) Bank of Bikaner, Kanpur, (2) Bank of Baroda, Kanpur, (3) Bank of Bihar, Kanpur, (4) Central Bank of India, Kanpur, (5) M/s. Matadin Bhagwan Dass, Kanpur and (6) M/s. Nand Kishore Sitaram of Kanpur by dishonestly inducing them to part with huge sums of money on the basis of hundis drawn on Murarka Bros., Calcutta, covered with securities knowing such R/Rs. to be forged and cheated the aforesaid Banks and Bankers by using forged documents as genuine knowing them to be forged in pursuance of a common agreement amongst them all and thereby committed an offence punishable under section 120-B read with sections 467/468/471 and 420 of the Indian Penal Code and within the cognizance of the Court Sessions."

It is the concluding portion of the charge to which learned counsel has taken objection. We do not think that there has at all been any jumbling up of the charges. The charge is just one and that is of conspiracy. A reference is made to other sections of the Code to indicate the objects of the conspiracy, that is to cheat and to commit forgery. The charge by referring to various sections of the Indian Penal Code merely makes it clear that the object of the conspiracy was to forge railway receipts, which were valuable securities, to commit forgeries for the purpose of cheating and to use forged documents as genuine. What was meant by the charge was apparently fully understood by the appellants because they never complained at the appropriate stage that they were confused or bewildered by the charge. In the circumstances, therefore, we overrule this objection also of learned counsel.

Since the commission of forgeries by Lachhmi Narain could not be denied what we have next to ascertain is whether Lachhmi Narain is guilty of cheating and if so whether under section 420, Indian Penal Code, as held by the learned

Additional Sessions Judge and the High Court or under section 417, Indian Penal Code as contended before us. Learned counsel points out and rightly, that for a person to be convicted under section 420, Indian Penal Code it has to be established not only that he has cheated someone but also that by doing so he has dishonestly induced the person who was cheated to deliver any property, etc. A person can be said to have done a thing dishonestly if he does so with the intention of causing wrongful gain to one person or wrongful loss to another person. Wrongful loss is the loss by unlawful means of property to which a person is entitled while wrongful gain to a person means a gain to him by unlawful means of property to which the person gaining is not legally entitled. Learned counsel contended that there has been no wrongful loss whatsoever to the banks and the two firms which discounted the hundis drawn by one or the other of the firms owned by the family. The High Court has held that these firms did sustain a wrongful loss inasmuch as they got very meagre amounts for discounting the hundis whereas had the true facts been known to them they would not have discounted the hundis though they may have advanced loans and charged interest at between 6 and 9 per cent. on the amounts advanced. It was because of the fraudulent misrepresentation made to the banks and the firms that they lost what they could have otherwise been able to obtain and thus wrongful loss has been caused to them. We have been taken through a large number of documents on the record and it is clear from these documents that those who discounted the hundis in question were entitled to charge, apart from the discount charges, interest at 6 per cent. or above in case of non-payment within 24 hours of presentation. A reference to some of the Exhibits 1440 to 1454 which are the debit vouchers of the Bank of Bikaner and Exhibits 1330 to 1345 which are debit vouchers of the Bank of Bihar clearly show that in fact interest in the case of the first Bank at 6 per cent. and in the case of the second at 9 per cent. was charged, debited and realised by these banks from the firms in question for the entire period during which the hundis though presented, remained unpaid. These documents are only illustrative but they do indicate that in fact the banks were not deprived of interest. Learned counsel pointed out that the Managers and officers of the Banks and the firms were examined and they do not say that any loss of interest was caused to them in these transactions. Mr. Mathur who appears for the State, however, pointed out that in the nature of things the hundis could not be presented for payment in less than ten days and in this connection he referred to Exhibits P-1106 and P-1055. These are records of bills purchased by the Central Bank of India, Kanpur. He referred us to the penultimate columns of these exhibits headed "date enquired on" and contended that this column contained the date of presentation. As an illustration he referred us to the first entry dated 10th June. It was the date on which the hundi was discounted by the Central Bank of India and then he said that the date in the penultimate column is 20th June, which means that the hundi was presented on 20th June. According to him, therefore, for this period of ten days and for 24 hours thereafter the bank would have got only the discount charges and no interest. The hundi in question was realised on 25th June, and, therefore, according to him all that the bank must have got was interest for four days. But it may be pointed out that the heading of the penultimate column has not been correctly reproduced in the paper book. We have been referred to the original and there the heading is "date enquired". Bearing in mind this fact as well as the entry in the last column which is headed "non-payment advice sent" we think that what is stated in the penultimate column is not the date of presentation at all but some other date. Unfortunately there is no column in either of the documents to show the date of presentation. Therefore, these documents do not help the State at all. Apart from that we may mention that it was for the Bank to take care to see that there was no delay in the presentation of hundis and if they themselves delayed they had to take the consequences. Further, we may point out that if the Bank was not able to earn interest or earn only very little interest in these transactions for as long as ten days that would have been so in all the transactions, that is, not merely transactions which were supported by forged railway receipts but also transactions which were supported by genuine railway receipts. There is, therefore, no substance in the contention of Mr. Mathur.

Mr. Mathur, then contends that the fact that the banks stood the risk of losing their moneys because the railway receipts which supported the bills were forged documents, wrongful loss must be deemed to have been caused to the bank, by the action of the firms. There is considerable force in this argument but we do not wish to express any final opinion thereon, because in our opinion the firms of the appellant have undoubtedly made an unlawful gain.

No doubt, Mr. Mulla contended that because the firms were able to obtain temporary credits on the basis of their hundis, it cannot be said that they have made any wrongful gain to themselves. His contention is that the firms had good credit in the market and for obtaining credit in the transaction in question they gave good equivalents in the shape of hundis. He also pointed out that out of the 180 odd hundis drawn by the firms only a very few were dishonoured and that this happened only in the month of December, 1949. It was not shown, he proceeded, that Murarka Brothers on whom the hundis were drawn were not throughout the period of nine months when the transactions were entered into, in a position to meet the hundis. Out of hundis worth Rs. 80 lakhs those worth Rs. 74 lakhs were in fact honoured and even the remaining hundis would have been honoured but for the fact that there was slump in the market and cotton bales worth Rs. 12 lakhs belonging to the appellants were lying pledged in the godowns of the Central Bank of India for securing an amount of Rs. 9 lakhs. Had these bales been sold in the normal course there would have been no crisis in December of the kind which occurred and led to the dishonourment of certain hundis, in which the Bank of Bikaner and Matadin Bhagwandas were payees. Bearing in mind all these facts, learned counsel wants us to draw the inference that the obtaining of credit was not on the security of forged railway receipts but on the security of hundis themselves which were drawn by parties who had credit in the market and drawn on a party which has not been shown not to be possessed of adequate funds to meet the hundis throughout the period covered by the transaction. We do not think that the argument of learned counsel has much force. B. N. Kaul (P.W. 32), the Manager of the Kanpur branch of the Bank of Bihar has said that he purchased hundis because the railway receipts showed that the consignments were large and their value was commensurate with the amount for which the bills had been drawn. He added that he would not have purchased these hundis if the consignments were for very small quantities, apparently meaning thereby that if the value of the consignments was not commensurate with the amount to be advanced he would not have purchased the hundis. Apart from the evidence of Kaul there is also other evidence to show that the real basis of discounting bills was not merely the credit of the appellant or the security afforded by these bills. This evidence is in consonance with the normal banking practice of discounting hundis only when they are supported by railway receipts of consignments despatched by the drawer to outside parties. No doubt, bills or hundis are themselves securities and taking into consideration the credit of the drawer of a hundi a bank may conceivably discount such hundis but where the hundis are themselves supported by railway receipts it would be futile to say that the railway receipts were not intended by the parties to be regarded as further security for discounting the bills. Where a consignor of goods draws a hundi for the price of the consignment on some firm and supports that hundi with the railway receipt obtained by him in respect of the consignment, the party in fact pledges the consignment to the bank discounting the hundi and, therefore, in such a transaction the railway receipt cannot be regarded as anything else than a security for that transaction. If that security turns out to be worthless or practically worthless because the value of the consignment is only a fraction of what it was represented to be, the discounting of the hundi by the party drawing it must necessarily be regarded as unlawful. It would thus follow that the firm in question made a gain by obtaining credits and that these credits were obtained by them by resorting to unlawful means. The gain they made was, therefore, unlawful. Mr. Mulla contended that for an act to be regarded as dishonest it is not enough to show that one person deceived another and thereby made a wrongful gain but it is further necessary to show that as a result of the deception the other person sustained wrongful loss. In support of his contention he has relied upon the decision in

*Sanjin Ratnappa Ronad v. Empeoror*<sup>1</sup>. That was a case where the first accused who was a Police Sub-Inspector was found to have made a false document by altering a certain entry made by him in his diary with a view to create evidence. It was argued before the Court that in order to constitute an offence of forgery under sections 463 and 464 the document must be made dishonestly or fraudulently and those words must be read in the sense in which they are defined in the Indian Penal Code and that it was not enough to show that the deception was intended to secure an advantage to the deceiver. Dealing with this argument Baker, J., who was one of the Judges constituting the Bench observed at page 493:

"The definition of 'dishonestly' in section 24 of the Indian Penal Code applies only to wrongful gain or wrongful loss and although there are conflicting rulings on the question of the definition of the word 'fraudulently' the consensus of opinion of this Court has been that there must be some advantage on the one side with a corresponding loss on the other."

Section 463, which defines forgery, runs thus :

"Whoever makes any false document or part of a document with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."

The intention to cause damage or injury to the public or to any person is thus an element which has to be established before a fabricated document can be held to be a false document or a forgery. In view of the terms of section 463 what the learned Judge has observed is understandable and may be right. Here, however, we are concerned with the offence under section 420, Indian Penal Code which speaks of dishonest inducement as a necessary ingredient. As Baker, J., has rightly pointed out :

"As dishonesty involves a wrongful gain or wrongful loss, obviously it does not apply to the present case where no pecuniary question arises."

But, in an offence under section 420, Indian Penal Code a pecuniary question necessarily arises. The first part of section 464, Indian Penal Code provides that a person is said to make a false document who dishonestly or fraudulently makes, signs, etc., a document with a particular intention and covers cases both of acts which are dishonest and acts which are fraudulent. Where no pecuniary question arises the element of dishonesty need not be established and it would be sufficient to establish that the act was fraudulent and, therefore, it may be, as the learned Judge has held, that where an act is fraudulent the intention to cause injury to the person defrauded must be established. But where the allegation is that a person has dishonestly induced another to part with property something different has to be considered and that is whether he has thereby caused a wrongful loss to the person who parted with property or has made a wrongful gain to himself. These are the two facts of the definition of dishonesty and it is enough to establish the existence of one of them. The law does not require that both should be established. The decision relied upon by learned counsel is, therefore, distinguishable. Learned counsel then referred to the dissenting judgment of Subrahmaniam Ayyar, J., in *Katamraju Venkatarayudu v. Emperor*<sup>2</sup> to the effect that in regard to offences falling under sections 465 and 461 it must be established that the deception involved some loss or risk of loss to the individual and to the public and that it was not enough to show that the deception was intended to secure advantage to the deceived. This decision as well as some other decisions referred to by learned counsel are therefore distinguishable for the same reason which distinguishes *Sanjin Ratnappa Ronad's Case*<sup>1</sup> from the one before us. We are, therefore, of the view that the offence of cheating has been established.

The High Court has found that dishonesty has been established against Lachhmi Narain because it was he who drew and negotiated the various hundis. According to learned counsel the prosecution has not established that the other appellants had either drawn any hundi or discounted any hundi. This contention, however, does not appear to be sound because there is a finding of the learned Additional Sessions.

Judge that the appellant Tulsi Ram had sold to the Central Bank of India certain hundis covered by forged railway receipts. He has also found that the appellant Beni Gopal had admittedly booked a consignment of two bags of rapeseed from Rae Bareilly to Raniganj and drawn a hundi of Rs. 40,000 on the basis of the railway receipt which was tampered with and subsequently got verified the stamped indemnity bond for this very consignment which was sent to the firm Chiranji Lal Ram Niwas for taking delivery. Another consignment of two bags, this time containing poppy seeds, was booked by the firm of Beni Gopal and Beni Gopal drew a hundi for Rs. 38,000 on Murarka Brothers and sold that hundi to the Central Bank of India. This hundi was supported by a railway receipt which had been tampered with. It is on the basis of these findings that the learned Additional Sessions Judge convicted both these appellants for an offence under section 417/420, Indian Penal Code. The learned Additional Sessions Judge has also held that the appellants, Babu Lal and Moti Lal were likewise guilty of offences under section 417/420, Indian Penal Code. The conviction and sentence passed on Moti Lal was set aside by the High Court. In our opinion the prosecution has failed to establish that Babu Lal had either drawn or negotiated hundis supported by forged railway receipts. The material upon which the learned Additional Sessions Judge has relied and, apparently, on which the High Court has relied, does not touch these matters at all. Whatever other part Babu Lal might have played in these transactions his actions do not bring home to him the charge under section 420, Indian Penal Code. For this reason his conviction and sentence for the offence of cheating must be set aside and we accordingly do so.

The High Court has affirmed the conviction of Tulsi Ram and Beni Gopal for offences under section 417/420, Indian Penal Code. As already indicated there is evidence to show that both these persons had taken part either in the drawing or in the negotiation of hundis which were supported by forged railway receipts. The evidence adverted to by the learned Additional Sessions Judge has not been challenged before us. We must, therefore, confirm the conviction of the appellants, Tulsi Ram and Beni Gopal, for the offence of cheating. We would, however, like to make it clear that having found that the acts fall under section 420, Indian Penal Code it was not appropriate for the High Court to affirm the conviction under "section 417/420", Indian Penal Code thus indicating that if the offence is not one it is the other.

The only other question which needs to be considered is regarding conspiracy. Mr. Mulla fairly admitted that in any case Lachhmi Narain cannot escape the conviction under section 120-B even if all the other appellants are held not to have been parties to the conspiracy because two other persons were admittedly associated with Lachhmi Narain. These persons would have been made co-accused in the case but for the fact that they died in the meanwhile.

Regarding the other appellants before us, Mr. Mulla strongly contends that there is no evidence of conspiracy. He concedes that he cannot challenge the correctness of the findings of the Additional Sessions Judge and the High Court regarding the commission of certain acts by the appellants but his contention is that those acts are not sufficient to show their complicity in the conspiracy. According to him, the other appellants were made to do these acts by Lachhmi Narain and they were not in the know of the deception which Lachhmi Narain had systematically practised in all the transactions. We cannot accept the argument. At least in so far as two of the appellants are concerned, Tulsi Ram and Beni Gopal, they are guilty of cheating itself. That fact coupled with the other evidence referred to in the concluding portion of the judgment of the High Court, and the circumstances established against each of the appellants are sufficient to warrant the conclusion that they were in the know of the conspiracy. In so far as Babu Lal is concerned the acts established are : (1) signing four forwarding notes ; (2) presenting a cheque at the Bank of Bikaner, Kanpur ; (3) cashing a cheque ; (4) paying off certain hundis accompanied by forged railway receipts ; and (5) signing 32 indemnity bonds. The forwarding notes related to certain consignments on the security of which hundis had been discounted by certain banks. By presenting a cheque to the Bank of Bikaner, Kanpur, and by

cashing another cheque, Babu Lal had operated on the bank account to which the proceeds of certain hundis supported by forged railway receipts had been credited. These facts, taken in conjunction with the acts of payment of hundis accompanied by the forged railway receipts would be sufficient to establish his connection with the conspiracy. In addition to this circumstance, he also signed or endorsed 32 indemnity bonds on the strength of which delivery of a large number of consignments, railway receipts in respect of which had been forged, was ultimately taken.

Similarly as regards Moti Lal the following acts have been established. (1) signing of 23 forwarding notes in connection with consignments, the railway receipts of which were tampered with but which supported certain hundis drawn by the firm; (2) he signed or endorsed 52 indemnity bonds on the strength of which delivery was taken of the consignments, the railway receipts in respect of which were tampered with and yet were offered as security to banks or firms which discounted hundis for the value of those consignments. These circumstances are sufficient to justify the conclusion drawn by the Additional Sessions Judge and upheld by the High Court. In addition to these circumstances, we must bear in mind the fact that these four appellants are closely related to Lachhmi Narain, that their family business is joint and, therefore, they have a common interest. It is inconceivable that they could not have been in the know of what was being done by Lachhmi Narain. In the circumstances we uphold their conviction under section 120-B, Indian Penal Code. As regards Chandrika Singh, the matter stands on a different footing. He was originally an employee of the firm Bhairo Prasad Srinivas and was transferred to Calcutta a year before the transactions in question commenced, when the firm of Murarka Brothers was established. He was in charge of paying hundis presented to Murarka Brothers. The High Court has held him to be a party to the conspiracy on the basis of the following facts :

(1) He signed the letter of authority, Exhibit P-1388 dated 22nd July, 1948 by which Lachhmi Narain authorised him to operate the account of Murarka Brothers in the Calcutta branch of the Allahabad Bank, as proved by Chandrika Chaubey, P.W. 44, and, admitted by the appellant ;

(2) He paid Rs. 25,000 to the Hindustan Commercial Bank and received the hundis and railway receipts concerned, as admitted by him and proved by G. N. Ghosh, P.W. 57, and the voucher Exhibit P-1232 ;

(3) He made payments to the Bank of Bihar at Calcutta on behalf of Murarka Brothers and obtained the hundis and railway receipts concerned, signing vouchers, Exhibits P-1342, 1343, 1346 and 1348 to 1353 about the same, as admitted by him ; and

(4) He made similar payments to the Calcutta Branches of the Central Bank of India, the Punjab National Bank and Allahabad Bank, as admitted by him and, so far as the Punjab National Bank is concerned proved by the receipt Exhibit P-1375 and, so far as the Allahabad Bank is concerned, by the vouchers, Exhibits P-1440 to 1446 and 1448 to 1457, as admitted by him.

The first circumstance relied upon by the High Court is really this, that he appended his specimen signatures to the letter of authority signed by Lachhmi Narain to the Allahabad Bank, Calcutta, wherein he (Chandrika Singh) was authorised to operate on the account of Murarka Brothers. This was done long before the conspiracy and, therefore, has no bearing on the question before us. The remaining three reasons merely indicate that Chandrika Singh had paid the hundis which it was his duty to do. It may be that along with those hundis forged railway receipts were also submitted to him but from this one circumstance it would not be legitimate to infer that he had any hand in the conspiracy. At worst what could be said is that his suspicion could have been aroused but nothing more. Therefore, in our opinion none of the reasons given by the High Court support the conclusion that Chandrika Singh was a party to the conspiracy. Our attention was, however, drawn to a further reason given by the learned Additional Sessions Judge. That reason is as follows :

"Chandrika Singh was asked to explain as to what he did with the forged R/Rs. and why he did not take delivery on them at Calcutta when they were endorsed in favour of Murarka Brothers. To this he replied that he gave the R/Rs. of Calcutta to Calcutta commission agents, and he sent other R/Rs. to Raj Bahadur Singh munim of Bhario Prasad Sri Niwas. But we find (*sic*) is that delivery in all these cases have (*sic*) been taken by the Calcutta merchants and the merchants of other West Bengal

his heir—admitted the mistake made in the revenue record before the concerned authorities. That apart, they had before them a report of the enquiry made by a subordinate officer of the revenue department tracing the history of the said Khasra numbers and also giving the relevant facts, namely, the partition between the co-sharers and the joint application filed by them for mutation of their names in respect of the plots allotted to each one of them. On the material so placed before them, the Revenue Authorities corrected the mistake, and against mutation No. 1490 the correct shares of Teja Singh and Jhandha Singh, namely, 1/8 and 7/8 respectively were given. On 24th October, 1934, *i.e.*, after Jhandha Singh had filed the application for correcting the mutation No. 960, Mula Singh executed a sale deed conveying the said land bearing Khasra Nos. 324 and 328 in favour of Gurbaksh Singh, the appellant, *i.e.*, on the very date when Mula Singh had to appear before the Revenue Authorities. The appellant obtained a security bond from Mula Singh to indemnify him against any loss that might be caused to him in respect of the said property; he also paid the bulk of the consideration only on 22nd October, 1937, *i.e.*, after three years 3 of the sale deed. Jhandha Singh, in his turn sold his 7/8 share in the said Khasra numbers, along with others, to Gopal Singh from whom Nikka Singh, the first respondent purchased the said share by a sale deed dated 27th October, 1936. The appellant filed a suit under section 117 of the Punjab Land Revenue Act, 1887, out of which the present appeal arises, in the Revenue Court for a declaration of his exclusive title to the said two Khasra numbers, and in that suit Nikka Singh, the first respondent, and Mula Singh, the second respondent, were the defendants. The suit has had a chequered career and it is not necessary to trace it. It would be enough if we start with the decision of the Subordinate Judge dated 14th February, 1949, to whose file the suit was transferred from the file of the Revenue Court by the District Judge after it was remanded by the High Court on an earlier occasion. The learned Subordinate Judge expressed his opinion on the relevant issue thus :

“.....so far as the land in suit is concerned, Mula Singh had sold it to the plaintiff on 24th October, 1934, and any admission by him made on 10th August, 1936 would not affect the plaintiff. Under section 37 of the Land Revenue Act, a mutation can be based either on facts proved or admitted. No facts had been proved before the officer who attested mutation No. 1490, and Mula Singh was nobody to admit any facts in relation to land which he had sold two years before to the plaintiff. The mutation entry 1490 was therefore not properly made and I decide issue No. 11 accordingly.”

It will be seen from the aforesaid observations that the learned Subordinate Judge based his finding on the assumption that the admission of Mula Singh could not bind the appellant when purchased his property before the said admission and that there was no other evidence before the Revenue Authorities to make the mutation entry No. 1490. On appeal the learned District Judge, though he made certain observations indicating his line of thought, did not give any definite finding on the question of title, but he dismissed the appeal on the finding that the appellant was a *bona fide* purchaser in good faith. The first respondent preferred a Second Appeal to the High Court. The High Court held that the correction of earlier mutation No. 960 was made with the consent of both the parties and there is a presumption attached to the correctness of the later mutation and that the appellant was fully cognizant of the real state of affairs, namely, that Mula Singh had only 1/8 share in the said Khasra numbers. On those findings, the decree of the learned Subordinate Judge was set aside and the plaintiff's suit was dismissed with costs throughout. Hence the appeal.

Learned counsel for the appellant raised before us the following points : (1) The High Court has no jurisdiction under sections 100 and 101 of the Code of Civil Procedure to set aside concurrent findings arrived at by the two lower Courts. (2) Under section 37 of the Punjab Land Revenue Act there is a presumption in favour of an entry in the revenue record if it is made in accordance with the facts proved or admitted to have occurred; but, as in the present case the entry was corrected on the admission of Mula Singh after he transferred his interest in favour of the appellant, the said admission could not constitute legal basis for the said entry, therefore, no presumption under that section would attach to that entry.



It is true that as early as 1931 the Privy Council held that the High Court had no jurisdiction to entertain a Second Appeal on the ground of erroneous findings of fact however gross the error may seem to be, and the said ruling has since been followed by all the Courts in India and accepted by this Court in a number of decisions. But in this case the learned District Judge has not given any finding on the question of title, but contented himself to dispose of the appeal on the ground that the appellant purchased the land in good faith from Mula Singh. The question of title was, therefore, left open and the High Court was certainly within its right in giving its own finding thereon.

The finding given by the learned District Judge that the appellant was a *bona fide* purchaser in good faith was not based on the evidence in the case, but was merely an *ipsi dixit*. Nor did the District Judge consider the impact of the provisions of section 41 of the Transfer of Property Act on the facts of the case. Such a finding arrived at without evidence and without applying the correct principles of law cannot obviously bind the High Court. Section 41 of the Transfer of Property Act reads :

“Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it : provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.”

The general rule is that a person cannot confer a better title than he has. This section is an exception to that rule. Being an exception the onus certainly is on the transferee to show that the transferor was the ostensible owner of the property and that he had, after taking reasonable care to ascertain that the transferor had power to make the transfer, acted in good faith. In this case the facts are tell-tale and they establish beyond doubt that the appellant had the knowledge that the title of his transferor was in dispute and he had taken a risk in purchasing the same. The appellant and Mula Singh belong to the same village-Kot Syed Mahmud. Mula Singh sold his property to the appellant on the very date on which he had to appear before the Revenue Authorities. Though the sale deed was executed on 24th October, 1934 the consideration was actually paid only three years thereafter i.e., on October, 22, 1937. The appellant also took a security bond from Mula Singh to indemnify himself against any loss that might be caused to him in the property in dispute. These facts show that the appellant had knowledge of the defect in the title of Mula Singh. It is, therefore, not possible to hold that he had purchased it in good faith. The High Court, having regard to the aforesaid circumstances, held that the appellant knew that the transaction was in respect of a property of which the title was extremely doubtful. There are no permissible grounds for challenging the correctness of that finding before us in an appeal under Article 136 of the Constitution.

Nor do we see any merits in the contention that no presumption can be drawn in favour of the correctness of the impugned entry in the revenue record on the ground that the conditions given in the section are not satisfied. Section 37 of the Punjab Land Revenue Act reads :

“Entries in records-of-rights or in annual records, except entries made in annual records by patwaris under clause (a) of section 35 with respect to undisputed acquisitions of interest referred to in that section, shall not be varied in subsequent records otherwise than by—

(a) making entries in accordance with facts proved or admitted to have occurred ;

(b) making such entries as are agreed to by all the parties interested therein or are supported by a decree or order binding on those parties ;

\* \* \* \* \*

Section 44 says that an entry made in a record of-rights in accordance with the law for the time being in force or in an annual record in accordance with the provisions of that Chapter and the Rules thereunder, shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor. If the entry No. 1490 substituting entry No. 960 had been made in strict compliance with

section 37 of the Punjab Land Revenue Act, it cannot be disputed that there will be a presumption that the new entry was lawfully substituted for the old. In that event the old entry should yield to the new entry. This presumption is no doubt rebuttable. There is force in the contention of learned counsel that Mula Singh, having parted with the interest in the property, could not have admitted the correctness of the new entry or agreed to have the old entry corrected in the manner done so as to bind a purchaser. But that contention does not avail him in the present case as we are satisfied on a perusal of the record that mutation entry 1490 had been made in accordance with the facts proved before the Revenue Authorities. There were the following pieces of evidence before the Revenue Authorities, among others : (1) evidence of Mula Singh ; (2) the report of the Sub-ordinate Revenue Officer with all the connected annexures, including Exhibit D-6, wherein the terms of the partition were recited. On the said evidence the Revenue Authorities corrected the entry in the record in the manner they did. It must, therefore, be held that the provisions of section 37 (a) of the Punjab Land Revenue Act were satisfied. If so, there is a presumption that the later entry was correct. The appellant did not adduce any evidence to rebut the said presumption. On the other hand, Exhibit D-6, the application dated 20th April, 1929 for mutation of names in the revenue record, signed by all the co-sharers contained the following recital :

“ Entries with respect to the following Khasra Nos. may be made in the revenue papers in the name of Teja Singh, co-sharer No. 5 to the tune of one share and Bhai Jhandha Singh co-sharer No. 2, to the tune of seven shares : 324/3 16,328/5.06 etc.”

The High Court was, therefore, right in holding that there was a presumption in favour of the correctness of the entry and the appellant had failed to rebut the same. The judgment of the High Court is correct and the appeal fails and is dismissed with costs.

K.L.B.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P.B. GAJENDRAGADKAR, K.C. DAS GUPTA AND RAGHUBAR DAYAL JJ  
Shyam Kartik Singh and others, etc.

*Appellants\**

Mathura Koeri (since deceased), now represented  
by his sons, etc.

*Respondents.*

*U. P. Tenancy Act, (XVII of 1939), as amended by the U. P. Tenancy (Amendment) Act (X of 1947), section 19 and rules 239-A and 239-B framed thereunder—Whether under there was substantial compliance with the provisions.*

The documents filed by the appellants in the trial Court clearly furnish particulars required by rules 239-A and 239-B made by the Board of Revenue under section 19 of the U. P. Tenancy (Amendment) Act (X of 1947), as the periods covered by these documents include 30th June, 1938, 31st December, 1939 and 1st January, 1940. The Trial Court could and did record findings on all the facts which had to be proved by the appellants to establish their case. The first appellate Court confirmed them. The particulars required by section 19(1) of the Amended Act and the Rules framed thereunder were for the purpose of ascertaining those facts. In the circumstances, it is reasonable to hold that there had been substantial compliance with the provisions of section 19 of the Act. The Board of Revenue was in error in setting aside the decree of the Additional Commissioner.

Appeals by Special Leave from the Judgment and Order dated the 6th August, 1954 of the U.P. Board of Revenue, Allahabad, in Petitions Nos. 203 to 208 of 1947-48.

G. C. Mathur, Advocate, for Appellants (In all the Appeals).

M. L. Agarwala, Advocate, for Respondents (In C. As. Nos. 484 and 485 of 1958) and Respondent No. 3 (In C.A. No. 488 of 1958).

The Judgment of the Court was delivered by

*Raghubar Dayal, J.*—These appeals, by Special Leave, against the orders of the Board of Revenue, Uttar Pradesh, arise in the following circumstances :

The appellants presented applications against each set of the respondents in these six appeals under section 175, U.P. Tenancy Act, 1939 (XVII of 1939), hereinafter called the Act, for ejectment, stating that they were the sir-holders of the land occupied by the respondents as non-occupancy tenants and that the period of five years during which the respondents were entitled to retain possession under section 20 of the Act had expired. The respondents contested the notice of ejectment alleging that the land in suit was not sir, that the appellants were not sir-holders, that the appellants paid local rate exceeding Rs. 25 in the United Provinces, Agra and Oudh, and held more than 50 acres of sir land. They claimed to be hereditary tenants of the land in dispute, in accordance with sections 14, 15 and 16 of the Act. The papers were thereafter forwarded by the Tasildar to the Assistant Collector in charge of the sub-division, in accordance with the provisions of section 179 of the Act.

The applications which were presented for the ejectment of the respondents were deemed to be plaints and the proceedings continued as suits, in view of sub-section (2) of section 179 of the Act.

The Court called upon the appellants to file necessary extracts of papers and to join all tenants of sir as parties. The Sub-Divisional Officer did not accept the contentions of the respondents and decreed the suits on 28th February, 1946, holding that the land in suit was sir, that the appellants were sir-holders; that each of them did not pay a local rate exceeding Rs. 25 either in 1938 or in 1940, that he did not hold more than fifty acres of sir land or more than fifty acres of sir and khudkasht land which had not been sublet in 1947 F., corresponding to the period from 1st July 1939 to 30th June, 1940.

The respondents appealed against the decree to the Additional Commissioner, Benares, and repeated their contentions which had not found favour in the trial Court. They also contended that the appellants had not complied with the requirements of section 19 of the Act as amended by the U.P. Tenancy (Amendment) Act, 1947 (X of 1947) which came into force on 14th June, 1947, after the appeals had been instituted.

The Additional Commissioner confirmed the findings of the Sub-Divisional Officer and further held that "there had been substantial compliance with the spirit of the law as laid down in the amended section 19 of the Act." He accordingly dismissed the appeals.

The respondents then instituted second appeals in the Board of Revenue. The Board of Revenue did not agree with the Additional Commissioner about there having been sufficient compliance with the provisions of amended section 19 of the Act and of the Rules framed thereunder. It therefore set aside the decree against the respondents and remanded the cases for fresh disposal in accordance with law and further directed the trial Court to decide the further contention raised by the respondents before the Board to the effect that they had acquired adivasi rights in the land in suit after the coming into force of the U.P. Zamindari Abolition And Land Reforms Act, 1950 (U. P. Act I of 1951). It is against these orders of the Board of Revenue that these six appeals have been filed after obtaining Special Leave from this Court.

It appears that there was no particular procedure laid down for the progress of the proceedings in the suit before the Sub-Divisional Officer after the papers had been sent to him in accordance with the provisions of section 179 of the Act. The ordinary procedure for the conduct of suits was followed. The Sub-Divisional Officer therefore called upon the appellants to file necessary extracts of documents. Naturally evidence had to be led, documentary or oral, to substantiate the allegations made by the parties and, especially by the appellants, who had to prove their

right to eject the respondents. They had to prove that the land in suit was sir and that they were sir-holders.

Section 6 of the Act defines 'sir'. This section reads :

"Sir" means—

(a) land which immediately before the commencement of this Act was sir under the provisions of the Agra Tenancy Act, 1926, or the Oudh Rent Act, 1886 :

Provided that if at the commencement of this Act, the sir-holder is assessed in the United Provinces to a local rate of more than twenty-five rupees, and which was sir under the provisions of clause (d) or clause (e) of section 4 of the Agra Tenancy Act, 1926, or of clause (c) or clause (d) of sub-section (17) of section 3 of the Oudh Rent Act, 1886, shall on this Act coming into force cease to be sir unless it was—

(i) before the first day of July, 1938, received otherwise than in accordance with the provisions of section 122 of the United Provinces Land Revenue Act, 1901, or

(ii) before the commencement of this Act, received in accordance with the provisions of that section, in exchange for land which was sir under the provisions of clause (a) or clause (b) or clause (c) of section 4 of the Agra Tenancy Act, 1926, or of clause (a) or clause (b) of sub-section (17) of section 3 of the Oudh Rent Act, 1886 :

Provided further that the provisions of the first proviso shall apply to a sir-holder who was not at the commencement of this Act assessed in the United Provinces to a local rate of more than twenty five rupees, if he or his predecessor-in-interest was so assessed on the 30th June, 1938, unless the local rate assessed on him has been decreased by resettlements or by revision of settlement or unless since that day he obtained his sir rights by succession or survivorship :

Provided also that if the land to which the provisions of the first proviso apply was joint sir of several sir-holders and all such joint sir-holders are not sir-holders to whom such provisions, apply such land shall not cease to be sir at the commencement of this Act, but shall remain sir until that portion of it which is the sir of those joint holders to whom such provisions apply is demarcated under the provisions of this Act ;

(b) land which was khudkasht and which is demarcated as sir under the provisions of this Act.

*Explanation*—If any portion of the land revenue assessed on sir-holder's land has been remitted owing to a fall in the price of agricultural produce the local rate payable by him shall, for the purposes of this section, be deemed to have been reduced in the same proportion."

It follows from these provisions that the appellants had to establish the following facts : (i) The land in suit was 'sir' on 1st January, 1940, when the Act came into force. (ii) Each sir-holder was not assessed in the United Provinces to a local rate of more than Rs. 25. (iii) The sir-holder or his predecessor-in-interest was not assessed to a local rate exceeding Rs. 25 on 30th June, 1938.

The appellants proved these facts and the Trial Court held that the land in suit did not cease to be 'sir'. Further, if the finding had been that the first proviso to section 6 applied, section 16 would have come into play and it would have been necessary for the Court to determine whether each of the sir-holders possessed more than fifty acres of sir or of sir and khudkasht land which had not been let. On this point too, the finding of the Trial Court, however, is that each sir-holder had less than fifty acres of sir and khudkasht land.

Section 19 of the Act, before its amendment in 1947, provided that if a sir-holder could apply under the provisions of section 15 or 16 of the Act, the Court was to take action under these sections. The amended section also repeated these provisions in its sub-section (3). Its sub-sections (1) and (2) were, however, new and read as follows :

"(1) In a suit or proceeding for the ejectment of a tenant of sir the sir-holder shall, before the first date fixed for recording evidence, furnish to the Court such particulars as the Board may by rule made in this behalf prescribe for ascertaining,

(a) whether the sir-holder is a person to whom the provisions of the first proviso to clause (a) of section 6 apply ; and

(b) the total area and nature of the sir-holders' sir and khudkasht :

Provided that if the sir-holder satisfies the Court that he had sufficient cause for not filing the particulars before the date fixed, it may, subject to the payment of costs to the opposite party, extend the time.

(2) If the sir-holder does not file the particulars mentioned in sub-section (1) within the time fixed thereunder, or deliberately furnishes inaccurate particulars, the Court shall dismiss the suit or proceeding, as the case may be, and shall declare the tenant to be hereditary tenant."

It is to be noticed that sub-section (1) requires a sir-holder to furnish particulars prescribed by the Board and that the purpose of furnishing those particulars is to assist the Court in ascertaining whether the provisions of the first proviso to clause (a) of section 6 apply to the sir-holder and what is the total area and nature of the sir-holder's sir and khudkasht. Section 19, therefore, did not bring about any real change in the substantive law affecting the question whether certain land is 'sir' or not, according to the definition of 'sir' in section 6 of the Act. After the amendment, a sir-holder, in order to succeed in his suit, had to establish the same facts which he had to establish prior to the amendment. What proof he had to lead to support his case, he has to give even after the amendment. The only difference brought about by the amendment is in the procedural conduct of the suit and is that prior to the amendment the sir-holder had simply to lead evidence to prove his case, without informing the Court before hand about the material on which he would rely to establish that the provisions of the proviso (a) of section 6 did not apply to him and in case they applied, how effect would be given to the Provisions of section 16. The amended section made it incumbent on the sir-holder to furnish such information to the Court and thereby to the tenant before the parties proceeded to lead evidence. Such information has to be furnished according to sub-section (1) of amended section 19, before the first date fixed for recording evidence. The time for furnishing such information can be extended under the proviso to that sub-section. Great importance, however, has been attached to the new provision as sub-section (2) of amended section 19 provides that the consequences of not filing those particulars, or filing those particulars inaccurately, would be that the Court shall dismiss the suit or proceeding and also declare the tenant to be a hereditary tenant.

Now, it is contended for the appellants, that the provisions of amended section 19 do not apply to the facts of this case as the amended section was enacted long after the first date of recording evidence and that therefore it could not have been possible for the appellant to furnish the necessary particulars in accordance with its provisions and that if its provisions apply to the facts of this case the appellants have substantially complied with those provisions inasmuch as they had actually filed in Court documents which gave the necessary particulars required under rules 239-A and 239-B made by the Board of Revenue under section 19. The contention for the respondents is that amended section 19 is retrospective in view of the provisions of section 31 of the Amendment Act X of 1947 and that the appellants had not complied with the requirements of section 19 (1) and the Rules framed thereunder.

The aforesaid section 31 reads :

*"Disposal of pending suits and appeals—*

(1) All proceedings, suits, appeals and revisions pending under the said Act on the date of the commencement of this Act and all appeals and revisions filed after that date against orders or decrees passed under that Act and all decrees and orders passed thereunder which have not been satisfied in full, shall be decided or executed, as the case may be, and where necessary such decrees and orders shall be amended, in accordance with the provisions of the said Act as amended by this Act :

Provided firstly that if such a decree or order cannot be so amended or the execution of or the appeal or revision from such an amended decree or order cannot be proceeded, with, it shall be quashed. In such a case the aggrieved party shall, notwithstanding any law of limitation be entitled to claim within six months from the date on which such decree or order is quashed, such rights and remedies as he had on the date of the institution of the suit or proceedings in which such decree or order was passed, except in so far as such rights or remedies are inconsistent with the provisions of the said Act as amended by this Act :

Provided secondly that the proceedings under section 53 between a landlord and his tenant and all proceedings under section 54 shall be quashed :

Provided thirdly that appeals and revisions arising out of the proceedings under section 53 between a landlord and his tenant or out of those under section 54 shall be so decided as to place the parties in the same position in which they were immediately before the institution of such proceedings :

Provided fourthly that all suits, appeals and revisions pending under section 180 of the said Act, on the date of the commencement of this Act for the ejectment of any person who was recorded as an occupant on or after the first day of January, 1938, in a record revised under Chapter IV of the United Provinces Land Revenue Act, 1901, or corrected by an officer specially appointed for the correction of annual registers in any tract, shall be dismissed, and all decrees and orders for the ejectment of such persons, which have not been satisfied in full on the date of the commencement of this Act shall be quashed :

Provided fifthly that nothing in this sub-section shall affect the forum of appeal or revisions from a decree or order passed by a Civil Court under the said Act.

(2) In counting the period of limitation in respect of an application for the execution of a decree or order which was passed under the said Act and the execution of which was stayed pending the enactment of this Act, the period during which the execution was so stayed shall be excluded."

In view of this section, the appeals which were pending before the Additional Commissioner when the Amendment Act came into force had to be decided in accordance with the provisions of the Act as amended. It has been stated above that no change in the substantive law affecting the rights of the parties has been brought about by the Amendment Act. The only provision which could affect the rights of the parties is contained in sub-section (2) of amended section 19 and provides the consequences of the failure of the sir-holder to furnish the necessary particulars. It follows therefore that if the necessary particulars had been furnished in this case even prior to the Amendment Act coming into force, there could be no difficulty in deciding the appeals by the Additional Commissioner in accordance with the provisions of the Act as amended by the Amending Act. This is exactly what the Additional Commissioner did. He held that substantial compliance has been made with the provisions of the amended section and the Rules framed thereunder. The Board of Revenue is itself of the opinion that if substantial compliance had been made of those provisions that would have been sufficient. It however did not agree with the Additional Commissioner's view that the appellants had sufficiently complied with the provisions of amended section 19 and the Rules framed thereunder. We are of opinion that in this the Board of Revenue was wrong.

Rules 239-A and 239-B framed by the Board are :

"239-A. In a suit or proceeding for the ejectment of a tenant of sir the sir-holder shall before the first date fixed for recording evidence, furnish to the Court the following particulars :

I. (1) The amount of local rate to which the sir-holder was assessed on 1st January, 1940, in the United Provinces.

(2) If the amount shown under the preceding sub-clause (1) is Rs. 25, or less then—

(a) the amount of local rate to which the sir-holder or his predecessor-in-interest was assessed on 30th June, 1938.

(b) Whether the local rate assessed on 30th June, 1938, was decreased before 1st January, 1940 as a result of resettlement or revision of settlement, and if so, the amount by which it was decreased ;

(c) Whether the sir-holder obtained his sir rights by succession or survivorship between 30th June, 1938, and 1st January, 1940.

II. (1) The area and khasra numbers of the plots, if any, held by him in severalty or jointly with others, on 31st December, 1939, as sir in the United Provinces under the provisions of clause (d) or clause (e) of section 4 of the Agra Tenancy Act, 1926, or of clause (a) or clause (d) of sub-section (17) of section 3 of the Avadh Rent Act, 1886.

(2) Such of the plots, if any shown under the preceding sub-clause (1) along with their areas, as were received by him in exchange for the land which was his sir under the provisions of clause (a) or clause (b) or clause (c) of section 4 of the Agra Tenancy Act, 1926, or clause (a) or clause (b) of sub-section (17) of the Avadh Rent Act, 1886.

(a) before the first day of July, 1938, otherwise than in accordance with the provisions of section 122 of the United Provinces Land Revenue Act, 1901, or

(b) before the first day of January, 1940, in accordance with the provisions of that section.

(3) The area and khasra numbers of the plots, if any, held by him in severalty or jointly with others and khudkasht in the United Provinces, along with the period of cultivation and nature to Khudhkasht of each such plot.

(4) The extent of his share in the joint sir and khudkasht, if any, shown under the preceding sub-clauses (1) and (3).

239-B. The particulars furnished in accordance with rule 239-A shall be accompanied by the following documents :

(1) If the local rate payable by the sir-holder in the United Provinces is claimed to be Rs. 25. or less, copies of the khewat khats of 1345 Fasli and of 1347 Fasli, in which he was recorded as a co-sharer :

(2) a certified copy of the khatauni khats of his sir and khudkasht ;

(3) a certified copy of the khewat to which such sir or khudkasht appertains, unless such copy is filed under sub-rule (1) ;

(4) a list giving the amount of local rate to which each co-sharer of the sir-holders in the joint sir and khudkasht, if any, assessed ;

(5) in the case of sir or khudkasht of a joint Hindu family, a genealogical table and a list showing the share of each living member of the family having an interest in such sir or khudkasht and the share of local rate which each member would be liable to pay on rateable distribution."

The documents filed by the appellants in the Trial Court consisted of (1) khewats of the various villages for the years 1345, 1346 and 1347 Fasli, *i.e.*, for the periods between 1st July, 1937 to 30th June, 1940; (2) khatauni jamabandhis of the various villages for the various years 1345 and 1347 Fasli, corresponding to 1st July, 1937 to 30th June, 1938 and 1st July, 1939 to 30th June, 1940, respectively ; (3) (a) a statement showing the shares of the appellants as recorded in the khewats and khataunis of 1347 Fasli ; this statement showed the total of the sir area held by the appellants to be 152.33 acres, their khudkasht area to be 19.93 acres and the total of the local rate payable by them to be Rs. 75-5-11 ; (b) a statement showing the sir, khudkasht and local rate of each plaintiff in 1347 Fasli. This shows that none of them held sir or sir and khudkasht in excess of 50 acres, or was assessed to local rate exceeding Rs. 25. (4) Copy of the pedigree.

These documents clearly furnish the particulars required by the rules as the periods covered by these documents include 30th June, 1938, 31st December, 1939 and 1st January, 1940. Rule 239-A-I required particulars regarding the amount of local rates on 30th June, 1938 and 1st January, 1940 and also about sir-holders' obtaining sir-rights by succession or survivorship during the period.

The particulars required under sub-rules (3) and (4) of rule 239-A-II were available from these documents. Rule 239-B required copies of the khewat khats of 1348 Fasli and 1347 Fasli ; certified copies of khatauni khats of sir and khudkasht certified copies of the khewats to which that sir or khudkasht appertained ; a list giving the amount of local rate to which each co-sharer of the sir-holder was assessed and genealogical table in the case of sir or khudkasht of a joint Hindu family showing the share of each living member of the family.

The only particulars which can possibly be not had directly from the documents on record are those required by sub-rules (1) and (2) of rule 239-A-II. These require particulars about such sir which was the sir of the appellants under the provisions of clauses (d) and (e) of section 4 of the Agra Tenancy Act, 1926, *i.e.*, land which became sir on account of the landlord's cultivation at the commencement of that Act, *i.e.*, on 7th September, 1926, and had been recorded as khudkasht in the previous agricultural year, *i.e.*, in 1333 Fasli, or land which became sir on account of the landlord's continuously cultivating it for a period of ten years subsequent to the enforcement of the Agra Tenancy Act. It is clear from the findings of the Trial Court that the land in suit had been sir from the time of the settlement, presumably, the First Settlement which took place in the Nineties of the last Century. This seems to be based on the fact that khatauni jamabandhis of 1345 and 1347 Fasli did not record a period of cultivation against the sir entry, indicating thereby that the sir is not of the kind mentioned in clauses (d) and (e) of section 4 of the Agra Tenancy Act, 1926.

The Trial Court could and did record findings on all the facts which had to be proved by the appellants to establish their case. The first Appellate Court confirmed them. The particulars required by sub-section (1) of amended section 19 of the Act and the Rules framed thereunder, were for the purpose of ascertaining those facts. In the circumstances, it is reasonable to hold that there had been substantial com-

pliance with the provisions of amended section 19 and the Rules framed thereunder. The Board of Revenue was therefore in error in stating that the appellants had not given the amount of local rate to which they were assessed in U.P. on 1st January, 1940 and that compliance did not appear to have been made of rule 239-A-II of the Revenue Court Manual and that there had not been sufficient compliance with the mandatory provisions of rules 239-A and 239-B. From the judgment of the Board it is clear that its attention was not drawn to the several relevant documents filed by the appellants in the Trial Court. We have no doubt that if the Board had considered the said documents it would not have held that section 19 had not been substantially complied with.

We therefore hold that the Board of Revenue was in error in setting aside the decree of the Additional Commissioner and remanding the case for fresh trial on the ground that there had not been compliance with the provisions of amended section 19 of the Act and the Rules framed thereunder. We accordingly allow the appeals, set aside the order of the Board of Revenue and remand the cases to it for decision in accordance with law. We further direct it to decide itself the contention raised by the respondents about their having acquired *adivasi* rights under the U.P. Zamindari Abolition and Reforms Act. In case the Board takes the view that for deciding the said issue any finding of fact is necessary, it may call for the said finding from the Trial Court and, on receiving it, proceed to deal with the appeals on the merits.

In the circumstances of these cases, we direct that the parties on either side bear their own costs.

K.L.B.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR, K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

Mrs. V. G. Peterson

.. *Appellant \**

*v.*

O. V. Forbes and another

.. *Respondents.*

*Criminal Procedure Code (V of 1898), sections 87 and 88—If applicable for attaching properties of person alleged to have committed contempt to secure his presence—Property bequeathed to a legatee and forming part of the unadministered estate of the testator in the hands of the executor—If could be attached for securing the arrest of the legatee.*

*Contempt—Chief Court of Oudh—If could furnish for contempt.*

Property bequeathed to a legatee and forming part of the unadministered estate of the testator in the hands of the executor cannot be legally attached in any proceedings for securing the arrest of the legatee under sections 87 and 88 of the Criminal Procedure Code. The property did not cease to be the unadministered assets of the estate merely because under the orders of the Court the executor had the assets in her hand deposited with the Registrar of the Court or the City Magistrate.

The provisions of sections 87 and 88 of the Criminal Procedure Code would not be available to securing the presence of a person who is alleged to have committed contempt.

The Chief Court of Oudh as a Court of Record had the right to punish persons for contempt and for the proper exercise of that power it will have all other powers necessary and incidental to it. In the instant case the contempt proceeding having abated on the death of the contemnor without appearing, the Court can and should direct restoration of the property to the rightful owner.

Assuming but not deciding whether such power of arrest and of attaching the alleged contemnors' property in an attempt to secure his presence the Chief Court still had no right to make over the attached property to the Government. The right of the Government to have any control over the attached property flows from the provisions of section 88 of the Criminal Procedure Code. As no attachment could legally be made under section 88, Criminal Procedure Code in any proceeding for contempt the provisions of section 88 (7) of the Code of Criminal Procedure under which the property under attachment shall be at the disposal of the State Government, if the proclaimed person does not appear within the time prescribed in the proclamation cannot come into operation.

Appeal by Special Leave from the Judgment and Order, dated the 28th August, 1961 of the Allahabad High Court (Lucknow Bench) at Lucknow in Cr. Misc. Case No. 125 of 1961.



A. S. R. Chari, Senior Advocate, (B. Parthasarathy, R. K. Garg and S. C. Aggarwal, Advocates and J. B. Dadachanji, O. C. Mathur and Ravinder Narain Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant.

G. C. Mathur and C. P. Lal, Advocates, for Respondent No. 2.

The Judgment of the Court was delivered by

*Das Gupta, J.*—This appeal by Special Leave is against an order of the High Court at Allahabad rejecting on 28th August, 1961 an application made by the present appellant. For a proper appreciation of the contention raised in the appeal it is necessary to set out in some detail the complicated facts which gave rise to her application.

It appears that on 23rd January, 1938, the appellant's mother Mrs. W.A. Forbes executed a will leaving all her property to her three children, *viz.*, the appellant, Mrs. V. G. Peterson, Mrs. E. D. Earle and Mr. O. V. Forbes. The testatrix died on 6th June, 1939 and this appellant applied for probate. The probate was granted on 30th November, 1939. On 4th May, 1943 when Criminal Appeal No. 9 of 1943 was being argued before a Single Judge of the Oudh Chief Court the Counsel for the State brought it to the notice of the Judge that Mr. O. V. Forbes—brother of the present appellant had made in his application before the Trial Court and in other ways certain aspersions against the conduct of the Trial Court which amounted to contempt of Court. The learned Judge ordered the issue of notice against Mr. O. V. Forbes in this matter. On 6th May, 1943 the present appellant also filed an application for similar action under the Contempt of Courts Act against her brother Mr. Forbes. On this also notice was issued to Mr. Forbes. As the notices are not on record we do not know the actual terms of the notice; but it does not appear to be disputed that by these notices Mr. Forbes was asked to appear before the Oudh Chief Court to show cause why he should not be proceeded against for contempt of Court. Mr. Forbes however did not appear. Some time after this a bailable warrant appears to have been issued for the arrest of Mr. Forbes. The warrant was returned unexecuted. A registered notice was thereafter issued under the orders of the Court asking Mr. Forbes to attend the Oudh Chief Court on 23rd September, 1943. On that date also he did not appear. The learned Judges of the Chief Court being of opinion that Mr. Forbes was concealing himself only to avoid the execution of the warrant, made the following order:—

"Accordingly we order that action be taken under section 87 of the Code of Criminal Procedure against Mr. Forbes and direct the issue of a written proclamation requiring him to appear in this Court on the 25th November, 1943, at 10 A.M. This proclamation will be issued in strict accordance with the requirements of section 87, Criminal Procedure Code. The proclamation will also be published once in the Pioneer of Lucknow and the Daily Statesman of Calcutta. Under section 88 of the Code of Criminal Procedure we further order attachment of the moveable and immoveable property belonging to Mr. Forbes within the jurisdiction of this Court including:—

(1) G. P. Notes and bonds for Rs. 10,70,000 in the hands of the Registrar of this Court.

(2) Rs. 12,250 deposited in this Court in the Personal Ledger, Trustees and Stake Holders Fund;

(3) G. P. Notes belonging to Mr. Forbes of the face value of Rs. 55,000 attached in Execution Case No. 16 of 1942 in the Court of the Civil Judge, Lucknow: *Dr. Hari Shanker Dube v. O. V. Forbes.*"

The Proclamation was duly published and certain property was attached on the basis that it was the property of Mr. O. V. Forbes. On 30th March, 1944, the Oudh Chief Court recorded an order stating that as Mr. Forbes did not appear within the time specified in the proclamation and under sub-section (7) of section 88 of the Code of Criminal Procedure the property under attachment was at the disposal of the Provincial Government. As regards the two applications for contempt the Court made the following order:

"These applications will therefore be adjourned *sine die* until Mr. Forbes appears or is arrested." On 21st September, 1944, the Court made an order withdrawing the prohibitory order it had earlier issued against the Registrar and the Civil Judge, Lucknow.

It appears that after the Oudh Chief Court made the order on 30th March, 1944 stating that the attached property was at the disposal of the Provincial Government

under sub-section (7) of section 88 of the Code of Criminal Procedure the Provincial Government directed the City Magistrate to take suitable action for the disposal of the attached property. It was to facilitate such action by the City Magistrate that the prohibitory orders were withdrawn. The Chief Court also made an order directing the Registrar and the Civil Judge to send the attached property to the City Magistrate for disposal according to law. On the same date Mrs. Peterson was also directed to hand over all the property in her possession which she may be holding as a custodian for Mr. O. V. Forbes to the City Magistrate.

It appears that in August, 1943, the City Magistrate forwarded to the U.P. Government at Lucknow promissory notes of the total value of Rs. 2,28,800 said to be the attached property adding

"these G. P. Notes to the total value of Rs. 2,28,800 have been ordered to be forfeited to the U. P. Government by the Chief Court of Oudh under order dated 21st September, 1944, in Criminal Miscellaneous Application No. 47 of 1943."

It was further stated that :

"It is requested that necessary action may be taken by you to credit the sum under the head 'Fines and Forfeitures'."

Apparently this has been done.

Mr. Forbes died in 1953. On 4th April, 1960, the present appellant made an application to the U.P. Government in which she stated that Mr. Forbes had died intestate and that his only heirs were his two sisters, the appellant herself and her sister Mrs. E. D. Earle for whom she was the trustee and prayed that as the Government was

"only in the position of a receiver or a trustee of the property of Mr. Forbes this trusteeship having ceased with Mr. Forbes' death the Government should return the property to the appellant and her sister."

On 3rd September, 1960 the Government rejected this prayer stating

"that this was a confiscated property of Mr. Forbes and that on legal grounds her claim was wholly untenable."

but added these words :

"If however she has any special reasons for invoking the compassion of Government she may indicate the same to Government and also furnish convincing evidence that Mr. Forbes actually has died and that she is his sole heir or one of the heirs entitled to his assets."

The appellant pointed out to the Government in her letter, dated 12th September, 1960 that the property of Mr. Forbes had not been confiscated but merely attached and emphasised that the Government had no proprietary right to the attached property but could retain it only as a custodian or trustee for the time being. She asked the Government to re-consider the whole situation. The reply of Government, if any was apparently unsatisfactory and so on 29th November, 1960 the appellant filed an application under Article 226 of the Constitution in the High Court at Allahabad in which after stating the several facts as regards the attachment of the property and the action taken by the Government, she prayed for a writ of *certiorari* to quash the Government's order of 3rd September, 1960 and also for a writ of *mandamus* ordering the Government to hand over the Government promissory notes and cash money which had been attached. On 29th March, 1961 the High Court rejected this application. The High Court pointed out that the applicant had not shown that the State Government had failed to carry out any duty imposed by law and further that the order, dated 3rd September, 1960 could not be said to be either a judicial or a quasi-judicial order or even an administrative order passed without jurisdiction. It was then that on 1st May, 1961 the appellant made to the High Court at Allahabad the application out of which the present appeal has arisen.

By this application the appellant asked for four reliefs :—(a) for an order terminating the contempt of Court proceedings ; (b) for an order vacating the orders of attachment made by the Chief Court ; (c) for a direction on the Finance Secretary, U.P. Government, to restore the attached property to the applicant as executrix

of the estate of late Mrs. A. E. Forbes. A copy of the writ petition, dated the 29th November, 1960 in which it had been mentioned that the proceedings under sections 87 and 88 of the Code of Criminal Procedure were illegal because the Code was inapplicable to proceedings for contempt, was attached to the application. It was further stated in the present application that in any case the attachment was void, inasmuch as the property that was attached was at the time of attachment an undistributed part of the estate of late Mrs. A. E. Forbes and so vested in this appellant as executrix.

By separate but concurring judgments Mulla and Nigam, JJ. who heard this application rejected the applicant's prayer for vacating the order of attachment or for any direction to the Finance Secretary, U.P. Government for restoration of the attached property. Mulla, J., based his decision mainly on the point that the appellant had herself acted in an unclean way, and she having been responsible for getting warrants under sections 87 and 88 of the Code of Criminal Procedure issued against Mr. Forbes it did not lie in her mouth to say now that the issue of these processes was without jurisdiction and held that as she was instrumental in getting the order now complained of passed, the discretionary powers of the Court should not be exercised in her favour, especially, as she had made the application after a long delay. The learned Judge also expressed the opinion that the judges of the Chief Court acted within their jurisdiction in issuing processes under sections 87 and 88 of the Code of Criminal Procedure, that this order was just and legal and the State had come into the custody of the property under the due process of law. In the opinion of the learned Judge

"Mr. Forbes was willing to give away this property rather than face a prosecution for contempt of Court"

and added

"if he took up that attitude it cannot be said by the heirs of Mr. Forbes that now the property should be released in their favour."

Nigam, J., stressed the point that the Court had attached the property belonging to Mr. Forbes and the present appellant had handed over the property "treating it to be the property of Mr. O. V. Forbes". According to this learned Judge if the property that was attached did not belong to Mr. O. V. Forbes this appellant should have "never handed over the property voluntarily". He was further of opinion that

"the fact that she voluntarily handed the property over as belonging to Mr. Forbes and actually suggested that this particular property be attached clearly amounted to an admission of the ownership of the property vesting in Mr. O. V. Forbes and the property not being part of the undistributed assets in the possession of Mrs. Peterson as executrix to Mrs. A. E. Forbes"

After holding that the Code of Criminal Procedure was not directly applicable to contempt of Court proceedings the learned Judge expressed the opinion that

"the Bench could adopt its own procedure for enforcing the attendance of the delinquent"

and added

"if it adopted the procedure prescribed in the Code of Criminal Procedure, I can see no warrant for the contention that the procedure adopted was wrong, improper and beyond the jurisdiction of the Court."

Finally, he held that it would be contrary to the interests of justice to review the order "after a lapse of about 18 years." The learned Judge also held that the Court was no longer in possession of the attached property, the same having been handed over to the City Magistrate for being passed on to the State Government and could not therefore pass any orders in respect of the property. He also expressed the view that *prima facie* it appeared to him that the appellant's remedy, if any, was by a civil suit. The contempt proceedings were however directed to be consigned to the record as abated.

The present appeal is directed against the High Court's decision refusing to give the plaintiffs the substantial relief asked for in the application, *viz.*, a direction on the Finance Secretary, U.P. Government to restore the attached property to her.

The first question for consideration is whether at the time of attachment the property formed part of the unadministered estate of Mrs. A. E. Forbes. If that was the correct legal position there could not be in law attachment of that property as the property of Mr. Forbes, even if section 87 and section 88 could be applied to secure the arrest of a person alleged to have committed contempt. Mulla, J. has not dealt with this question. Nigam, J. has however formed the definite conclusion that the property had vested in Mr. O. V. Forbes on the date of attachment and was not part of the undistributed assets of Mrs. A. E. Forbes in the hand of the executrix. In coming to this conclusion the learned Judge appears to have relied on what he described as

“the fact that she (Mrs. Peterson voluntarily handed the property over as belonging to Mr. Forbes and actually suggested that this particular property be attached.”

It is not clear from the record of this case on what materials the learned Judge thought that Mrs. Peterson actually suggested that this particular property be attached. That she really handed the property over appears to be correct. It appears reasonable to think that she did so in obedience to the order of the Court. The matter was stated thus by her in paragraph 8 of the Writ Petition :—

“That under the orders of the Honourable Chief Court of Avadh the petitioner deposited with the Registrar of that Court and finally with the City Magistrate, Lucknow, unadministered assets consisting of Government Promissory Notes and cash totalling Rs. 2,41,300 detailed in the list attached to this petition which the then City Magistrate, Sri S.G. Bose Mullick was pleased to transfer the same to the Finance Secretary to the U. P. Government, Lucknow, in August, 1948.”

In the counter-affidavit filed on behalf of the State of U.P. in the Writ Petition the statement made in this paragraph was admitted to be true. It appears clear therefore that the petitioner made over the securities and cash—the property which was attached—under the orders of the Chief Court of Oudh. It is further to be borne in mind that the petitioner made the definite statement in this paragraph 8 of the Writ Petition that the property that was made over by her formed part of the unadministered assets in her hand and the truth of this statement was admitted by the State of U.P. It is difficult to see how it can be reasonably held that merely because the executrix handed over certain assets in her hand to the Registrar and the City Magistrate in obedience to the orders of the Chief Court, they thereby become vested in Mr. O. V. Forbes. The property in the hands of the executrix could become vested in Mr. O. V. Forbes only on her handing over the same to him or to somebody on his behalf. Delivering the property to the Registrar of the Court or to the City Magistrate could not amount to handing over to the legatee. For, obviously the Registrar of the Chief Court or the City Magistrate, Lucknow, were not acting on behalf of the legatee Mr. O. V. Forbes but indeed acting against his interest. In our opinion, the property did not cease to be unadministered assets of the estate of Mrs. A. E. Forbes merely because under the orders of the Court this appellant, who was the executrix, had the assets in her hand deposited with the Registrar or the City Magistrate.

It must therefore be held that the property which was attached was at the time of attachment not the property of Mr. O. V. Forbes but formed part of the unadministered assets of Mrs. A. E. Forbes. This property could not be legally attached in any proceedings for securing the arrest of Mr. O. V. Forbes.

If what was attached did not form part of the property of Mr. O. V. Forbes, the order of attachment was invalid ; and there would be no scope for the operation of section 88 (7) of the Code of Criminal Procedure. Assuming that the property was of Mr. O. V. Forbes, the question arises whether it would, as a result of the attachment, be at the disposal of Government under section 88 (7) of the Code of Criminal Procedure. In *Sukhdev Singh Sodhi v. The Chief Justice and Judges of the Pepsu High Court*<sup>1</sup> it was held that the Code of Criminal Procedure does not apply to proceedings for contempt. On this authority it must be held that the provisions of sections 87 and

88 would also not be available to securing the presence of a person who is alleged to have committed contempt.

It may be mentioned that on behalf of the appellant, Mr. Chari had urged that even if the property was of Mr. O. V. Forbes, the alleged contemner the Chief Court of Oudh had no power to attach it.

The High Court seems to think that the Chief Court could choose any procedure it liked in the matter of punishing people for contempt and so if it thought that it would not finally dispose of contempt proceedings without the alleged contemner being present before it, it had the inherent right of first issuing a warrant of arrest and next, if that was not successful, by proclamation for his appearance and also by attachment of his property. It seems to us that the Chief Court as a Court of Record had the right to punish persons for contempt and for the proper exercise of that power it will have all other powers necessary and incidental to it.

It is, however, unnecessary to decide whether such necessary and incidental powers include the power of arrest and of attaching the alleged contemner's property in an attempt to secure his presence. But assuming they do, we are of opinion that the Chief Court had still no right to make over the attached property to Government. The right of the Government to have any control over the attached property flows from the provisions of section 88 of the Criminal Procedure Code. As no attachment could legally be made under section 88, Criminal Procedure Code, in any proceeding for contempt, the provisions of section 88 (7) of the Code of Criminal Procedure, under which the property under attachment shall be at the disposal of the State Government, if the proclaimed person does not appear within the time prescribed in the proclamation cannot come into operation.

The position, therefore, is that Government is in possession of the property that was attached under the orders of the Chief Court ; but the possession is without any authority of law. The question then arises : whether the Court can or should direct restoration of the property to the rightful owner.

On behalf of the State of U.P. it is argued that if the Government is in unlawful possession of the property the proper remedy for the rightful owner is to seek his remedy in a civil suit. In such a suit he will have to pay the necessary court-fee, and it will be open to Government to take the plea of limitation or such other defences as may be available to it. This would ordinarily be a correct statement of the position in law. In the present case, we have however the special circumstance that it is by reason of an error on the part of the Chief Court that the property has found its way to the State Government. Proceedings taken by the Chief Court against Mr. O.V. Forbes for alleged contempt of the Court must be taken to be fully justified, as such action is necessary not only to uphold the dignity of the Court but also to keep the administration of justice free from calumny. When however we find that the Court acted without jurisdiction in attaching the property, and in any case, in ordering such property to be handed over to Government we have to remember the other great principle which was stated many years ago in these words by Cairns, L.C. in *Rodger v. Comptoir D' Escompte de Paris*<sup>1</sup> : " One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors. . . . " To say that, we are aware, is not to say that whenever a Court after wrongly deciding a case between two parties discovers that the decision was wrong it has the inherent jurisdiction to re-open the matter and to set matters right by altering the decision. In many cases when the Court has made a mistake the party who has suffered for that mistake is without any remedy except what he can get in accordance with the provisions of appeal, revision or review. As the Courts are careful to point out again and again, Courts of law have the jurisdiction to decide wrongly as well as rightly and the mere fact that the decision is wrong does not give a party a remedy. Those considerations against the use of inherent jurisdiction to correct errors made by the Courts in the exercise of its jurisdiction have, however, no application to cases like the present. Here, the Court

for the purpose of exercising its jurisdiction in a matter of contempt took steps to attach certain properties. This is not a case where there are conflicting claims between two parties which have been decided by a judgment or order of the Court as between the parties. The question really is whether the rightful owner of the property would have it or the Government which has come into possession of the property without being a claimant to it because of an erroneous order of the Court should retain it, if it is found that the order was wrong. In our opinion, this question must be answered in favour of the rightful owner of the property.

We have assumed that the Court had the power to attach the properties of the alleged contemner; but have held that it had no power in law to make these over to the Government. The attachment however could only subsist so long as the contemner was alive. On the contemner's death the attachment could not in law or equity continue. For, the purpose for which the attachment was made, *viz.*, to secure the presence of the alleged contemner could no longer be achieved. Obviously, in such a case, the rightful owner of the property would be entitled to restoration of the property on the contemner's death. It would not be proper for the Court to say then that it cannot do anything in the matter because the property has passed into the hands of the Government by the Court's own mistake. In our opinion, the Court will be failing to perform its primary function of doing justice if in such circumstances the Court, on discovering its mistake refuses to correct that mistake. As it is plain here that it is the mistaken act of the Court which has put Government in possession of the property even though without being a claimant to it, it is only right and proper that the Court should correct that error and restore the property to the person from whom it was wrongly taken.

We cannot see what legitimate grievance the State of U.P. can have against this. It had no title to the attached property and it would have had no control over it, except for the mistaken application of the provisions of section 88 (7) of the Code of Criminal Procedure. If now it is found that the Court had made a mistake, first, in attaching the property in question, and secondly, even apart from that, in directing the property to be made over to Government, the Government cannot legitimately object to the Court correcting this mistake. It would be deplorable if in circumstances like these the Court would find itself helpless to correct its mistake and to order restoration on an application being made to it in that behalf. In our opinion, the applicant is entitled to an order for restoration of the attached property.

We accordingly allow the appeal, and order that the Finance Secretary, U.P. Government be directed to restore to this appellant, the attached property which is in the possession of the Government. In the peculiar circumstances of the case, we make no order as to cost.

K.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P.B. GAJENDRAGADKAR, K.C. DAS GUPTA AND J.R. MUDHOLKAR, JJ.  
Parmanand and Others

*Appellants\**

*v.*

Ganpatrao (since deceased) after him his legal representatives and  
Others

*Respondents.*

*Central Provinces Land Revenue Act (II of 1917), section 149 (2)—Construction and scope—Sale proclamation showing a higher amount as arrears than was actually due—Effect.*

The Revenue sales under the Central Provinces Land Revenue Act (II of 1917) are authorised to be held in a summary procedure prescribed by the relevant provisions of the Act and so it would not be unreasonable to construe these provisions strictly. If defaulter's property is being sold under revenue sale and the object of issuing the proclamation is to show for what arrear it is being sold, it is

fair to assume that the said arrear must be stated with absolute accuracy. It would not be enough to say that some arrear was due and so the sale should be upheld though it was purported to be held for recovery of much larger arrear. The arrear in question must be correctly stated in the proclamation so that everybody concerned knows the exact amount for which the revenue sale is held. Arrears accumulating after an order for sale has been passed and the proclamation in that behalf has been issued, cannot come into the calculation while construing section 149 (2). Every arrear dealt with must be specifically dealt with as provided by the Act. Once the amount of arrear is determined and sale is ordered with reference to it, it is that amount which must be shown in the proclamation and it is for that amount of arrear for which the property must be sold. Where the arrear is lower than what is mentioned in the sale proclamation "the arrear for which the property is sold was not due" within the meaning of section 149 (2) of the C.P. Land Revenue Act and so, the sale must be set aside.

Appeal by Special Leave from the Judgment and Decree dated the 13th April 1956 of the former Nagpur High Court in F.A. No. 99 of 1947.

*Naunit Lal*, Advocate, for Appellants.

*B.A. Masodkar, D.B. Najbale and Ganpat Rai*, Advocates, for Respondents.

The judgment of the Court was delivered by

*Gajendragadkar, J.*—This appeal by Special Leave raises a short question about the construction of section 149 (2) of the C.P. Land Revenue Act, 1917 (No. II of 1917) (hereinafter called the Act). The validity of a revenue sale of their properties held on 27th February, 1941 under section 128 (f) of the Act was challenged by the appellants by their suit filed in the Court of the Additional Judge, Nagpur on 12th November, 1946. Ganpatrao Vishwanathji Deshmukh who had purchased the properties at the said auction sale was impleaded as defendant No. 1 to the said suit. During the pendency of the litigation, the said Ganpatrao has died and his heirs have been brought on the record. They will be referred to as respondent No. 1 in the course of this judgment. The appellants challenged the impugned sale on five different grounds. They alleged that the sale was without jurisdiction; that as the final bid was not accepted by the Dy. Commissioner, it was invalid; that as the sale was brought about fraudulently by respondent No. 1 in collusion with the Revenue Clerk, it was invalid; that as the Commissioner was not competent to confirm the sale on 13th November, 1945, it was invalid; and that the sale could not be held validly for the recovery of Rs. 1,354/9 which was shown in the proclamation of sale as the arrear for which the property was put to sale. The trial Court rejected all the contentions raised by the appellants in impeaching the validity of the sale and so, the relief claimed by the appellants against respondent No. 1 by way of injunction restraining him from recovering possession of the property and disturbing the appellants' possession thereof was rejected.

The appellants then preferred an appeal in the Nagpur High Court. The High Court has confirmed the findings of the trial Court and accordingly, the appeal has been dismissed. It is against this decree that appellants have come to this Court by Special Leave, and the only point which has been raised on their behalf by Mr. Naunit Lal is that the view taken by the Courts below that the impugned sale could not be effectively challenged by the appellants under section 149 (2) is not justified on a fair and reasonable construction of the said provisions.

The material facts leading to this point are very few, and they are not in dispute. The appellants are Lambardars of Mahal No. 2 of Mouza Gujarkhedi, tehsil Saoner, district Nagpur, and they held therein an undivided interest of As. 11/11. On or about 4th October, 1940, they were found to be in arrears of land revenue to the extent of Rs. 730/13 in respect of the suspended Rabi kist of 1938-39 and the Rabi kist of 1939-40. The Tehsildar of Saoner made a report on 4th October, 1940 to the Dy. Commissioner that the said arrears were due from the appellants and asked for sanction to sell by auction the property in suit. Along with this report, a draft of the sale proclamation containing the relevant details was also submitted for the signature of the S.D.O. in case the Dy. Commissioner sanctioned the sale. The S.D.O. forwarded the said report to the Dy. Commissioner who accorded sanction to the proposal of the Tehsildar on 17th December, 1940. Thereafter, on 23rd December, 1940, the S.D.O. signed the said proclamation and on getting the said documents back, the Tehsildar ordered on 7th January, 1941 that the sale

proclamation should be published and that the sale should be held on 26th February, 1941. On that date, the sale was adjourned to 27th February, 1941 for want of adequate bids. On the next day, the sale was held and the property was sold to respondent No. 1 for Rs. 600. Ultimately, the said sale was confirmed. It is common ground that though at the relevant time, arrears due from the appellants amounted only to Rs. 730/13, in the Parchanama the said amount was shown as Rs. 1,354/9 and the property in fact was sold to recover the said amounts of arrears under section 128 (f) of the Act. The appellants' contention is that the arrear, Rs. 1,354/9, for which his property has been sold under section 128 (f) was not due; what was due was the lesser amount of Rs. 730/13 and so, the sale in question is invalid under section 149 (2) of the Act.

In dealing with this point, it is necessary to refer to the relevant provisions of the Act. Chapter X of the Act deals with the collections of land revenue, and it consists of sections 122 to 160. Section 124 confers power on the State Government to regulate payment of sums payable under the Act and provides for the number and amount of the instalments, and the time, place and manner of payment of any sum payable under a settlement or sub-settlement, or otherwise under an assessment made under this Act. Sub-section (2) of section 124 requires that unless the State Government otherwise directs, all such payments shall be made as prescribed under sub-section (1). A notice of demand can be issued by Tehsildar or Naib Tehsildar under section 127 and it may be served on any defaulter before the issue of any process under section 128 for the recovery of an arrear. Section 128 provides for the process for recovery of an arrear and it prescribes that an arrear payable to Government may be recovered, *inter alia*.....(f) by selling such estate, mahal or land, or the share or land of any co-sharer who has not paid the portion of the land revenue which, as between him and the other co-sharers, is payable by him. Section 131 prescribes the procedure for attachment and sale of movables and attachment of immovable property. Then section 132 provides for holding enquiry into claims of third persons in respect of property attached or proceeded against. Section 138 (1) provides that the purchaser of any estate, mahal, share or land sold for arrears of land revenue due in respect thereof shall acquire it free of all encumbrances imposed on it, and all grants and contracts made in respect of it, by any person other than the purchaser. Sub-sections (2) (3) and (4) make other provisions, but it is unnecessary to refer to them. Section 143 lays down that if the arrear in respect of which the property is to be sold is paid at any time before the lot is knocked down, the sale shall be stayed. Section 145 provides for application to set aside sale on deposit of arrear, and section 146 provides for application to set aside sale for irregularity. Under section 148 it is provided that on the expiry of 30 days from the date of sale, if no application has been made under section 145 or 146 or no claim has been made under section 151, or if such application or claim has been made and rejected, the Dy. Commissioner shall pass an order confirming the sale. Section 151 refers to claims of pre-emptions.

That takes us to section 149. Section 149 reads as follows :—

"(1) If no application under section 146 is made within the time allowed therefor, all claims on the grounds of irregularity or mistake shall be barred.

(2) Nothing in sub-section (1) shall bar the institution of a suit in the Civil Court to set aside a sale on the ground of fraud or on the ground that the arrear for which the property is sold is not due."

It would thus be seen that the scheme of the relevant provisions of the Act in relation to revenue sales appears to be self-contained. The revenue process for recovering arrears begins with the report as to the arrears and ends with the confirmation of sale. Provision is made for the examination of claims of third parties as well as for setting aside sales on account of deposit or on account of irregularities committed in conducting the sales. It is in the light of this self-contained scheme that section 149 (1) provides that if no application under section 146 is made within the time prescribed, all claims on the grounds of irregularity or mistake shall be barred. In other words, the effect of this provision is that if a party aggrieved by a revenue



sale of his property wants to challenge the validity of the said sale on grounds of irregularity or mistake, the Act has provided a remedy for him by section 146 and if he fails to avail himself of that remedy, it would not be open to him to challenge the impugned sale on the said grounds by a separate suit. The grounds of irregularity or mistake must be urged by an application made under section 146 and if no such application is made, then the party is precluded from taking the said grounds otherwise. Thus far there is no difficulty or dispute.

Sub-section (2) of section 149 provides an exception to sub-section (1), and it says that the institution of a suit would not be barred in a Civil Court to set aside a sale on two grounds; if the sale is challenged on the ground of fraud, a suit will lie; similarly, if a sale is challenged on the ground that the arrear for which the property is sold is not due, a suit will lie. The effect of this provision is that if fraud is proved in regard to a revenue sale, a suit will lie and the sale will be set aside; similarly, if it is shown that the arrear for which the property is sold was not due a suit will lie and the sale will be set aside. There is no difficulty or dispute about this position also.

The question on which the parties are at issue before us is in regard to the interpretation of the clause "the arrear for which the property is sold". It has been held by the High Court that what this clause requires is not that the arrear for which the property is sold should be stated with meticulous accuracy; if a mistake is made in showing the actual amount of arrear due from the defaulter for which the property is sold, that mistake would not render the sale invalid; it would be a mistake within the meaning of sub-section (1) and so, to cases of that kind sub-section (2) will not apply. On the other hand, Mr. Naunit Lal contends that the clause "the arrear for which the property is sold" is plain and unambiguous. In considering the question as to whether this clause is attracted or not, one has to look at the proclamation of sale and enquire whether the amount shown as arrears due from the defaulter was in fact due or not. If the said amount was not due, the clause will apply notwithstanding the fact that a lesser amount may have been due from the said defaulter.

In construing section 149 (2) it is relevant to remember that the provision in question is made in relation to revenue sales and there is no doubt that the revenue sales are authorised to be held under the summary procedure prescribed by the relevant sections of the Act, and so, it would not be unreasonable to construe these provisions strictly. That is why we are not inclined to accept the view that in interpreting the relevant clause, we should assume that the Legislature did not expect the authorities to specify the arrear for which the property is sold with meticulous care. If the defaulter's property is being sold under revenue sale and the object of issuing the proclamation is to show for what arrear it is being sold, it is, we think, fair to assume that the said arrear must be stated with absolute accuracy. It would not be enough to say that some arrear was due and so, the sale should be upheld though it was purported to be held for recovery of much larger arrear.

Nor is this consideration purely academic. As we have seen, section 143 provides that if the arrear in respect of which the property is to be sold is paid before the lot is knocked down, the sale shall be stayed. In the present case, if the arrear had been properly shown at Rs. 730/-13, it is theoretically possible that the appellants may have been in a position to deposit this amount before the lot was knocked down and the sale would have been stayed. Since the arrear was shown to be much larger, it is theoretically possible that the appellants could not make a successful attempt to deposit the said amount. Now, in working out the provisions of section 143 there should be no difficulty in determining the amount which the defaulter has to deposit to avoid the revenue sale. The arrear in question must be correctly stated in the proclamation so that every body concerned knows the exact amount for which the revenue sale is held. That is another consideration which supports the construction for which the appellants contend.

Mr. Masodkar for respondent No. 1 argued that the construction for which the appellants contend is mechanical and it may lead to anomalies. In support of this.

argument, he took the illustration of a case where the amount of arrears is accurately shown in the proclamation, but after the proclamation is issued, a part of it is paid by the defaulter ;—(as in fact Rs. 291 were deposited by the appellants in the present case)—the contention is that in such a case, if the original amount of arrears continues to be shown in the proclamation, the sale would be invalid on the construction suggested by the appellants. We are not impressed by this argument. Our attention has not been drawn to any specific provision of the Act under which a partial payment of the arrear due is allowed to be made by the defaulter. If such a payment is made, it may at best be treated as deposited on account, and no deduction would be made from the arrear notified to be due from him in the proclamation at that stage. The only provision which has been cited before us in that behalf is section 143 and section 143 expressly provides for the payment of the whole of the arrear due and lays down that on such payment before the lot is knocked down, the sale shall be stayed. Therefore, the complication sought to be introduced by Mr. Masodkar by taking a hypothetical case of a part payment of the arrears due from the defaulter, does not affect the construction of section 149 (2).

It is then argued that the impugned sale cannot be said to be irregular in the present case, because on the date when it was actually held, the amount of Rs. 1,354/9 was in fact due from the appellants as arrears. It is common ground that after the proclamation was issued, a further amount of arrears became due from the appellants and on the date of the sale, the total amount came to be Rs. 1,354/9. In our opinion, arrears accumulating after an order for sale has been passed and the proclamation in that behalf has been issued, cannot come into the calculation while construing section 149 (2). Every arrear for which the sale is ordered must be specifically dealt with as provided by the Act. It is not open to the authorities to deal with a specific arrear as prescribed by the Act and to pass an order for sale of the defaulter's property on the basis of that arrears and then add to it subsequently accruing arrears without following the procedure prescribed in that behalf. One the amount of arrear is determined and sale is ordered by reference to it, it is that amount which must be shown in the proclamation and it is for that amount of arrear for which the property must be sold. That, in our opinion, is clearly the effect of the relevant clause in section 149 (2). We must, therefore, hold that the High Court was in error in coming to the conclusion that the sale of the appellants' property on 27th February, 1941 was valid. We are satisfied that the arrear for which the appellants' property was sold was not due within the meaning of section 149 (2) and, so, the sale must be set aside.

In support of his argument that the impugned sale cannot be held to be invalid, Mr. Masodkar relied on a decision of the Privy Council in *Rewa Mahlon v. Ram Kishen Singh*<sup>1</sup>. In that case, the Privy Council was dealing with a question which had reference to the true construction of section 246 of the Civil Procedure Code of 1877 (Act X of 1877). The said section had provided that if cross decrees between the same parties and for the payment of money be produced in the Court, execution shall be taken out only by the party who holds that decree for the larger sum, and for so much only as remains after deducting the smaller sum. It appears that contrary to the provisions of this section, an auction sale was held and when the title of the auction-purchaser was challenged, it became necessary to consider what the effect of non-compliance with the provisions of section 246 would be on the title of the auction-purchaser. The Privy Council held that a purchaser under a sale in execution is not bound to inquire whether the judgment-debtor had a cross judgment of a higher amount such as would have rendered the order for execution incorrect. If the Court has jurisdiction, such purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which execution issues. In other words, the effect of this decision is that if in contravention of the provisions of section 246 an executing Court orders a sale to be held, the auction-purchaser gets a good title notwithstanding non-compliance with section 246. We do not see how this case can assist Mr. Masodkar in the present

appeal. The decision turned upon the construction of section 246. But the present dispute has to be decided on a construction of section 149 (2). It is well-known that execution sales held under the Code of Civil Procedure can be challenged only in the manner prescribed and for the reasons specified, say, for instance, by Order XXI, rules 89, 90 and 91. The fact that certain irregularities committed during the conduct of execution sales would not render the sales invalid, flows from the relevant provisions of the Code and so, it would not be reasonable to invoke the assistance of the decisions dealing with irregularities committed in execution sales in support of the argument that a revenue sale held under section 128 (f) should be judged by the same principles. The question as to whether the revenue sale is valid or not must obviously be determined in the light of the relevant provisions of the Act and that again takes us to the construction of section 149 (2).

Mr. Masodkar has also relied on the decision of the Calcutta High Court in *Ram Prasad Choudhury v. Ram Jadu Lahiri and others*<sup>1</sup> in support of his argument that a revenue sale held under section 128 (f) of the Act would not be rendered invalid merely because the amount of arrears shown in the proclamation is not accurate. In the case of *Ram Prasad Choudhury*<sup>1</sup>, the sale had been held under the provisions of the Bengal Land Revenue Sales Act (XI of 1859). Under section 5 of the said Act, notice had to be issued before the sale could be held. In the notice issued prior to the sale had been shown a sum which had then not become due as an arrear along with other sums which had become arrears, and the subsequent sale was held on the footing of the total amount thus shown being the arrears due. It was urged that the sale was invalid because of the irregularity committed in the issue of the notice under section 5. This argument was rejected and it was held that despite the said irregularity, the sale was valid. Now, in appreciating the effect of this decision, it is necessary to refer to the provisions of section 33 of the said Act under which the sale was challenged. We have already referred to the fact that section 5 required a notice to be issued prior to the sale. The notice provided for by this section had to specify the nature and amount of arrear or demand, and the latest date on which payment thereof shall be received. Section 33 provides that no sale for arrears of revenue shall be annulled, except upon the ground of its having been made contrary to the provisions of this Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of; with the rest of the section we are not concerned. The argument which was urged in the case of *Ram Prasad Choudhury*<sup>1</sup> was that the notice under section 5 having been irregularly issued, the sale should be deemed to have been held contrary to the provisions of the said Act, and this argument was not accepted. It would be noticed that section 33 justifies a claim for annulling the sale only if two conditions are satisfied: that the sale should have been made contrary to the provisions of the Act and that the plaintiff must show that he has sustained substantial injury by reason of the irregularity complained of. It is in the context of these requirements that the Calcutta High Court held that the inclusion of an amount in the notice which had not become an arrear on the date of the notice did not render the impugned sale invalid. We do not think that this decision can assist us in interpreting section 149 (2) with which we are concerned. The scope and effect of the relevant provisions of section 149 (2) are not at all similar to the scope and effect of section 33 of the Bengal Act. Therefore, we are not inclined to accept Mr. Masodkar's argument that the defect in the sale on which the appellants rely would not render the sale invalid.

The result is, the appeal is allowed, the decree passed by the High Court is set aside and the appellants' suit decreed. There would be no order as to costs throughout.

K.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—K. C. DAS GUPTA AND J. R. MUDHOLKAR, JJ.

Shri Raja Durga Singh of Solon

.. Appellant\*

Tholu and others

.. Respondents.

*Punjab Tenancy Act (XVI of 1887), (applied to Himalaya Pradesh), section 77 (3)—Applicability—Suit when barred from the cognizance of a Civil Court.*

Following *Magiti Sasamal v. Pandab Bisoi*, A.I.R. 1962 S.C. 547, the Court held that as the relationship of landlord and tenant as between the parties to the suit is not admitted by the appellant, section 77 (3) of the Punjab Tenancy Act (XVI of 1887) will not apply and hence the suit is not barred from the cognizance of a civil Court. A finding of fact arrived at by the District Judge on the consideration of all evidence, oral and documentary adduced by the parties cannot be set aside in Second Appeal.

Appeal by Special Leave from the Judgment and Decree dated the 31st October, 1957, of the Judicial Commissioner's Court of Himachal Pradesh at Simla in Civil Regular Second Appeal No. 8 of 1957.

*Achhru Ram*, Senior Advocate, (*Naunit Lal*, Advocate, with him), for Appellant.

*Anil Kumar Gupta*, Advocate, and *S. C. Agarwal*, *R. K. Garg.*, *D. P. Singh* and *M. K. Ramamurthy*, Advocates of *M/s. Ramamurthy & Co.* for Respondents.

The Judgment of the Court was delivered by

*Mudholkar, J.*—In this appeal by Special Leave against the Judgment of the Judicial Commissioner, Himachal Pradesh, in Second Appeal two points have been urged on behalf of the appellant. The first is that the Court of the Judicial Commissioner was in error in interfering with a finding of fact of the District Judge and the second is that the Court of the Judicial Commissioner was wrong in holding that the suit was not triable by a civil Court but is triable by a revenue Court under section 77 of the Punjab Tenancy Act, 1887 (XVI of 1887) (hereinafter referred to as the Act) which applies to Himachal Pradesh.

In order to appreciate these points it is necessary to state some facts. The appellant who was plaintiff in the suit was the former Ruler of the State of Bhagat, one of the Simla Hill States. The State of Bhagat and several other Simla Hill States were merged in Himachal Pradesh on July 1, 1947. As a consequence of the merger the Ruler surrendered his sovereignty to the new State. Khasra Nos. 70, 80, 81, 167, 263/170, 171, 172, 173 and 269/177 measuring in all 15 bighas and 19 biswas, among other property, were declared to be the private property of the appellant. It is the appellant's case that these fields are his *khudkhast* land, that they are recorded as such in the revenue papers ever since the year 1936 and that the defendants were granted licence to cultivate these lands on his behalf with the obligation that the entire produce from the lands should be handed over by them to the appellant at the end of every year. The consideration for the arrangement was a remission in rent and land revenue which the appellant had granted to the respondents with respect to certain other lands which were leased out by him to the respondents. Bulk of these lands were declared to be the State property as a result of the merger and presumably the respondents have now to pay full assessment or rent with respect to them. According to the appellant the respondents failed to hand over the annual produce from the fields in suit to him and, therefore, he leased out the lands at Rs. 500 per annum to Chuku Koli for Rs. 500 for a period of one year from October, 1950. The respondents, however, obstructed Chuku in taking possession of the land and despite repeated demands by the appellant, they kept him out of possession. He, therefore, instituted a suit for possession and mesne profits from Rabi 1950 to Kharif 1953 at Rs. 500 per annum and future profits in July, 1954.

On behalf of the respondents it was contended that they were the occupancy tenants of these lands for the last two or three generations, that they were cultivating these lands jointly and severally and that the suit was not cognizable by a civil Court. They also contended that they had filed a suit against the appellant in the Court of the Assistant Collector, First Grade, Solon, for a declaration to the effect that they are in possession of the lands as occupancy tenants and that, therefore, the appellant's suit should be stayed. The trial Court decreed the suit of the appellant as against all the respondents including the claim for mesne profits. The respondents preferred an appeal before the District Judge, Mahsu. He dismissed the appeal and confirmed the decree of the trial Court. They, therefore, preferred Second Appeal to the Court of Judicial Commissioner. The Judicial Commissioner allowed the appeal holding that the respondents were occupancy tenants of the lands and that consequently the provisions of section 77 (3) read with the first proviso thereto barred the jurisdiction of the Civil Court. On this finding the Judicial Commissioner set aside the decree granted by the trial Court and affirmed by the District Judge and directed that the plaint be returned for presentation to proper Court.

It is contended before us by Mr. Achhru Ram for the appellant that for a suit to be barred under section 77 (3) of the Act from the cognizance of a civil Court two conditions have to be satisfied. The first is that the suit should relate to one of the matters described in sub-section (3) and the second is that the existence of the relationship of landlord and tenant should be admitted by the parties. If these two conditions are not satisfied then, according to him, the suit is not barred from the cognizance of a civil Court. In support of his contention he has relied upon the decision in *Sham Singh v. Amarjit Singh*<sup>1</sup>; *Baru v. Niadar*<sup>2</sup>; *Daya Ram v. Jagir Singh*<sup>3</sup>. He has also relied upon certain observations of this Court in *Magiti Sasamal v. Pandab Bisoi*<sup>4</sup>. Section 77 (3) and the first proviso thereto run as follows :

"The following suits shall be instituted in, and heard and determined by revenue Courts, and no other Court shall take cognizance of any dispute or matter with respect to which any such suit might be instituted :—

Provided that—

(1) where in a suit cognizable and instituted in a civil Court it becomes necessary to decide any matter which can under this sub-section be heard and determined only by a revenue Court the civil Court shall endorse upon the plaint the nature of the matter for decision and the particulars required by Order VII, rule 10, Code of Civil Procedure and return the plaint for presentation to the Collector."

We are not concerned with the second proviso. Below the second proviso the kind of suits which are triable by the revenue Courts are set out in three groups. It is contended on behalf of the respondents that the suit in question would fall under entry (e) in the second group. That entry reads thus :

"Suits by a landlord to eject a tenant."

They also contend that their suit before the revenue Court was one under entry (d) which reads thus :

"Suits by a tenant to establish a claim to a right of occupancy, or by a landlord to prove that a tenant has not such a right ;"

It would, however, appear that not only items (d) and (e) but every other item in the three groups relates to a dispute between tenants on the one hand and the landlord on the other. There is no entry or item relating to a suit by or against a person claiming to be a tenant and whose status as a tenant is not admitted by the landlord. It would, therefore, be reasonable to infer that the Legislature barred only those suits from the cognizance of a civil Court where there was no dispute between the parties that a person cultivating land or who was in possession of land was a tenant. This is precisely what has been held in the two decisions of the Lahore High Court relied upon by Mr. Achhru Ram. In the first of these two cases *Tek Chand J.*, observed :

1. (1931) I.L.R. 12 Lah. 111.

2. (1942) I.L.R. 24 Lah. 191 (F.B.).

3. A.I.R. 1956 Him. Pra. 61.

4. (1962) 1 S.G.J. 636; A.I.R. 1962 S.C. 547.

"It is obvious that the bar under clause (d) is applicable to those cases only in which the relationship of landlord and tenant is admitted and the object of the suit is to determine the nature of the tenancy i.e., whether the status of the tenant falls under sections 5, 6, 7 or 8 of the Act."

In that case the suit was instituted by someone claiming to succeed to the tenancy of certain land on the death of the occupancy tenant. The learned Judge observed :

"In a suit like the one before us the point for decision is not the nature of the tenancy, but whether the defendant is related to the deceased tenant and if so whether their common ancestor had occupied the land. If these facts are established, the claimant *ipso facto* succeeds to the occupancy tenancy. But if they are found against him, he is not a tenant at all."

As these facts were not established the High Court held that the landlord was entitled to sue the defendant who had entered on the land asserting a claim to be a collateral of the deceased tenant but who failed to substantiate his claim. This view was affirmed by a Full Bench consisting of five Judges in the other Lahore case. In *Daya Ram v. Jagir Singh*<sup>1</sup>, the same Judicial Commissioner who decided the appeal before us has expressed the view that where in a suit for ejectment the existence of the relationship of landlord and tenant is not admitted by the parties the Civil Court had jurisdiction to try the suit and that such a suit did not fall under section 77 (3) of the Act. In *Magili Sasamal v. Pandab Bissoi*<sup>2</sup>, this Court was considering the provisions of section 7 (1) of the Orissa Tenants Protection Act, 1948 (III of 1948). The provisions of that section run thus :

"Any dispute between the tenant and the landlord as regards, (a) tenant's possession of the land on the 1st day of September, 1947 and his right to the benefits under this Act, or (b) misuse of the land by the tenant, or (c) failure of the tenant to cultivate the land properly, or (d) failure of the tenant to deliver to the landlord the rent accrued due within two months from the date on which it becomes payable, or (e) the quantity of the produce payable to the landlord as rent, shall be decided by the Collector on the application of either of the parties."

It was contended in that case on behalf of the respondents who claimed to be tenants that the suit for permanent injunction instituted by the appellant-landlord was barred by the provisions of section 7 (1). Dealing with this contention this Court observed as follows :

"In other words, section 7 (1) postulates the relationship of tenants and landlord between the parties and proceeds to provide for the exclusive jurisdiction of the Collector to try the five categories of disputes that may arise between the landlord and the tenant. The disputes which are the subject-matter of section 7 (1) must be in regard to the five categories. That is the plain and obvious construction of the words 'any dispute as regards'. On this construction it would be unreasonable to hold that a dispute about the status of the tenant also falls within the purview of the said section. The scheme of section 7 (1) is unambiguous and clear. It refers to the tenant and landlord as such and it contemplates disputes of the specified character arising between them. Therefore, in our opinion, even on a liberal construction of section 7 (1) it would be difficult to uphold the argument that a dispute as regards the existence of the relationship of landlord and tenant falls to be determined by the Collector under section 7 (1)".

The observations of this Court would clearly apply to the present case also inasmuch as the relationship of landlord and tenant as between the parties to the suit is not admitted by the appellant.

Now we will come to the second point because the argument is that on the finding of the learned District Judge the respondents are tenants, and, therefore, their ejectment cannot be ordered by a Civil Court. As already stated the appellant challenged the finding of the Judicial Commissioner on the point on the ground that he had no jurisdiction to reserve the finding of the District Court because it was a finding of fact on the question. There is no doubt in our mind that the learned Judicial Commissioner was in error in reversing the finding of fact of the District Judge particularly so because the finding of the District Judge is based upon a consideration of entries in the record of rights from the year 1936 onwards showing that the lands were the *khudkast* lands of the appellant and were in his possession. The learned Judicial Commissioner has omitted to bear in mind the provisions of section 44 of the Act which give a presumptive value to the entries in revenue records. It was argued before us that there are prior entries which are in conflict with those on which the learned District Judge has relied. It is sufficient to say that where there is such a conflict, it is the later entry which must prevail. Indeed from the language

of section 44 itself it follows that where a new entry is substituted for an old one it is that new entry which will take the place of the old one and will be entitled to the presumption of correctness until and unless it is established to be wrong or substituted by another entry. In *Deity Pattabhiramaswamy v. S. Hanymayya and others*,<sup>1</sup> this Court held that a finding of fact arrived at by the District Judge on the consideration of all evidence, oral and documentary, adduced by the parties, cannot be set aside in Second Appeal. The question here is whether the respondents are the tenants of the appellant. Though for determining the question documentary evidence fell to be considered, the finding on the question is no less a finding of fact than may have been the case if the evidence to be considered was merely oral. As was pointed out by this Court in that case as well as recently in *Sir Chuni-lal V. Mehta & Sons Ltd., Bombay v. The Century Spinning and Manufacturing Co., Ltd., Bombay*<sup>2</sup>, an issue of law does not arise merely because documents which are not instruments of title or otherwise the direct foundation of rights but are merely historical documents, have to be construed. Of course here, as we have already pointed out, the High Court has ignored the presumption arising from certain documentary evidence and, therefore, there is an additional reason vitiating its finding.

Upon this view we set aside the decree of the Court of the Judicial Commissioner and restore that of the trial Court as affirmed by the District Court. Costs throughout will be borne by the parties as incurred.

K.L.B.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, J. L. KAPUR, A. K. SARKAR, M. HIDAYATULLAH AND RAGHUBAR DAYAL, JJ.

M/s. Mangalore Ganesh Beedi Works

.. Appellant\*

v.

The State of Mysore and another

.. Respondents.

*Mysore Sales Tax Act (VI of 1948)—Coinage Act (III of 1906) as amended by the Amending Act (XXXI of 1955), section 14—Conversion of old coinage into new resulting in the enhancement of tax exigible—Whether invalid in the absence of a Money Bill—Constitution of India (1950), Articles 197, 198, 199, 212 and 255—Applicability.*

By substitution of new coinage (under the Indian Coinage Act (III of 1906), amended by the Amending Act (XXXI of 1955), section 14 (*i.e.*), naye Paise in the place of annas, pice and pies no enhancement of tax was enacted, but it was merely a substitution of one coinage by another of equivalent value. Even assuming that it is a taxing measure its validity cannot be challenged on the ground that it ends Articles 197 to 199 and the procedure laid down in Article 202 of the Constitution of India (1950). Article 212 prohibits the validity of any proceedings in a Legislature of a State from being called in question on the ground of any alleged irregularity of procedure and Article 255 lays down that requirements as to recommendation and previous sanction are to be regarded as matters of procedure only. Consequently the tax cannot be challenged on the ground that it is contrary to the provisions of the Constitution.

Appeal by Special Leave from the Order dated the 15th July, 1960, of the Mysore High Court in Writ Petition No. 719 of 1960.

*N. C. Chatterjee*, Senior Advocate (*S. S. Shukla*, Advocate, with him), for Appellant.

*N. S. Bindra*, Senior Advocate (*P. D. Menon*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

*Kapur, J.*—This is an appeal by Special Leave against the Judgment and Order of the High Court of Mysore dismissing the assessee's petition under Article 226 of the Constitution for quashing the order of assessment relating to two quarters, *i.e.*,

<sup>1</sup> I. A.I.R. 1959 S.C. 57.

<sup>2</sup> A.I.R. 1962 S.C. 1314.

\* G.A. No. 194 of 1962.

25th September, 1962.

from 1st April, 1957 to 30th September, 1957, under the Mysore Sales Tax Act, (VI of 1948).

The appellant is a firm registered under the Mysore Sales Tax Act and was assessed to sales tax on a return of over Rs. 58,36,422.26 nP. and the tax imposed on that sum at .02 nP. per rupee was Rs. 1,16,728.44 nP. The grievance of the appellant was that according to the Mysore Sales Tax Act he was liable to sales tax at the rate of 3 pice for every rupee on the turnover and calculated on that basis the amount of tax would be Rs. 91,690 but after the amendment of the Indian Coinage Act (III of 1906) by the Amending Act (XXXI of 1955) the rate of sales tax which was levied on the appellant's Beedis was .02 nP. per rupee and thus the appellant was called upon to pay Rs. 25,038 more than he would have paid if he had been charged at the rate of 3 pice per rupee. It was contended on behalf of the appellant in the High Court and before us that this amounted to enhancement of tax which was illegal because the tax had not been increased in the manner provided under the Constitution and thus it was a breach of Article 265 of the Constitution and was therefore void and illegal.

Under the amended Indian Coinage Act provision was made in section 14 for the substitution of value expressed in annas, pice and pies by value expressed in naya Paise, which was the new coinage introduced under the amended Act. Section 14 reads as under :—

"Section 14. (1) The rupee shall be divided into one hundred units and the new coin representing such unit may be designated by the Central Government, by notification in the Official Gazette, under such name as it thinks fit, and the rupee, half rupee and quarter-rupee shall be respectively equivalent to one hundred, fifty and twenty-five such new coins and shall, subject to the provisions of sub-section (1) and sub-section (2) of section 13 and to the extent specified therein, be a legal tender in payment or on account accordingly. (2) All coins issued under the authority of this Act in any denomination of annas, pice and pies shall, to the extent specified in section 13, be a legal tender in payment or on account at the rate of sixteen annas, sixty-four pice or one hundred and ninety-two pies to one hundred new coins referred to in sub-section (1), calculated in respect of any such single coin, or number of such coins tendered at one transaction, to the nearest new coin, or where the new coin above and the new coin below are equally near, to the new coin below.

(3) All references in any enactment or in any notification, rule or order under any enactment or in any contract, deed or other instrument to any value expressed in annas, pice and pies shall be construed as references to that value expressed in new coins referred to in sub-section (1) converted thereto at the rate specified in sub-section (2)".

By sub-sections (1) and (2) of section 14 therefore one rupee is divided into a hundred naya Paise, the old legal tender of sixteen annas or sixty-four pice or one hundred and ninety-two pies to a rupee remains legal tender which will be equivalent to one hundred naya Paise and for purposes of calculation and conversion of old coins into new coins, one old coin or a number of such coins have to be calculated to the nearest new coin or coins and where the new coin above and the new coin below are equally near then the calculation is to the new coin below. Sub-section (3) provides that all references under any enactment to annas, pice or pies have to be construed as reference to the new coin referred to in sub-section (1). In other words wherever the old legal tender *i.e.*, annas, pice and pies is mentioned in an enactment it is to be converted into naya Paise and the naya Paise are to be substituted in place of the old legal tender calculated in the manner laid down in sub-section (2). On 1st March, 1957, the Mysore Legislature enacted the Mysore Existing Laws (Construction of References to Values Act, 1957), Act XII of 1957. By section 2 of that Act "existing law" was defined as an Act, Order, or Regulation having the force of law in Mysore State relating to any matter other than any enactment, notification, rule or order to which the provisions of sub-section (3) of section 14 of the Indian Coinage Act are applicable. By section 3 of that Act in every such existing law reference to any value expressed in annas, pice or pies shall be construed as reference to that value expressed in new coins referred to in sub-section (1) of section 14 of the Indian Coinage Act converted thereto at the rate specified in sub-section (2) of section 14 of that Act.



Two objections were taken to the validity of the tax: Firstly it was argued that by the substitution of 2 naya Paise in place of 3 pies there was a change in the tax exigible by the Mysore Sales Tax Act and this could only be done if that enactment had been passed according to the procedure for Money Bills in the manner provided by Articles 198, 199 and 207 of the Constitution and as, no such Money Bill was introduced or passed for the enhancement of the tax, the tax was illegal and invalid. In our opinion by substitution of new coinage, i.e., naya Paise in place of annas, pice and pies no enhancement of tax was enacted but it was merely a substitution of one coinage by another of equivalent value. Even assuming that it is a taxing measure its validity cannot be challenged on the ground that it offends Articles 197 to 199 and the procedure laid down in Article 202 of the Constitution. Article 212 prohibits the validity of any proceedings in a Legislature of a State from being called in question on the ground of any alleged irregularity of procedure and Article 255 lays down that requirements as to recommendation and previous sanction are to be regarded as matters of procedure only. It provides:

Article 255. "No Act of Parliament or of the Legislature of a State, and no provision in any such Act, shall be invalid by reason only that such recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given—

(a) where the recommendation required was that of the Governor, either by the Governor or by the President;

(b) .....

(c) .....

Consequently the tax cannot be challenged on the ground that it is contrary to the provisions of the Constitution.

Secondly it was submitted that the Indian Coinage Act, being a Central Act dealing with "coinage and legal tender" under Item 36 of List I, could not change the rate of tax under the Mysore Sales Tax Act. It is unnecessary to decide this question because if the Central Act i.e., the Indian Coinage Act, has not the effect of changing 3 pies into .02 nP. in the rate of tax leviable under the Mysore Sales Tax Act, the Mysore Existing Laws (Construction of References to Values) Act, 1957, which has been set out above has made a provision for charging the tax in terms of naya Paise instead of pies. Therefore the levy of tax in terms of naya Paise is not unconstitutional nor is it a taxing measure but it deals merely with the conversion of the old coinage into new coinage.

It was then argued that because of the order of the High Court in a previous petition under Article 226 whereby the provisional assessment was set aside the principle of *res judicata* applied and a different decision could not be given in the present petition which was subsequently filed after the final assessment. In our opinion there is no merit in that submission. The previous petition upon which the appellant relies was to set aside the provisional assessment and it was set aside in the following language:

"Read Memo. dated 7th June, 1958 by the Advocate-General and Advocate for respondent, stating that the respondents do not oppose the writ petition being allowed and that the provisional assessment may be set aside."

The previous decision setting aside the provisional assessment does not indicate what issues were raised and decided and there is no indication that the question now raised before us was before the Court. That decision cannot therefore operate as *res judicata*.

In our opinion this appeal is without merits and is dismissed with costs.

K.L.B.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

Khem Chand

.. Appellant\*

The Union of India and others

.. Respondents.

*Civil Service (Classification, Control and Appeal) Rules (1957), rule 12 (4)*—Provision that in certain circumstances the Government servant shall be deemed to have been placed under suspension from the date of original order of dismissal (set aside by Court) until further orders on further inquiry—Constitutional validity—If contravenes Articles 142, 144, 14, 19 (1) (f) and 31 of the Constitution of India (1950).

The appellant a Sub-Inspector of Co-operative Societies was dismissed by the Appointing Authority on December 17, 1951 (after framing charges and consideration of the Report made by the Officers who held the enquiry into the charges) was ultimately dismissed. A suit by the appellant challenging the order of dismissal as invalid in law being made in violation of Article 311 of the Constitution of India and asking for a declaration that he continued to be in service of the Government was decreed by the Trial Court and an appeal by the Government of India was dismissed by the Subordinate Judge. The decree was however set aside by the Punjab High Court in a Second Appeal by the State and the suit was dismissed. On appeal to the Supreme Court it was held on December 13, 1957, that the provisions of Article 311 (2) had not been fully complied with and the appellant had not had the benefit of all the constitutional protections and accordingly his dismissal could not be supported and that the appellant continued to be a member of the service at the date of the suit.

Meanwhile on April 20, 1955 shortly after the Government appeal had been dismissed by the Senior Subordinate Judge the appellant instituted a suit in the Subordinate Judge's Court claiming arrears of salary and allowances on the basis of the decree obtained by him. In view of the pendency of the appeal before the Supreme Court the trial of the second suit was stayed by the Trial Court. The appeal having been allowed on December 13, 1957 the appellant made an application on December 26, 1957 to the Trial Court praying that the hearing of the suit (for arrears of salary and allowances) be taken up. On August 7, 1958 the defendants made an application to the Trial Court stating that the disciplinary Authority had on a consideration of the circumstances of the case, decided to hold a further enquiry against the appellant on the original charges and consequently the appellant should be deemed to have been placed under suspension by the Appointing Authority from December 17, 1951, the date of the original order of dismissal. Accordingly it was contended that the suit was untenable. The trial Court adjourned the suit *sine die*; and a revisional application challenging the validity of rule 12 (4) of the Central Civil Service (Classification, Control and Appeal) Rule, 1957 was dismissed by a Division Bench of the Punjab High Court. In appeal by Special Leave against the decision,

**Held :** (1) The provision in rule 12 (4) that in certain circumstances the Government servant shall be deemed to have been placed under suspension from the date of the original order of dismissal and shall continue to remain under suspension until further orders, does not in any way go against the declaration made by the Supreme Court (on December 13, 1957) in the appellant's earlier appeal. The contention that the rule contravenes Articles 142 or 144 of the Constitution is therefore untenable.

(2) In so far as rule 12 (4) restricts the appellant's right (to arrears of pay, etc.) under Article 19 (1) (f) of the Constitution, it is a reasonable restriction in the interests of the general public. Rule 12 (4) is therefore within the saving provisions of Article 19 (6), so that there is no contravention of the constitutional provisions.

(3) There is no difference worth the name between the effect of rule 12 (4) on a Government servant the penalty of dismissal, removal or compulsory retirement on whom is set aside by a decision of a Court of law and a further enquiry is decided upon and the effect of rule 12 (4) on another Government servant a similar penalty on whom is set aside in appeal or on review by the departmental authority and further inquiry is decided upon. In both cases the Government servant will be deemed to be under suspension from the date of the original order of dismissal of, except that where in a departmental enquiry a Government servant was not placed under suspension prior to the date when the penalty was imposed, this result will not follow, as rule 12 (3) would not then have any operation. The contention that rule 12 (4) contravenes Article 14 of the Constitution must therefore be rejected.

(4) The further attack on rule 12 (4) on the basis of Article 31 (1) of the Constitution also necessarily fails. For, whatever deprivation of property may result from rule 12 (4) would be by authority of law—the law being rule 12 (4).

Accordingly the High Court was right in holding that rule 12 (4) is valid and consequently in rejecting the appellant's revisional application.

Appeal by Special Leave from the Judgment and Order dated the 14th November, 1960 of the Punjab High Court (Circuit) Bench, Delhi in Civil Revision Case No. 224-D of 1959.

*Janardan Sharma*, Advocate, for Appellant.

*R. Ganapathy Iyer* and *P. D. Menon*, Advocates, for Respondent.

The Judgment of the Court was delivered by

*Das Gupta, J.*—This appeal by Special Leave raises the question of validity of rule 12 (4) of the Central Civil Services (Classification, Control and Appeal) Rules, 1957, that were framed by the President and published by a notification dated 28th February, 1957. Rule 12 (4) is in these words :—

“12. (4) Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Government servant is set aside or declared or rendered void in consequence of or by a decision of a Court of law and the disciplinary authority on a consideration of the circumstances of the case, decides to hold a further inquiry against him, on the allegations on which the penalty of dismissal, removal or compulsory retirement was originally imposed, the Government servant shall be deemed to have been placed under suspension by the Appointing Authority from the date of the original order of dismissal, removal or compulsory retirement and shall continue to remain under suspension until further orders.”

The question arises in this way. On 1st July, 1949, the appellant, who was a permanent Sub-Inspector of Co-operative Societies, Delhi, was suspended by the Deputy Commissioner, Delhi. On 9th July, he was served with a charge-sheet under rule 6 (1) of the Rules which had been framed by the Chief Commissioner, Delhi. On a consideration of the report made by the Officers, who had held an enquiry into the several charges against him the Deputy Commissioner, Delhi, made an order on 17th December, 1951 dismissing this appellant.

The appellant filed a suit on 20th May, 1953, praying for a declaration that the order of dismissal made against him was invalid in law being in violation of Article 311 of the Constitution of India and for a further declaration that he still continued to be in service of the Government.

The Trial Court decreed the suit on 31st May, 1954 declaring that the plaintiff's dismissal was void and inoperative and that the plaintiff continued to be in service of the State of Delhi at the date of the institution of the suit.

The appeal by the Government of India was dismissed by the Senior Subordinate Judge, Delhi, on 31st December, 1954.

The decree was however set aside by the Punjab High Court on 1st November, 1955 in Second Appeal by the State and the suit was dismissed.

Against this decision of the High Court, the appellant preferred an appeal by Special Leave to this Court. This Court held that the provisions of Article 311 (2) had not been fully complied with and the appellant had not had the benefit of all the constitutional protections and accordingly, his dismissal could not be supported. The Court then passed the following order :—

“We, therefore, accept this appeal and set aside the order of the Single Judge and decree the appellant's suit by making a declaration that the order of dismissal passed by the Deputy Commissioner on December 17, 1951 purporting to dismiss the appellant from service was inoperative and that the appellant was a member of the service at the date of the institution of the suit out of which this appeal has arisen. The appellant will get costs throughout in all Courts. Under Order 14; rule 7 of the Supreme Court Rules, we direct that the appellant should be paid his fees which we assess at Rs. 250.”

The judgment of this Court was delivered on 13th December, 1957 and is reported in *Khemchand v. Union of India*.<sup>1</sup>

On 20th April, 1955, *i.e.*, shortly after the Government appeal had been dismissed by the Senior Subordinate Judge, the appellant instituted a suit in the Court of the Senior Sub-Judge, Delhi, out of which the present appeal has arisen. The defendants in this suit are : 1. The Union of India; 2. The State of Delhi; and 3. The Collector and Registrar, Co-operative Societies, Delhi. In this suit the plaintiff

<sup>1</sup> 1958 S.C.J. An. W.R. (S.C.) 169 : (1958) S.C.R. 1080. 497 : (1958) 1 M.L.J. (S.G.) 169 : (1958) 1

claims, on the basis of the decree obtained by him in the earlier suit, a sum of Rs. 14,042/8 as arrears of salary and allowances. The hearing of the suit was however stayed by the Trial Court on 26th December, 1955 in view of the pendency of the appellant's appeal in this Court against the decision of the Punjab High Court dismissing the earlier suit. As already stated, this Court delivered the judgment in an appeal on 13th December, 1957. On 26th December, 1957 the appellant made an application to the Trial Court praying that the hearing of the suit be taken up. Before, however, the suit could be disposed of, the defendants made an application to the Subordinate Judge, on 7th August, 1958 stating that the disciplinary authority had on a consideration of the circumstances of the case, decided to hold a further enquiry against this appellant on the allegations on which he had been originally dismissed and that, consequently, the appellant should be deemed to have been placed under suspension by the appointing authority from 17th December, 1951 the date of the original order of dismissal. Accordingly, it was contended by the defendants that the plaintiff's claim in the present suit was untenable.

On 14th February, 1959 the Trial Court made an order in these terms :—

"It is hereby ordered that the proceedings in the case shall remain stayed until the time the order of suspension is revoked under rule (5) of the Central Civil Service (Classification, Control and Appeal) Rules, 1957 referred to above or its being set aside by a competent tribunal or authority whichever event occurs earlier. The hearing of the suit is adjourned *sine die* and the proceedings shall be revived on the application of the plaintiff after the occurrence of any of the two events referred to above."

Against this order the appellant filed a revisional application in the Punjab High Court, challenging the validity of rule 12 (4) of the Central Civil Service (Classification, Control and Appeal) Rules, 1957. A Division Bench of the High Court dismissed the revision petition rejecting the appellant's contention against the validity of rule 12 (4). Against that decision of the High Court the appellant has filed the present appeal after obtaining Special Leave from this Court.

It is clear that if rule 12 (4) of the Central Civil Service (Classification, Control and Appeal) Rules, 1957 is valid the appellant must be deemed to have been placed under suspension from 17th December, 1951. For, it is not disputed that after the penalty of dismissal imposed on him had been rendered void by the decision of this Court, the disciplinary authority did in fact decide to hold a further enquiry against him on the allegations on which this penalty of dismissal had originally been imposed. It is equally clear that if the appellant be deemed to have been placed under suspension from 17th December, 1951 the order made by the Trial Court staying the hearing of the suit and the order of the High Court rejecting the revisional application are not open to challenge. The sole question therefore is whether rule 12 (4) is valid in law.

This rule forms part of the Rules made by the President in exercise of the powers conferred on him by the Proviso to Article 309 and clause (5) of Article 148 of the Constitution. The main provision of Article 309 is that subject to the provisions of the Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State. The Proviso to this Article makes it competent for the President or such other person as he may direct, in the case of services and posts in connection with the affairs of the Union, to make Rules regulating the recruitment and the conditions of service of persons appointed to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article. Clause (5) of Article 148 makes a similar provision in respect of the conditions of service in the Indian Audit and Accounts Department and provides *inter alia* that subject to the provisions of the Constitution and of any law made by Parliament, the conditions of service of persons serving in the Indian Audit and Accounts Department shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-General.

Mr. Janardan Sharma rightly contends that this power of the President to make Rules is subject to all the provisions of the Constitution and consequently if in making the rule the rule-making authority has contravened any of the provisions of the Constitution the rule is invalid to the extent of such contravention. According to Mr. Sharma rule 12 (4) contravenes the provisions of Article 142, Article 144, Article 19 (1) (f), Article 31 and also Article 14 of the Constitution.

The argument that the impugned rule contravenes Article 142 and Article 144 is practically the same. Article 142 provides *inter alia* that any decree passed by the Supreme Court in the exercise of its jurisdiction shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and until provision in that behalf is so made, in such manner as the President may by order prescribe. Article 144 provides that all authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court. Mr. Sharma's argument as far as we could understand it is that under these provisions of Articles 142 and 144 a duty lay on the President to do all that was necessary to give effect to the decree made by this Court in the earlier appeal and that by framing rule 12 (4) the President has, in effect, gone against the directions of this Court as contained in that decree. In our judgment, there is no substance in this contention. If the decree of this Court had directed payment of arrears of appellant's salary and allowances and the effect of the rule made by the President was to deprive him of that right there might perhaps have been scope for an argument that the rule contravened the provisions of Article 144. The decree made by this Court did not however contain any direction as regards payment of salary and allowances. It did contain a direction that the appellant will get his costs throughout in all Courts. Quite clearly, however, the impugned rule does not in any way affect that right of the appellant. The only other relief granted by the decree was the making of a declaration that the order of dismissal passed by the Deputy Commissioner, Delhi, on 17th December, 1951 purporting to dismiss the appellant from service was inoperative and that the appellant was a member of the service at the date of the institution of the suit out of which the appeal had arisen. Does the impugned rule go against this declaration? The answer, in our opinion, must be in the negative. The provision in the rule that the Government servant shall be deemed to have been placed under suspension from the date of the original order of dismissal does not seek to affect the position that the order of dismissal previously passed was inoperative and that the appellant was a member of the service on May 25, 1953 when the first suit was instituted by the appellant. An order of suspension of a Government servant does not put an end to his service under the Government. He continues to be a member of the service in spite of the order of suspension. There was a termination of the appellant's service when the order of dismissal was made on 17th December, 1951. When that order of dismissal was set aside the appellant's service revived; and so long as another order of dismissal is not made or the service of the appellant is not terminated by some other means, the appellant continues to be a member of the service and the order of suspension in no way affects this position. The real effect of the order of suspension is that though he continued to be a member of the Government service he was not permitted to work, and further, during the period of his suspension he was paid only some allowance—generally called "subsistence allowance"—which is normally less than his salary—instead of the pay and allowances he would have been entitled to if he had not been suspended. There is no doubt that the order of suspension affects a Government servant injuriously. There is no basis for thinking however that because of the order of suspension he ceases to be a member of the service. The provision in rule 12 (4) that in certain circumstances the Government servant shall be deemed to have been placed under suspension from the date of the original order of dismissal and shall continue to remain under suspension until further orders, does not in any way go against the declaration made by this Court. The contention that the impugned rule contravenes Article 142 or 144 is therefore untenable.

Equally untenable is the appellant's next contention that the impugned rule contravenes the provisions of Article 19 (1) (f) of the Constitution. The argument is that as a result of this Court's decree the appellant had a right to his arrears of pay and allowances. This right constituted his property; and as the effect of the impugned rule is that he would not, for some time at least, get those arrears it restricts his right. It may be conceded that the right to arrears of pay and allowances constituted property within the meaning of Article 19 (1) (f) of the Constitution and further, that the effect of rule 12 (4) is a substantial restriction of his right in respect of that property under Article 19 (1) (f). The question remains whether this restriction is a reasonable restriction in the interests of the general public. No body can seriously doubt the importance and necessity of proper disciplinary action being taken against Government servants for inefficiency, dishonesty or other suitable reasons. Such action is certainly against the immediate interests of the Government servant concerned; but is absolutely necessary in the interests of the general public for serving whose interests the Government machinery exists and functions. Suspension of a Government servant pending an enquiry is a necessary part of the procedure for taking disciplinary action against him. It follows, therefore, that when the penalty of dismissal has been set aside but the disciplinary authority decides to hold a further enquiry on the same facts against him a fresh order of suspension till the enquiry can be completed, in accordance with law, is a reasonable step of the procedure. We have no hesitation in holding, therefore, that in so far as rule 12 (4) restricts the appellant's right under Article 19 (1) (f) of the Constitution, it is a reasonable restriction in the interests of the general public. Rule 12 (4) is therefore within the saving provisions of Article 19 (6), so that there is no contravention of the constitutional provisions.

Mr. Sharma drew our attention to the decision of this Court in *Devendra Pratap v. State of Uttar Pradesh*<sup>1</sup>, where the effect of rule 54 of the Fundamental Rules framed by the State of U. P. under Article 309 was considered. It was held that while rule 54 undoubtedly enabled the State Government to fix the pay of a public servant where dismissal is set aside in a departmental appeal, the rule has no application to cases in which the dismissal of a public servant is declared invalid by a civil Court and he is reinstated and that it would not in such a contingency be open to the authority to deprive the public servant of the remuneration which he would have earned had he been permitted to work. This decision has however no application to a case like the present, where because of the operation of rule 12 (4) of the Central Civil Service (Classification, Control and Appeal) Rules, 1957 the public servant is deemed to be placed under suspension from the date of the original order of dismissal.

This brings us to the attack on the rule on the basis of Article 14. According to Mr. Sharma the result of the impugned rule is that where a penalty of dismissal, removal or compulsory retirement from service imposed on a Government servant is set aside or declared or rendered void in consequence of or by a decision of a Court of law and the disciplinary authority decides to hold a further enquiry against him on the allegations on which the penalty was originally imposed, the consequence will follow that the Government servant shall be deemed to have been placed under suspension from the date of the original imposition of penalty, whereas no such consequence will follow where a similar penalty is set aside not by a Court of law but by the departmental disciplinary authority. According to Mr. Sharma, therefore, there is a discrimination between a Government servant the penalty of dismissal, removal or compulsory retirement on whom is set aside by a decision of a Court of law and another Government servant a similar penalty on whom is set aside on appeal by the departmental disciplinary authority. The argument however ignores the result of rule 30 (2) and rule 12 (3) of these Rules. Rule 30 (2) provides *inter alia* that in the case of an appeal against an order imposing any of the penalties specified in rule 13, i.e., the penalty of dismissal, removal or compulsory retirement and certain other penalties, the appellate authority shall pass

orders :

"(i) Setting aside, reducing, confirming or enhancing the penalty ; or (ii) remitting the case to the authority which imposed the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case."

Rule 12 (3) provides that

"Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Government servant under suspension is set aside in appeal or on review under these Rules and the case is remitted for further enquiry or action or with any other directions, the order of his suspension shall be deemed to have continued in force on and from the date of the original order of dismissal, removal or compulsory retirement and shall remain in force until further orders."

Where a penalty of dismissal, removal or compulsory retirement imposed upon a Government servant is set aside by the departmental authority on appeal, it may or may not order further enquiry ; just as where a similar penalty is set aside by a decision of a Court of law the disciplinary authority may or may not direct a further enquiry. Where the appellate authority after setting aside a penalty of dismissal, removal or compulsory retirement makes an order under rule 30 (2) (ii) remitting the case to the authority which imposed the penalty, for further enquiry, rule 12 (3) will come into operation and so the order of suspension which in almost all cases is likely to be made where a disciplinary proceeding is contemplated or is pending shall be deemed to have continued in force on and from the date of the original order of dismissal and shall remain in force until further orders. There is therefore no difference worth the name between the effect of rule 12 (4) on a Government servant the penalty of dismissal, removal or compulsory retirement on whom is set aside by a decision of a Court of law and a further enquiry is decided upon and the effect of rule 12 (4) on another Government servant a similar penalty on whom is set aside in appeal or on review by the departmental authority and a further enquiry is decided upon. In both cases the Government servant will be deemed to be under suspension from the date of the original order of dismissal, except that where in a departmental enquiry a Government servant was not placed under suspension prior to the date when the penalty was imposed, this result will not follow, as rule 12 (3) would not then have any operation. It is entirely unlikely however that ordinarily a Government servant will not be placed under suspension prior to the date of his dismissal. Rule 12 (1) provides that the appointing authority or any authority to which it is subordinate or any other authority empowered by the President in that behalf may place a Government servant under suspension : (a) where a disciplinary proceeding against him is contemplated or is pending, or (b) where a case against him in respect of any criminal offence is under investigation or trial. Mr. Sharma does not say that ordinarily any cases occur where a Government servant is visited with a penalty of dismissal, removal or compulsory retirement, in a departmental proceeding, without there being a previous order of suspension under the provisions of rule 12 (1) and we do not think any such case ordinarily occurs. Consequently, the effect of rule 12 (3) will be the same on a Government servant a penalty of dismissal, removal or compulsory retirement on whom is set aside in appeal by the departmental authority as the effect of rule 12 (4) on a Government servant a similar penalty on whom is set aside by a decision of a Court of law. The contention that rule 12 (4) contravenes Article 14 of the Constitution must therefore be rejected.

As we find that all the above attacks on the validity of rule 12 (4) fail, the further attack on the rule on the basis of Article 31 (1) of the Constitution also necessarily fails. For, whatever deprivation of property may result from rule 12 (4) would be by authority of law—the law being rule 12 (4).

We have therefore come to the conclusion that the High Court is right in holding that rule 12 (4) is valid and consequently, in rejecting the appellant's revisional application.

The appeal is dismissed. But, in view of the circumstances of the case we make no order as to costs. Though the appellant has failed in this appeal which was brought by him as a pauper, we make no order against him to pay the Court-fee which would have been paid by him if he had not been permitted to appeal as a pauper.

K.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT: —P. B. GAJENDRAGADKAR, OF M. HIDAYATULLAH AND J. C. SHAH, JJ.

The Oriental Bank of Commerce, Ltd.

... Appellant\*

v.

Harcharan Das Loomba

... Respondent.

*Companies Act (VII of 1913), sections 55, 56 and 57—Scope—Resolution for reduction of share capital—Order under section 60 confirming resolution—Finality—"Displaced person" not appearing to oppose application—If bound—Claim under section 19 of the Displaced Persons (Debts Adjustment) Act (LXX of 1951) to convert partly paid-up shares into fully paid-up shares—If barred—Latter Act—If overrides Companies Act.*

Where an application is made under sections 55, 56 and 57 of the Companies Act, 1913, for an order sanctioning a resolution for reduction of share capital and an order is made thereon under section 60, sanctioning reduction of share capital such order would normally be binding on all share-holders. But that order cannot deprive a share-holder who is a "displaced person" as defined by section 2 (10) of the Displaced Persons (Debts Adjustment) Act 1951, of the special statutory right conferred upon him by section 19 of that Act to claim that his partly paid-up share-holding be converted into fully paid shares, even though he fails to appear at the hearing of the petition for reduction of share capital or to avail himself of the option given to him by the Court's order to surrender the shares without any payment of future calls upon him. The provisions of Act (LXX of 1951) override those of the Companies Act and of the Rules and Orders made thereunder and of any decree or order of the Company Court.

The order does not operate as *res judicata* because the jurisdiction to decide whether there is good ground for refusing to grant the request of the displaced person for conversion of his partly paid-up share into fully paid-up shares is vested exclusively in the Tribunal constituted under Act LXX of 1951.

The absence of assets in the company to meet its liabilities is not a sufficient ground for depriving a displaced person of his statutory right under section 19 (4) of Act LXX of 1951.

Where the Tribunal finds that the reason set up by the company for reducing the share capital was not genuine, and that the resolution of the company for reduction of share capital was passed *malafide* with a view to deprive displaced persons of their right to claim conversion of their partly paid-up shares, and the finding is confirmed by the High Court and is supported by evidence, such a conclusion, according to the practice of the Supreme Court, must be held, to be final and binding.

Appeal by Special Leave from the Judgment and Order dated 13th November, 1957, of the Punjab High Court in Letters Patent Appeal No. 19-D of 1955.

K. L. Gosain, Senior Advocate (O. P. Malhotra and S. N. Anand, Advocates, with him), for Appellant.

Bakshi Mektap Singh Sawhney, H. K. L. Sabharwal and I. S. Sawhney, Advocates, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—The Oriental Bank of Commerce Ltd., was incorporated in February, 1943, under the Indian Companies Act, 1913. The Bank had its registered office at Delhi and it opened branches in Lahore and in other towns which are now in Pakistan. The capital of the Bank was divided into 5,97,584 ordinary shares of Rs. 10 each, and 24,200 B Class ordinary shares of Re. 1 each. The paid-up capital of the Bank on December 31, 1946 was approximately Rs. 23 lakhs. On account of disturbances which followed in the wake of the setting up of the Dominions of India and Pakistan, the Bank lost a substantial part of its assets in the territory now called West Pakistan and was unable to recall its advances. By 1950 the accumulated losses of the Bank amounted to Rs. 10,57,850.

In December, 1950 the Directors of the Bank made a call of Rs. 2-8-per share on its ordinary share-holders. They also resolved to reduce capital of the Bank and for that purpose an extraordinary General Meeting of the Bank was convened on November 29, 1951 and special resolutions were passed reducing the issued and subscribed capital of the Bank of Rs. 4,56,137 ordinary shares of Rs. 5 each and 24,200 B Class ordinary shares of annas 8 each. This reduction was to be effected by cancelling the paid-up capital to the extent of Rs. 5 on each ordinary share and annas 8



on each 'B' Class ordinary share. Before the special resolution was passed the Parliament enacted the Displaced Persons (Debts Adjustment) Act LXX of 1951. That Act defines 'displaced person' by section 2 (10) as meaning

"any person who on account of the setting up of the Dominions of India and Pakistan, or on account of civil disturbances or the fear of such disturbances in any area now forming part of West Pakistan, has, after the 1st day of March, 1947, left, or been displaced from, his place of residence in such area and who has been subsequently residing in India, and includes any person who is resident in any place now forming part of India and who for that reason is unable or has been rendered unable to manage, supervise or control any immovable property belonging to him in West Pakistan,

\* \* \* \*

Diverse provisions were made by the Act to ameliorate the condition of displaced persons. The Act provided for adjustment of debts, secured and unsecured, relief from liability to pay calls on shares in companies, and enacted provisions for revision of decrees and settlements, apportionment of joint debts, cesser of accrual of interest, exemption from arrest and attachment of property, scaling down of debts, and extension of the period of limitation in certain classes of actions. Power to set up Tribunals having authority to exercise jurisdiction under the Act was also conferred by the State Government.

Pursuant to the resolution passed by the Bank at an extraordinary General Meeting on November 29, 1951 an application was submitted before the District Judge, Delhi exercising powers of the Company Judge for an order under sections 55, 56 and 57 of the Indian Companies Act, 1913 for reduction of the share capital of the Bank. This application was opposed by two shareholders who contended that the Bank was merely trying to circumvent the provisions of the Displaced Persons (Debts Adjustment) Act LXX of 1951 by resolving to reduce the capital. At the hearing of the application counsel for the Bank proposed that the Bank would accept, without any payment, surrender of ordinary share of Rs. 10 each, on which Rs. 5 had been paid up, by any person entitled to relief under section 19 of the Displaced Persons (Debts Adjustment) Act, so as to relieve him from further liability to pay the call of Rs. 2-8-0 per share made by the Bank and all future calls. This condition was accepted by the shareholders who appeared at the hearing. The Company Judge allowed the petition and confirmed the resolution reducing the share capital on the terms and conditions relating to surrender accepted by the Bank and directed that notice be given under section 61 of the Indian Companies Act, offering to all persons intending to avail themselves of the option of surrender an opportunity to apply in that behalf to the Bank within two weeks of the publication of the notice.

The respondent Harcharan Das Loomba was a holder, since 1944, of 500 ordinary shares of the face value of Rs. 10 each on which Rs. 5 were paid. The respondent was a displaced person within the meaning of Act (LXX of 1951), but he did not appear at the hearing of the petition for reduction of capital, nor did he avail himself of the option to surrender the shares given under the order of the Company Judge. On January 7, 1954 he applied to the Bank under section 19 (2) of Act (LXX of 1951) to convert his holding of 500 ordinary shares into 250 fully paid-up shares. By its letter dated January 16, 1954 the Bank declined to carry out the requisition. The respondent then petitioned the Tribunal under section 19 (4) of the Displaced Persons (Debts Adjustment) Act for an order directing the Bank to convert 500 partly paid-up shares held by him into 250 fully paid-up shares. The petition was resisted by the Bank, *inter alia*, on the grounds that the order of the Company Judge sanctioning reduction of capital and granting facility for surrender of their holding to shareholders entitled to apply under section 19 (2) of the Act was conclusive and binding upon all shareholders, and the respondent having failed to avail himself of the option given by the order was not entitled to enforce his rights under section 19 (2). The Bank also submitted that the right conferred by section 19 (4) of Act (LXX of 1951) was not absolute, and that there were good grounds for not complying with the requisition under section 19 (2), in that at the date of the special resolution for reduction of capital there being practically no assets with the Bank on which a fresh credit structure could be built, funds had to be raised by making calls and by issuing fresh

capital and the claim for conversion of partly paid-up shares into fully paid-up shares was neither fair nor equitable to the share holders who had already paid the call or had subscribed to the new shares.

In the view of the Tribunal losses suffered by the Bank and doubtful debts had been accumulating for a long time, but the Bank resorted to the scheme of capital reduction after Act (LXX of 1951) was enacted, only with a view to deprive the displaced shareholders of the benefit under the provisions of section 19 of the Act. This view of the Tribunal was affirmed in appeal by Khosla, J., of the Punjab High Court, and also by a Division Bench in an appeal under clause 10 of the Letters Patent. With Special Leave, the Bank has appealed to this Court.

The respondent's claim that he is a displaced person within the meaning of section 2 (10) of the Displaced Persons (Debts Adjustment) Act (LXX of 1951) is not disputed. The material clauses of section 19 on the true effect of which the right claimed by the respondent has to be adjudicated, read as follows :—

“(1) \* \* \* \* \*

(2) Notwithstanding anything contained in the Companies Act, or in the memorandum or articles of association, of the Co-operative Societies Act, it shall be lawful for a displaced person or a displaced “bank to apply to the company or the co-operative society” as the case may be, for the conversion of any partly paid-up shares held by him or it in the company or society into such smaller number of fully paid-up shares as the society or company may have issued and in respect of which calls have already been made.

(3) \* \* \* \* \*

(4) If the company or the co-operative society refuses to comply with any such request as is contained in an application under sub-section (2), the Tribunal may, on application made to it in this behalf and if satisfied that there is no cause for such refusal, issue a direction to the company or the co-operative society accordingly, and the company or society shall be bound to comply therewith and every such direction shall take effect from the date thereof.

(5) Save as otherwise provided in this section, nothing contained herein shall affect the validity of any action taken by the company or its board of directors in pursuance of the provisions of the Companies Act or the memorandum or articles of association relating to the company.

(6) \* \* \* \* \*

By clause (1) a displaced person is not liable to pay any interest on unpaid calls in respect of his shares nor is his holding liable to be forfeited, notwithstanding anything to the contrary contained in the Companies Act, or in the memorandum or articles of association. Clause (2) grants to a shareholder of a company who is a displaced person the privilege of applying to the company for conversion of any partly paid-up shares held by him into fully paid up shares and in respect of which a call has been made. The Tribunal constituted under the Act is invested by clause (1) with power to order any company to comply with a requisition under sub-section (2), if it is satisfied that there is no cause for such refusal to comply with the requisition to convert partly paid-up shares into fully paid-up shares. The expression “no cause for such refusal” within the meaning of clause (4) must mean no good cause for refusal. Therefore when an application is filed by a shareholder for an order directing the company to grant conversion of partly paid-up shares into fully paid-up shares and the company sets up some cause declining to carry out the conversion the Tribunal is authorised to adjudicate whether the cause set up by the company is a cause reasonably justifying refusal to comply with the requisition.

The respondent had called upon the Bank under section 19 (2) to convert his partly paid-up shares into fully paid-up shares, but the Bank declined to comply with the requisition. The first question falling to be determined is whether the order of the Company Judge in the petition filed by the Bank under sections 55, 56 and 57 of the Indian Companies Act for sanctioning reduction of capital is conclusive and binding upon the respondent so as to deprive him of his right to claim that his partly paid-up shares be converted into fully paid-up shares. The order of the Court under section 60 of the Companies Act, 1913, sanctioning reduction would normally be binding upon all shareholders. But it must be noticed that section 3 of Act LXX of 1951 invests, save as expressly provided in that Act, the provisions of

the Act and of the Rules and Orders made thereunder with overriding effect notwithstanding anything contained in any other law for the time being in force or in any decree or order of a Court, or in any contract between the parties. By section 55 of the Indian Companies Act, 1913, a company limited by shares, if so authorised by its articles, may by special resolution sanctioned by the Court reduce its share capital, and the Court is authorised to make an order confirming the reduction, on such terms and conditions as it thinks fit. The Company Judge did make an order sanctioning reduction of the capital on conditions relating to conversion of the share holding of displaced persons, but the order could not deprive a displaced person of the special statutory right granted under section 19 of the Displaced Persons' (Debts Adjustment) Act (LXX of 1951). The Act has conferred a special right upon displaced persons to claim that their partly paid share holding be converted into fully paid shares: and this right may cease to be exercisable only if the Tribunal is satisfied that there is good cause for refusing conversion. It is not the refusal by the company to comply with the requisition, but the adjudication by the Tribunal which deprives the displaced person of his right to have his shares converted.

Before the Company Judge the validity of the resolution for reduction of capital was challenged on the ground that it was passed with a view to deprive the displaced persons of their right under section 19, and it may be assumed that the Company Judge having regard to the reasons recorded by him rejected that contention. But the order does not operate as *res judicata*, for the jurisdiction to decide whether there is good ground for refusing to grant the requisition for conversion by a displaced person is vested exclusively in the Tribunal and in no other body. It was open to any displaced person to avail himself of the option given by the order of the Company Judge; if he elected to avail himself of the option he would be bound by his election. But a displaced person was not obliged to avail himself of the option, and if he did not, his right to call upon the Bank to grant him conversion was not affected by the order of the Company Judge. The order of the Company Judge did not and could amount to a decision binding all displaced shareholders. If a displaced person does not desire to avail himself of the option he will be entitled thereafter to apply under clause (4) of section 19. The order passed by the Company Judge remains valid and binding but subject to such orders as the Tribunal may make in respect of any individual shareholder who makes an application under sub-section (4) of section 19. That is clear from the terms of clause (5) which ensures the validity of the action taken by the company or its board of directors in pursuance of the provisions of the Companies Act or of the memorandum or articles of association relating to the company, save as otherwise provided in section 19. We agree therefore with the view of the Courts below that the Tribunal did not lose its jurisdiction to adjudicate upon the petition filed by the respondent, merely because the Company Judge had given him and others similarly placed, an option which they could but were not obliged to elect.

The second question which falls to be determined is whether the cause shown by the Bank for refusing to convert the holding of the respondent into fully paid-up shares was good or sufficient. The Tribunal held that the resolution for reduction of capital was passed *mala fide* and with a view to deprive the displaced persons of their right to claim conversion of their partly paid-up shares. The Tribunal pointed out that even though the financial condition of the Bank was precarious for many years, the scheme of reduction of capital was only evolved after the parliament enacted Act (LXX of 1951) as an expedient to nullify the statutory right of displaced shareholders. The High Court also held that all the assets of the Bank had not disappeared and in any event absence of assets was by itself not a sufficient ground for depriving a displaced person of his statutory right. The finding of the Tribunal which was confirmed by the High Court establishes that the cause set up by the Bank was not genuine; the resolution for reduction of capital was a device to which resort was had for nullifying the statutory protection granted to displaced persons. That conclusion is supported by evidence, and ought according to the practice of this Court be regarded as binding. There was no other ground set up in support of the refusal by the Bank.

The order directing the Bank to convert the shares of the respondent into fully paid-up shares must therefore be confirmed, because no good cause has been shown by the Bank for declining to convert the partly paid shares. This appeal must fail and is dismissed with costs.

P.R.N.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT :—S. J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Chimanlal Jagjivandas Sheth

*Appellant.\**

v.

The State of Maharashtra

*Respondent.*

*Drugs Act (XXIII of 1940) (as amended by Act II of 1955), section 3 (b)—Construction—Drugs—Includes such substances like absorbent cotton wool, roller bandages, guaze and other things—Manufacture and sale of such things which were found to be below standard—Offence.*

Absorbent cotton wool, roller bandages, guaze and other things are “substances” used for or in the “treatment” within the meaning of section 3 (b) of the Drugs Act 1940 as amended by Act II of 1955. A person manufacturing and selling such things which were not of standard quality is guilty of an offence under section 18 of the Drugs Act.

Appeal by Special Leave from the Judgment and Order dated the 16th June, 1961 of the Bombay High Court in Cr. A. No. 21 of 1961.

*Rajni Patel*, Advocate and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *J. B. Dadachanji & Co.*, for Appellant.

*H. R. Khanna*, *R. H. Dhebar* and *R. N. Sachthey*, Advocates, for Respondent.

The Judgment of the Court was delivered by

*Subba, Rao, J.*—This appeal by Special Leave against the judgment of the High Court of Judicature at Bombay raises the question of construction of section 3 (b) of the Drugs Act, 1940, as amended by the Drugs (Amendment) Act, 1955, hereinafter called the Act.

This appeal has been argued on the basis of facts found by the High Court. The appellant was carrying on business in the name of Deepak Trading Corporation at Bulakhidas Building, Vithaldas Road, Bombay. On 27th December, 1958, the Sub-Inspector or Police accompanied by the Drug Inspector, raided the said building and found large quantities of absorbent cotton wool, roller bandages, guaze and other things. It was found that the appellant was not only storing these goods in large quantities but was actually manufacturing them in Bombay and passing them off as though they were manufactured by a firm of repute in Secunderabad. The samples of the aforesaid articles and lint were sent to the Government Analyst, who reported that out of the samples sent to him only the lint was of standard quality and the other articles were not of standard quality. The appellant was prosecuted before the Presidency Magistrate, 16th Court, Bombay, for an offence under section 18 of the Act, *inter alia*, for manufacturing drugs which were not of standard quality. The learned Presidency Magistrate acquitted the appellant on the ground that the prosecution had failed to prove that the articles were in the possession of the appellant. The High Court on a resurvey of the evidence came to a different conclusion and found that the said articles were not only found in the possession of the appellant but also were manufactured by him and that they were below the standard prescribed. On the finding, it convicted the appellant and sentenced him to undergo rigorous imprisonment for three months and to pay a fine of Rs. 500 under each count. Hence the appeal.

Though an attempt was made to argue that the said articles had not been proved to be below the prescribed standard, it was subsequently given up. The only

question that was argued is whether the said articles are drugs within the meaning of section 3 (b) of the Act. The said section reads :

"drug" includes :—

(i) all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals other than medicines and substances exclusively used or prepared for use in accordance with the Ayurvedic or Unani systems of medicine, and

(ii) such substances (other than food) intended to affect the structure or any function of the human body or intended to be used for the destruction of vermins or insects which cause disease in human beings or animals as may be specified from time to time by the Central Government by notification in the Official Gazette.

The said definition of "drugs" is comprehensive enough to take in not only medicines but also substances intended to be used for or in the treatment of diseases of human beings or animals. This artificial definition introduces a distinction between medicines and substances which are not medicines strictly so-called. The expression "substances", therefore must be something other than medicines but which are used for treatment. The part of the definition which is material for the present case is "substances intended to be used for or in the treatment". The appropriate meaning of the expression "substances" in the section is "things". It cannot be disputed, and indeed it is not disputed, that absorbent cotton wool, roller bandages and gauze are "substances" within the meaning of the said expression. If so, the next question is whether they are used for or in "treatment". The said articles are sterilized or otherwise treated to make them disinfected and then used for surgical dressing; they are essential materials for treatment in surgical cases. Besides being aseptic these articles have to possess those qualities which are utilized in the treatment of diseases. Thus for instance, in the case of gauze one of the articles concerned in this appeal—it has to conform to a standard of absorbency in order that it might serve its purpose; otherwise the fluid which oozes is left to accumulate at the site of the wound or sore. The Legislature designedly extended the definition of "drug" so as to take in substances which are necessary aids for treating surgical or other cases. The main object of the Act is to prevent sub-standards in drugs, presumably for maintaining high standards of medical treatment. That would certainly be defeated if the necessary concomitants of medical or surgical treatment were allowed to be diluted: the very same evil which the Act intends to eradicate would continue to subsist. Learned counsel submitted that surgical instrument would not fall within the definition and that gauze and lint would fall within the same class. It is not necessary for the purposes of this appeal to define exhaustively "the substances" falling within the definition of "drugs" and we consider that whether or not surgical instruments are "drugs", the articles concerned in this case are. Learned counsel for the appellant sought to rely upon a report of a high powered committee consisting of expert doctors, who expressed the opinion in the report that as the surgical dressings did not come under the purview of the Drugs Act, no control on their quality was being exercised. Obviously, the opinion of the medical experts would not help us in construing a statutory provision. We, therefore, hold, agreeing with the High Court, that the said articles are substances used for or in the "treatment" within the meaning of section 3 (b) of the Act.

An impassioned appeal was made for reducing the sentences imposed upon the appellant. When a similar argument was advanced in the High Court, it pointed out that this was a gross case where large quantities of spurious drugs had been manufactured by the appellant and passed off as goods manufactured by a firm of repute. The appellant was guilty of an anti-social act of a very serious nature. In our view, the punishment of rigorous imprisonment for three months was more lenient than severe. There is no case for interference with the sentences. The appeal fails and is dismissed.

K.S.

*Appeal dismissed.*

lungs". The Sessions Judge accordingly acquitted Mewa Singh, Mehar Singh and Pakhar Singh of the offence charged and convicted Narain Singh of the offence punishable under section 304, Part II of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for five years.

Against the order of conviction and sentence Narain Singh preferred an appeal to the High Court of Punjab. The High Court agreed with the view of the Sessions Court that the evidence was insufficient to establish the case for the prosecution, the High Court also held that the Sessions Court was justified in relying upon the statement made by Narain Singh under section 342 of the Code of Criminal Procedure and in holding that Narain Singh "had exceeded the right of self-defence" and by causing the death of Bachan Singh by stabbing him with a *kirpan*, had committed an offence punishable under section 304, Part II, Indian Penal Code. The High Court, however, reduced the sentence imposed upon Narain Singh to rigorous imprisonment for 3 years and subject to that modification dismissed the appeal against the order of conviction and sentence. With Special Leave Narain Singh had appealed to this Court.

The case for the prosecution was that Narain Singh, when he participated in the assault on Bachan Singh, was armed with a stick, but the evidence of the witnesses about the assault on Bachan Singh has not been accepted by the Court of Session and the High Court. In the view of the Courts injuries on the person of Bachan Singh were caused by Narain Singh by striking him with a *kirpan*, and the three nephews of Narain Singh had not participated in the assault. In finding Narain Singh guilty of the offence under section 304, Part II for causing injuries to the victim Bachan Singh with a *kirpan* the Court of Session and the High Court have accepted a case which was not the case of the prosecution, but have relied only upon the statement of Narain Singh made in his defence. Under section 342 of the Code of Criminal Procedure by the first sub-section, in so far as it is material, the Court may at any stage of the enquiry or trial and after the witnesses for the prosecution have been examined and before the accused is called upon for his defence shall put questions to the accused person for the purpose of enabling him to explain any circumstance appearing in the evidence against him. Examination under section 342 is primarily to be directed to those matters on which evidence has been led for the prosecution, to ascertain from the accused his version or explanation, if any, of the incident which forms the subject-matter of the charge and his defence. By sub-section (3), the answers given by the accused may "be taken into consideration" at the enquiry or the trial. If the accused person in his examination under section 342 confesses to the commission of the offence charged against him the Court may, relying upon that confession, proceed to convict him, but if he does not confess and in explaining circumstances appearing in the evidence against him sets up his own version and seeks to explain his conduct pleading that he has committed no offence, the statement of the accused can only be taken into consideration in its entirety. It is not open to the Court to dissect the statement and to pick out a part of the statement which may be incriminative, and then to examine whether the explanation furnished by the accused for his conduct is supported by the evidence on the record. If the accused admits to have done an act which would but for the explanation furnished by him be an offence, the admission cannot be used against him divorced from the explanation.

The Courts below were of the view that the prosecution evidence as it stood, was insufficient to bring home the charge against Narain Singh and his nephews. The case for the prosecution that Narain Singh was armed with a stick and joined in the assault upon Bachan Singh was sought to be established by affirmative evidence. The case failed because the evidence in support of the case was unreliable. Narain Singh admitted that he had caused injuries to Bachan Singh with a *kirpan* carried by him, but he explained that he caused the injuries when he was thrown down and Bachan Singh was attempting to strangle him. There can be no

doubt that if a person reasonably apprehends that his assailant is attempting to strangle him, exercise of the right of defence of person extends even to causing death of the assailant. Narain Singh pleaded that he had fallen down and Bachan Singh attempted to strangle him and therefore he caused injuries to Bachan Singh in exercise of the right of self-defence. This plea had to be considered as a composite plea : it was not open to the Court to investigate whether Narain Singh could have reasonably apprehended such injury to himself as justified him in causing the death of Bachan Singh. Where a person accused of committing an offence sets up at his trial a plea that he is protected by one of the exceptions, general or special, in the Indian Penal Code, or any other law defining the offence the burden of proving the exception undoubtedly lies upon him. But this burden is only undertaken by the accused if the prosecution case establishes that in the absence of such a plea he would be guilty of the offence charged. The prosecution case, however, did not by reliable evidence establish affirmatively that Narain Singh had done any act which rendered him liable for the offence of murder. His responsibility, if any, arose only out of the plea raised by him : if the plea amounted to a confession of guilt the Court could convict him relying upon that plea, but if it amounted to admission of facts and raised a plea of justification, the Court could not proceed to deal with the case as if the admission of facts which were not part of the prosecution case was true, and the evidence did not warrant the plea of justification.

The Courts below were, therefore, in our judgment, in error in convicting Narain Singh of the offence under section 304, Part II of the Indian Penal Code.

K.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR, A. K. SARKAR AND M. HIDAYATULLAH, JJ.

Bhiva Doulu Patil

.. Appellant.\*

v.

The State of Maharashtra

.. Respondent.

*Evidence Act (I of 1872), sections 133 and 114, Illustration (b)—Combined effect—Conviction based on approver's evidence—When sustainable.*

*Criminal trial—Conviction based on approver's evidence—When sustainable.*

The combined effect of section 133 and section 114 Illustration (b) may be stated as follows: According to the former, which is a rule of law, an accomplice is competent to give evidence and according to the latter which is a rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the Court will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars. Without corroboration of the approver *qua* a particular accused person a conviction of that accused person is unsustainable, the law being that there should be corroboration of the approver i: material particulars and *qua* each accused.

Appeal by Special Leave from the Judgment and Order dated the 12th/13th April, 1961 of the Bombay High Court in Cr.A. No. 308 of 1961.

G. C. Mathur, Advocate (*amicus curiae*), for Appellant.

S. B. Jathar and R. N. Sachthy, Advocates, for Respondent.

The Judgment of the Court was delivered by

*Kapur, J.*—This is an appeal against the judgment and order of the High Court of Bombay confirming the conviction of the appellant for an offence under section 302, Indian Penal Code, read with section 34 for the murder of one Lahu Vithu Patil on the night between 23rd and 24th May, 1960 at village Pasarde.

Four persons Rama Krishna Patil accused No. 1, Bhiya Doulu Patil accused No. 2 (now appellant before us), Lahu Santu Patil accused No. 3 and Deoba approver

P. W. 5 are alleged to have taken part in the murder of Lahu Vithu Patil. Rama Krishna Patil accused No. 1 was convicted of murder and sentenced to death but on appeal his sentence was reduced to one of imprisonment for life. The appellant was convicted as above stated and sentenced to imprisonment for life. The third accused Lahu Santu Patil was acquitted and the 4th participant Deoba turned approver and is P.W. 5.

The case for the prosecution was that the appellant had a suspicion that the deceased had a liaison with his wife. He, the appellant, approached the approver and suggested that the deceased should be killed. This was on 16th March, 1960. On 17th March, 1960, Rama Krishna Patil accused No. 1 and appellant got a knife prepared by Nanu Santu Sutar P.W. 7 from a crowbar. The deceased was a wrestler and he and his brothers used to sleep in the fields and they also had dogs and for that reason the murder could not be committed for sometime. When rains set in, the deceased started sleeping at Patil's *Talim* (gymnasium). There, on the night of the murder the deceased was killed with the knife which was used by Rama Krishna Patil accused No. 1. At that time the appellant had a torch and two others Lahu Santu Patil and Deoba were unarmed. Two blows were given by accused No. 1 one on the throat and the second one on the left side of the chest. At the place of the occurrence the assailants left a towel and a *patka* (turban). Both these articles have been found to belong to accused No. 1 Rama Krishna Patil. Hearing the noise and groaning of the deceased, Lahu Vithu Patil, other persons who were sleeping were awakened and one of them went and informed the brother of the deceased and then the first information report was made to the police but no names were mentioned therein. On 6th June, 1960, Deoba was arrested on information received by Police Sub-Inspector Mandke. On 25th June, 1960, as a result of a statement made by accused No. 1 the knife which is alleged to have been used for the murder was recovered. This knife is stated to be stained with blood but it has not been proved to be human blood. It may be stated that the knife was of rather unusually large dimensions. The two injuries on the deceased were very extensive and according to the medical evidence they could have been caused with the knife which was recovered.

The question that arises in the present case is whether the statement of the approver has been corroborated in material particulars and *qua* the appellant. The trial Court convicted the appellant on the testimony of the approver and found corroboration for the approver's testimony in the statement of Nanu Santu Sutar P. W. 7 who had prepared the knife alleged to have been used for the offence on 17th March, 1960 and his motive to commit murder because of the suspicion he had about his wife having a liaison with the deceased. These facts according to the learned Judge were sufficient to convict the appellant. The High Court on appeal found corroboration in material particulars; from the evidence of Santu P.W. 6 brother of Deoba to whom Deoba had made a confession of his participation in the offence; the discovery of the knife at the instance of accused No. 1 and the knife being found blood-stained and the unusual character of the knife which fitted in with the dimensions of the injuries caused to the deceased. From those facts the learned Judges came to the conclusion that the approver Deoba was giving a true version of the occurrence. With great respect to the High Court we are unable to agree because without corroboration of the approver *qua* the appellant the conviction is unsustainable, the law being that there should be corroboration of the approver in material particulars and *qua* each accused.

The statement of Santu, brother of the approver is no corroboration of the approver. It only means that the approver made a confessional statement to his brother. That cannot be called, in the circumstances of this case, to be a corroboration of the approver. The evidence of Nanu Santu Sutar P. W. 7 also cannot operate as a corroboration of the approver's story because the knife was got prepared by accused No. 1 and the appellant nine weeks before the murder and that fact by itself will not corroborate the charge under section 302 read with section 34 of the Indian



Penal Code against the appellant. The time gap between the preparation of the knife and murder is great and it is possible in such circumstances that the appellant might have recanted and not proceeded with the commission of the offence. The finding of the knife at the instance of the first accused also is no corroboration of the approver's story which would be sufficient to connect the appellant with the murder, under section 34 of the Indian Penal Code. It may be that in this case the approver's evidence was sufficiently corroborated for the conviction of the first accused upon which we express no opinion but so far as the appellant is concerned we find that there is no corroboration of the approver's story and it is not sufficient that there is evidence to corroborate the participation of the first accused in the murder. It is also necessary for there being independent corroboration of the participation of the appellant in the offence with which he has been charged. In these circumstances the conviction of the appellant is not sustainable.

In coming to the above conclusion we have not been unmindful of the provisions of section 133 of the Evidence Act which reads :—

Section 133. "An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

It cannot be doubted that under that section a conviction based merely on the uncorroborated testimony of an accomplice may not be illegal, the Courts nevertheless cannot lose sight of the rule of prudence and practice which in the words of Martin, B. in *R. v. Boyes*<sup>1</sup>, "has become so hallowed as to be deserving of respect" and the words of Lord Abinger "it deserves to have all the reverence of the law." This rule of guidance is to be found in *Illustration (b)* to section 114 of the Evidence Act which is as follows :—

"The Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars."

Both sections are part of one subject and have to be considered together. The Privy Council in *Bhuboni Sahu v. The King*,<sup>2</sup> when its attention was drawn to the judgment of Madras High Court in *re Rajagopal*<sup>3</sup>, where conviction was based upon the evidence of an accomplice supported by the statement of a co-accused, said as follows :—

"Their Lordships.....would nevertheless observe that Courts should be slow to depart from the rule of prudence, based on long experience, which requires some independent evidence implicating the particular accused. The danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue."

The combined effect of sections 133 and 114, *Illustration (b)* may be stated as follows : According to the former, which is a rule of law, an accomplice is competent to give evidence and according to the latter which is a rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the Courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars. The law may be stated in the words of Lord Reading, C.J., in *R. v. Baskerville*<sup>4</sup>, as follows :—

"There is no doubt that the uncorroborated evidence of an accomplice is admissible in law (*R. v. Attwood*).<sup>5</sup> But it has been long a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice, and in the discretion of the Judge, to advise them not to convict upon such evidence, but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence (*R. v. Stubbs*,<sup>6</sup> *In re Meunier*).<sup>7</sup>

We therefore allow this appeal, set aside the order of conviction and direct that the appellant be released forthwith.

K.S.

*Appeal allowed.*

1. 9 Cox.C.C. 32.  
2. L.R. 76 I.A. 147 : (1949) 2 M.L.J. 194 (P.C.).  
3. I.L.R. (1944) Mad. 308 : (1943) 2 M.L.J. 634.

4. L.R. (1916) 2 K.B. 658.  
5. (1787) 1 Leach 461.  
6. Devis 555.  
7. L.R. (1894) 2 Q.B. 415.

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. C. DAS GUPTA, AND RAGHUBAR DAYAL, JJ.

R. G. Jacob

.. Appellant\*

The Republic of India

.. Respondent.

*Penal Code (XIV of 1860), section 165—Gist of offence under—"Subordinate"—It should be in respect of the very functions.*

An Assistant Controller of Imports is administratively subordinate to the Joint Chief Controller of Imports and Exports and where he is proved to have accepted illegal gratification promising that he would use his influence and help to get an "export" permit an application for which had been rejected by the Assistant Controller of Exports an offence under section 165 of the Penal Code is made out. The argument that "subordinate" means something more than administratively subordinate must be rejected.

Appeal from the Judgment and Order dated the 14th December, 1960 of the Madras High Court in Criminal Appeal No. 933 of 1959.†

S. Mohan Kumaranangalam, Senior Advocate (R. Ganapathy Iyer, Advocate and G. Gopalakrishnan, Advocate of M/s. Gagrath & Co., with him), for Appellant.

C. K. Daphtary, Solicitor-General of India and D. R. Prem, Senior Advocate (R. N. Sachithy and P. D. Menon, Advocates, with them), for Respondent.

The Judgment of the Court was delivered by

*Das Gupta, J.*—The appellant who was the Assistant Controller of Imports in the office of the Joint Chief Controller of Imports and Exports, Madras, was tried by the Special Judge, Madras, on three charges—one under section 161 of the Indian Penal Code, another under section 5 (1) (d) read with section 5 (2) of the Prevention of Corruption Act and the third—which was added later under section 165 of the Indian Penal Code. He was acquitted of the first two charges but was convicted of an offence under section 165 of the Indian Penal Code and sentenced to rigorous imprisonment for one year. He appealed to the High Court of Madras; but the High Court dismissed the appeal and affirmed the order of conviction, but reduced the sentence to that of fine of Rs. 400 in default rigorous imprisonment for three months. The High Court has however granted a certificate under Article 134 (1) (c) of the Constitution that this was a fit case for appeal to this Court. On the basis of that certificate this appeal has been filed.

The prosecution case is that one K. R. Naidu (who has been examined as Prosecution Witness No. 8) a merchant having export business in onions, chillies and groundnuts made on January 21, 1958, an application for export of chillies. He was informed by a letter dated March 5, 1958, that the application had been rejected. This letter was purported to be signed by the Assistant Controller of Exports for the Joint Chief Controller of Imports and Exports. Arumugam (Prosecution Witness No. 1) who had been acting on behalf of Naidu in this matter then sought the assistance of this appellant for getting a permit for Naidu. When he met the appellant later the same evening the appellant told him that an appeal of Imports and Exports, Rangaswamy. The appellant also proposed that if he was given two bags of cement and Rs. 50 he would use his influence and help him to get him the permit. Arumugam agreed and the appellant gave Arumugam a sheet of paper stating the address to which the cement was to be sent. On the next day the memorandum of appeal was sent by registered post to Rangaswamy, the Joint Chief Controller. The same day Arumugam saw the Deputy Superintendent, Special Police Establishment, and gave him a complaint in writing mentioning all the facts. A trap was thereafter laid with a view to catch the appellant in the

\*Criminal Appeal No. 116 of 1961.

† (1961) 2 M.L.J. 547; (1961) M.L.J. (Cal.) 776.

actual act of accepting the bribe. On the evening of April 3, 1958, Arumugam went to the house of the appellant with two cement bags which had been marked by putting attested cards inside the bags and Rs. 50 in currency notes the numbers of which were noted by the Deputy Superintendent of Police. The appellant accepted the cement bags and the money from Arumugam. The two cement bags were put in a room of the building as directed by the appellant. Immediately after this the Deputy Superintendent of Police, who had been waiting according to the arrangement a little distance away from the house came into the house on getting the pre-arranged signal from Arumugam. He revealed his identity to the appellant and asked him to produce the money and cement bags. The accused then took him upstairs and opened an Almirah with his own keys and produced from inside the Almirah the very notes of which the number had been taken by the Deputy Superintendent of Police. The cement bags with the marks inside were also found downstairs.

The accused pleaded not guilty. He admits the recovery of the cement bags and the currency notes from his house but pleads that neither of these have been given to him and that the notes were found on the table and the cement bags were in the hall nearby; and these had been kept in his house without his knowledge or consent by Arumugam who wanted to make up a false case against him. According to him the whole story of his being approached by Arumugam or his asking for cement bags or money, or accepting them, is entirely false.

The Special Judge as also the High Court accepted the prosecution evidence in these matters as true and rejected the defence version and Mr. Kumaramangalam has rightly not tried to challenge before us the findings of facts. His principal contention in support of the appeal is that assuming the findings to be true, an offence under section 165, Indian Penal Code, has not been established. This contention is based mainly on the fact that the appellant was Assistant Controller of Imports only and had no connection with the issue of export permits. According to the learned counsel he was not therefore "subordinate" to the Joint Chief Controller of Imports and Exports to whom the appeal petition had been filed and consequently his acceptance of cement bags from Arumugam did not amount to an offence under section 165 of the Indian Penal Code. Section 165 of the Indian Penal Code runs thus :—

"165. Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate from any person whom he knows to have been or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

What has been proved in this case is : (1) That the appellant, a public servant, accepted some valuable things from Arumugam without consideration. (2) Arumugam was concerned in an appeal against an order rejecting an application for export licence. (3) This proceeding had connection with the official functions of the Joint Chief Controller of Imports and Exports who was a public servant. (4) The appellant knew that Arumugam was concerned in this proceeding having connection with the official function of the Joint Chief Controller of Imports and Exports, (5) The appellant was in respect of his official position subordinate to the Joint Chief Controller of Imports and Exports. It may be mentioned that it is not disputed that at the relevant time, viz., March, 1958 the accused was the Assistant Controller of Imports only and had nothing to do with export permits.

All the ingredients of an offence under section 165, Indian Penal Code, appear therefore to have been proved *prima facie*. Mr. Kumaramangalam's contention is that the fifth fact mentioned above, viz., that the appellant was in respect of his official position "subordinate" to the Joint Chief Controller of Imports and Exports is not sufficient to establish his "subordination" to the Joint Chief Controller of Imports and Exports within the meaning of section 165.

individual opinions, that cannot be said to constitute the contravention of section 59(3). Indeed section 59(3) does not impose an obligation on the Board to make any report at all.

*Per Subba Rao, J.*—Under the Act, there are two connected powers—a power to appoint a Mining Board and a power to make regulations subject to a condition. The condition imposed on the power confers a right on a Mining Board to be consulted before a regulation is made. A combined reading of section 12 and sections 57 and 59 shows that the power or powers conferred on the Central Government are coupled with a duty to consult the Board whenever the Central Government seeks to exercise the power under section 57. This power is coupled with a duty and that power has to be exercised when the duty demands it. The Central Government in making the Regulations has a duty to consult the Mining Board and the Mining Board has a right to be so consulted; and to discharge its duty it is incumbent upon the Central Government to exercise the connected power by appointing the Board.

Petition under Article 32 of the Constitution for the enforcement of Fundamental Rights.

*B. Sen*, Senior, Advocate, (*K.L. Hathi*, Advocate with him), for Petitioners.

*C.K. Daphtary*, Solicitor-General of India, (*B.R.L. Iyengar* and *R.H. Dhebar*, Advocates with him), for Respondents.

*S. Chowdhury*, Senior Advocate, (*S.C. Banerjee*, and *P.K. Chatterjee*, Advocates with him), for Intervener.

The Judgments of the Court were delivered by

*Gajendragadkar, J.* (on behalf of the majority).—The four petitioners who are in charge of the working of the mine owned by the colliery known as Salanpur "A" Seam Colliery in the District of Burdwan, are being prosecuted for the alleged contravention of the provisions of Regulation 127 (3) of the Coal Mines Regulations, 1957, framed under the Mines Act, 1952 (XXXV of 1952) (hereinafter called the Act). By their petition filed under Article 32 of the Constitution, the petitioners pray that an order or writ in the nature of prohibition should be issued quashing the said criminal proceedings on the ground that the said proceedings contravene Article 20 (1) of the Constitution and as such, are void. To this petition have been impleaded as opponents 1 to 4, the Union of India, the Chief Inspector of Mines, Dhanbad (W.B.) the Regional Inspector of Mines Sitarampur and the Sub-Divisional Magistrate, Asansol, respectively. The prosecution of the petitioners has commenced at the instance of opponents 2 and 3 and the case against them is being tried by opponent No 4. The petitioners' contention is that Regulation No. 127 (3) whose alleged contravention has given rise to the present proceedings against them is invalid, *ultra vires* and inoperative and so, the prosecution of the petitioners contravenes Article 20 (1) of the Constitution. It is on this basis that they want the said proceedings to be quashed and ask for an order restraining opponents 2 and 3 from proceeding with the case and opponent No. 4 from trying it. The case in question is C. No. 783 of 1961 pending in the Court of opponent No. 4.

Regulation 127 (3) is a part of the Coal Mines Regulations framed by opponent No. 1 in exercise of the powers conferred upon it by section 57 of the Act, the same having been previously published as required by sub-section (1) of section 59 of the said Act. Regulation 127 (3) provides that no working which has approached within a distance of 60 metres of any disused or abandoned workings (not being workings which have been examined and found to be free from accumulation of water or other liquid matter), whether in the same mine or in an adjoining mine, shall be extended further except with the prior permission in writing of the Chief Inspector and subject to such conditions as he may specify therein. There is a Proviso and *Explanation* attached to this provision, but it is unnecessary to refer to them. The case against the petitioners is that they have contravened the provisions of Regulation 127 (3) in that they extended the working of the mine further than the permitted limits without the prior permission in writing of opponent No. 2. The petitioners' case is that this Regulation is invalid and inoperative and so, its contravention cannot validly be made the basis of their prosecution having regard to the provisions of Article 20 (1) of the Constitution.

According to the petitioners, opponent No. 1 is no doubt conferred with the power of making Regulations under section 57 of the Act, but section 59 (3), as it

stood at the relevant time, has imposed an obligation on opponent No. 1 that the draft of the said Regulations shall not be published unless the Mining Boards therein specified have had a reasonable opportunity of reporting to it as to the expediency of making the Regulations in question and as to the suitability of its provisions. The petitioners allege that at the relevant time, when the Regulations were made in 1957, no Mining Boards had been established under section 12 of the Act. Three Boards had been established under section 10 of the Indian Mines Act of 1923, but as a result of the subsequent amendments made in the provisions of section 10, the composition of two of the said Boards became invalid with the result that two of them could not be treated as Boards validly constituted. These invalid Boards, were the Madhya Pradesh Mining Board and the West Bengal Mining Board. A third Board existed at the relevant time and that is the Bihar Mining Board. This Board had been constituted on the 22nd February, 1946 under section 10 of the earlier Act as it then stood. The petitioners' case is that it was obligatory for opponent No. 1 to consult all the three Boards and since two out of the three Boards were not properly constituted, the fact that reference was made to the individual members of the said two invalid Boards did not satisfy the requirement of section 59 (3). According to the petition, a reference was made to the Bihar Mining Board, but the Board did not make a report to opponent No. 1 as a Board but its individual members communicated their opinions to opponent No. 1. Therefore, on the whole section 59 (3) had not been complied with and that makes the whole body of Regulations issued in 1957 invalid and inoperative. That, in brief, is the basis on which the petitioners want the criminal proceedings pending against them to be quashed.

The respondents dispute the main contention of the petitioners that section 59 (3) has not been complied with. According to them, section 59 (3) has been duly complied with and the Regulations made are valid. The respondents concede that two out of the three existing Board were invalid; but their case is that it is only the validly existing Board that had to be consulted and the Bihar Mining Board, which was the validly existing Board at the relevant time, had been duly consulted. The respondents allege that the fact that individual members of the Bihar Mining Board communicated their opinions to opponent No. 1 does not introduce any infirmity in the Regulations which were subsequently published in the Gazette and which, under section 59 (5) have, in consequence, the effect as if enacted in the Act.

On behalf of the petitioners, Mr. Sen contends that section 59 (3) imposes an obligation on the Central Government to consult the Boards therein specified and he argues that reading section 12 of the Act in the light of section 59 (3), it follows that the Central Government has to constitute Mining Boards for the areas or mines in respect of which the Regulations are intended to be made and since two of the Boards had not been validly constituted, section 12 had not been complied with and section 59 (3) had been contravened. Mr. Sen suggested that his contention about the mandatory character of the provisions contained in sections 12 and 59 (3) is concluded by a recent decision of this Court. On the other hand, the learned Solicitor-General for the respondents contends that the said decision has no material or direct bearing on the question about the construction of section 12. He concedes that the said decision has concluded the point that the requirement of section 59 (3) is mandatory. It is, therefore, necessary, in the first instance, to examine the effect of the said decision.

In *Banwari Lal Agarwalla v. State of Bihar and others*<sup>1</sup>, this Court had occasion to consider the validity of the prosecution launched against the appellant on the ground of the contravention of one of the Regulations made in 1957. It appears that in that case, the respondents stated before the Court that the Mining Boards constituted under section 10 of the Act of 1923 were continuing to operate at the time the relevant Regulations were framed and that there was full consultation with the said Mining Boards before the said Regulations were framed. The respondents, no doubt, contended that section 59 (3) was directory and not mandatory and ac-

1. (1962) 2 S.C.J. 27 : (1962) M.L.J. (Cr.) 399: A.I.R. 1961 S.C. 849.

Central Government is compelled to constitute Boards under section 12. *Prima facie*, there is some force in this contention. But, on the other hand, if section 59 (3) is read as imposing an obligation on the Central Government to consult the Board if it is in existence, then no corollary would follow from the mandatory character of the said provision as is suggested by Mr. Sen. Section 59 (3) as it stood before the amendment of 1959, provides that every Mining Board which, in the opinion of the Central Government, is concerned with the subject dealt with by the regulation, shall be consulted ; and this means that there should be a Mining Board before it is consulted and that the said Mining Board should, in the opinion of the Central Government, be concerned with the subject dealt with by the regulation. This provision does not mean that a Mining Board must be constituted, for that is the subject-matter of the provisions contained in section 12. If section 12 is not mandatory, then section 59 (3) must be read in the light of the position that it is open to the Central Government to constitute the Board or not to constitute it, and that being so, section 59 (3) would then mean only this and no more that if the Board is in existence and it is concerned with the subject, it must be consulted.

Similarly, section 59 (4) as it stands after the amendment of 1959, requires that the draft of the rule or regulation shall be referred to every Mining Board constituted in that part of the territories to which the Act extends which is affected by the regulation or rule. That again means no more than this that if a Board is constituted in the part of the territories which is affected by the regulation, it shall be consulted. It is not as if this construction adds any words in section 59 (3) or section 59 (4) ; it merely proceeds on the basis that section 12 (1) is not mandatory. Therefore, in our opinion, in construing section 12 (1) it would not be logical to assume that section 59 (3) or section 59 (4) imposes an obligation on the Central Government to constitute a Board because as we have just indicated the constitution of the Boards is not the subject-matter of section 59 (3) or section 59 (4) ; that is the subject-matter of section 12 and, so, whether or not it is obligatory on the Central Government to constitute a Board must be determined in the light of the construction of section 12.

Reverting then to the material words used in section 12 itself, it seems clear that the said words do not permit the construction for which Mr. Sen contends. It is not disputed that the context may justify the view that the use of the word " may " means " shall " ; but if we substitute the word " shall " for " may " in section 12 (1), it would be apparent that the argument about the mandatory character of the provisions of section 12 (1) would just not work. To say that the Central Government shall constitute for any part of the territories to which the Act extends or for any group or class of mines a Mining Board, would emphatically bring out the contradiction between the obligation sought to be introduced by the use of the word " shall " and the obvious discretion left to the Central Government to constitute the Board for any part of the territories or any group or class of mines. The discretion left to the Central Government in the matter of constitution of Board which is so clearly writ large in the operative part of the said provision indicates that in the context, " may " cannot mean " shall ". Section 12 (1) really leaves it to the discretion of the Central Government to constitute a Board for any part of the territories and that means, it may not constitute a Board for some parts of the territories. Likewise, discretion is left to the Central Government to constitute a Board for a group or class of mines and that means that for some groups or some classes of mines, no Board need be constituted. Whether or not Boards should be constituted for parts of territories or for groups or classes of mines, has been left to be determined by the Central Government according to the requirements of the territories or the exigencies of the groups or classes of mines. Therefore, we are unable to accept the argument that section 12 (1) imposes an obligation on the Central Government to constitute Boards in order that in making regulations, there should be appropriate Boards who have to be consulted under section 59 (3). The directory nature of the provisions of section 12 (1) rather strengthen the construction placed upon section 59 (3) by this Court in the case of *Banwari Lal Agarwalla*<sup>1</sup> that if there are Boards in existence, they must be consulted

1. (1962) 2 S.C.J. 27 : (1962) M.L.J. (Grl.) 399 : A.I.R. 1961 S.C. 849.

before draft regulations are published under section 59. But that is very different from saying that Boards must be constituted in all areas or in respect of all groups or classes of mines which are intended to be covered by the regulations proposed to be made by the Central Government.

Mr. Sen relied on section 5 for showing that the use of the word "may" in that section really means "shall". The said section provides that the Central Government may appoint such a person as possesses the prescribed qualifications to be the Chief Inspector of Mines for all territories to which the Act extends; and it may be conceded that the implementation of the material provisions of the Act depends upon the appointment of the Chief Inspector of Mines and so, in the context, "may" in section 5 would really mean "shall" so far as the appointment of the Chief Inspector is concerned. But this section itself shows that "may" may not necessarily mean "shall" in regard to the appointment of Inspectors contemplated by the latter part of the said section. Whether or not the word "may" means "may" or it means "shall" would inevitably depend upon the context in which the said word occurs and as we have just indicated, the context of section 12 (1) is not in favour of the construction for which Mr. Sen contends. It cannot be said that like the appointment of the Chief Inspector of Mines, the constitution of the Boards is essential for the working of the Act, for, without the constitution of the Boards, the working of the Act can smoothly proceed apace. We have already pointed out that there are only two functions which can be assigned to the Boards; under section 81 (2) it is discretionary for the Central Government to refer a pending criminal case to the Board or not, and under section 59 (3) consultation with the Board is necessary only if the Board is in existence. Therefore, the working of the Act is not necessarily dependent on the constitution of the Boards, and that distinguishes the context of section 12 from the context of section 5.

There is another provision of the Act to which reference may be made in this connection. Section 61 deals with the making of the bye-laws. Section 61 (1) provides that the owner, agent or manager of a mine may, and shall, if called upon to do so by the Chief Inspector or Inspector, frame and submit to the Chief Inspector or Inspector a draft of bye-laws in the manner indicated in the said sub-section. Section 61 (2), *inter alia*, authorises the Chief Inspector or the Inspector to propose amendments in the said draft. Section 61 (3) then lays down that if within a period of two months from the date on which any draft bye-laws or draft amendments are sent by the Chief Inspector or Inspector to the owner, agent or manager under sub-section (2), and the Chief Inspector or Inspector and the owner, agent or manager are unable to agree as to the terms of the bye-laws to be made under sub-section (1), the Chief Inspector or Inspector shall refer the draft bye-laws for settlement to the Mining Board, or, where there is no Mining Board, to such officer or authority as the Central Government may, by general or special order, appoint in this behalf. It would be noticed that this sub-section assumes that there may not be in existence a Mining Board in the area where the mine in question is situated or for the group or class of mines to which the said mine belongs. Now, if the petitioner's construction of section 12 read with section 59 (3) is accepted, it would follow that in order to make the regulations binding on all the mines situated in the whole of the country, there must be Mining Boards in respect of all the said mines either territory-wise or group-wise or class-wise; and that would not be consistent with the assumption made by section 61 (3) that in certain areas or in respect of certain groups or classes of mines a Mining Board may not be in existence. It is in this indirect way that section 61 (3) supports the construction which we are disposed to place on section 12 (1).

It is then urged that if the respondents' construction of section 12 is upheld, section 59 (3) or section 59 (4) would be rendered nugatory and the whole purpose of consulting the Boards would be defeated. We are not impressed by this argument. In testing the validity of this argument, it is necessary to recall the scheme of section 59. Section 57 confers power on the Central Government to make regulations and section 58 confers power on the said Government to make rules as therein specified respectively. Section 59 (1) requires that the power to make regulations is subject to the

condition that the said regulations would be made after previous publication. Section 59 (2) then provides for the period which has to pass before the said draft can be taken into consideration. Section 59 (3) refers to the consultation with the Boards. Logically, consultation with the Boards is the first step to be taken in making regulations; publication of the draft regulations is the second step; allowing the prescribed period to pass before the draft is considered is the third step and publishing the regulations after considering them is the last step. After the regulations are thus published, they shall have effect as if enacted in the Act. That is section 59 (5). The first publication is the publication of the draft under section 23 (3) of the General Clauses Act and it is significant that the object of this publication is to invite objections or suggestions from persons or bodies affected by the draft regulations. Section 23 (4) of the General Clauses Act provides that the authority having power to make the rules or regulations shall consider any objection or suggestion which may be received with respect to the draft before the date specified therein, so that the whole object of publishing the draft is to give notice to the parties concerned with the regulations which are intended to be framed and the object of the requirement that the said draft will not be considered until the prescribed period has passed is to enable parties concerned to file their objections. Therefore, the scheme of section 59 clearly shows that apart from consulting the Boards to which section 59 (3) refers, all parties affected by the draft would have an opportunity to make their suggestions or objections and they would be considered before the draft is settled and regulations are finally made. Therefore, in our opinion, it would not be correct to say that the construction of section 59 (3) for which the respondents contend would enable the Central Government to make regulations without consulting the opinion of persons affected by them. The result then is that section 12 (1) is directory and not mandatory and section 59 (3), or section 59 (4) after the amendment in 1959 is mandatory in the sense that before the draft regulation is published, it is obligatory for the Central Government to consult the Board which is constituted under section 12. If no Board is constituted there can be, and need be, no consultation.

It is in the light of this position that the grievance made by the petitioners against the validity of their prosecution has to be judged. We have already noticed that it is common ground between the parties that the Madhya Pradesh Mining Board and the West Bengal Mining Board which were constituted under section 10 of the Act of 1923 have become invalid after the amendment of section 10 by the Amending Act V of 1935. Under section 10 as it originally stood, the Board was constituted by the Provincial Government and it was composed of five members. After the amendment a Board had to be constituted by the Central Government and it was to consist of seven members. That is why the respondents concede that the Madhya Pradesh and West Bengal Mining Boards could not be said to be validly constituted for the purposes of section 12 even by the application of section 24 of the General Clauses Act. The position then is that at the time when the regulations were framed in 1957, there was only one Board which was properly constituted and that is the Bihar Mining Board. It was constituted in 1946 and by virtue of section 24 of the General Clauses Act, it continued as a valid Board under section 12. This Board has been consulted by the Central Government before the regulations were made. It is not disputed that the draft regulations were sent by the Central Government to the Bihar Mining Board through the State Government. It appears that after the Board received the said draft, it was circulated by the Chairman of the Board to all the members of the Board and the members communicated their opinions individually. It is argued that the communication by individual members of the Board of their opinions to the Central Government cannot be said to amount to the consultation with the Board and so, it is urged that the requirement of section 59 (3) has not been complied with. We do not think there is any substance in this argument. All that section 59 (3) requires is that a reasonable opportunity should be given to the Board to make its report as to the expediency or the suitability of the proposed regulations. How the Board chooses to make its report is not a matter which the Central Government can control. The Central Government has discharged its obligation as soon as it is shown that a copy of the draft regulations was sent to the Board, and if the Board



thereafter, instead of making a collective report, chose to send individual opinions, that cannot be said to constitute the contravention of section 59 (3). Indeed, section 59 (3) does not impose an obligation on the Board to make any report at all. It is true that since under section 14, the Board is empowered to make a report, it is unlikely that any Board, when consulted, would refuse to make a report. But, nevertheless, the position still remains that if the Board refused to make a report, that will not introduce any infirmity in the regulations which the Central Government may ultimately frame and publish under section 59 (5). We must accordingly hold that the regulations framed in 1957 have been duly framed and published under section 59 (5) and as such, they shall have effect as if enacted in the Act.

The result is, the petition fails and is dismissed.

*Subba Rao, J.*—I regret my inability to agree. The facts relevant to the question raised lie in a small compass. The petitioners are in charge of the working of a mine, known as Salanpur "A" Seam Colliery, in the District of Burdwan, West Bengal. On the allegation that they contravened the provisions of Regulation 127 (3) of the Coal Mines Regulations, 1957 (hereinafter called the Regulations), a criminal complaint was filed against them in the Court of Sub-Divisional Magistrate, Asansol, and the said Magistrate has taken cognizance of the said complaint under section 190 (1) (c) of the Code of Criminal Procedure, read with section 73 of the Mines Act, 1952 (hereinafter called the Act).

The petitioners challenge the validity of the said Regulations on the ground that they were made in contravention of the provisions of section 59 (3) of the Act. Section 59 (3) of the Act imposes a condition on the Central Government to give a reasonable opportunity to a Mining Board before making regulations in exercise of the power conferred on it by the Act. Under section 10 of the Indian Mines Act, 1923, the Central Government in the year 1946 constituted the Bihar Mining Board with jurisdiction over the area covered by the Province of Bihar. The Central Government sent the draft Regulations to the said Board. The Chairman of the Board circulated the said draft Regulations to all the members of the Board and the members communicated their opinions individually to the Central Government. Thereafter the Central Government made the said Regulations governing the whole of India, except Jammu and Kashmir, and to every coal mine therein, in compliance with the other provisions of section 59 of the Act.

The question in this petition is whether the Regulations so made after consulting the Bihar Board alone would be valid and in force in the West Bengal area so as to sustain a criminal prosecution on the basis of an infringement of the said Regulations in respect of a mine in that area.

This question may be divided into two parts, namely, (1) where the Central Government has not constituted a Mining Board, can it ignore the condition laid down under section 59 (3) of the Act? and (2) if giving a reasonable opportunity within the meaning of section 59 (3) of the Act is a necessary condition for the validity of the Regulations made thereunder, can the Central Government validly make a regulation in respect of West Bengal after giving such a reasonable opportunity to a Mining Board constituted for Bihar?

In my view, the first question is directly covered by the decision of this Court in *Banwari Lal v. State of Bihar*<sup>1</sup>. There, Das Gupta, J., delivered the judgment of the Court. As it is contended that the said decision should be confined only to a case where a Mining Board has been validly constituted under the Act and should not be applied to a case where such a Board has not been constituted, it would be necessary to scrutinize the decision carefully to ascertain the exact scope of the said decision. The facts of that case were : there was an accident in the Central Bhowra Colliery, in Dhanbad in Bihar, as a result of which 23 persons lost their lives ; the Regional Inspector of Mines, Dhanbad, filed a complaint against the appellant for allegedly committing an offence under section 74 of the Mines Act, 1952, *i.e.*, for contravening regulations 107 and 127 of the Coal Mines Regulations, 1957 ; after the Sub-Divisional Officer took cognizance of the complaint, the appellant made an application

to the Patna High Court under Article 226 of the Constitution contesting the validity of the said proceedings on the ground, *inter alia*, that there was no Mining Board constituted under section 12 of the Act and therefore the Central Government had made the Regulations without consulting the Mining Board as it should do under section 59 (3) of the Act. The second ground on which a prayer for quashing the proceedings was based, with which alone we are now concerned, was stated in the judgment thus : "the Coal Mines Regulations, 1957, are invalid having been framed in contravention of section 59 (3) of the Mines Act, 1952". The contention of learned counsel, who elaborated this ground, was stated thus : "As regards the other contention that the regulations are invalid the appellant's argument is that the provisions of section 12 and section 59 of the Mines Act, 1952, are mandatory." Then the learned Judge quoted *in extenso* section 12 and section 59 (3) of the Act and proceeded to state the relevant basic facts and posed the question raised in the case thus :

"It was not disputed before us that when the Regulations were framed, no Board as required under section 12 had been constituted and so, necessarily there had been no reference to any Board as required under section 59. The question raised is whether the omission to make such a reference make the rules invalid."

It is manifest from the question so posed that the question considered by the Court was whether the making of the Regulations without reference to a Mining Board, as it was not in existence, would be invalid. Then the learned Judge considered the language of section 59 (3) of the Act and observed at page 851 :

"..... it is legitimate to note that the language used in this case is emphatic and appears to be designed to express an anxiety of the Legislature that the publication of the regulation, which is condition precedent to the making of the regulations, should itself be subject to two conditions precedent first a reference to the Mining Board concerned, and secondly, that sufficient opportunity to the Board to make a report as regards the expediency and suitability of the proposed regulations."

The learned Judge then proceeded to consider the reasons for imposing such a condition and observed :

"Even a cursory examination of the purposes set out in the 27 clauses of section 57 shows that most of them impinge heavily on the actual working of the mines. To mention only a few of these. . . are sufficient to show that the very purpose of the Act may well be defeated unless suitable and practical regulations are framed to help the achievement of this purpose."

Then he pointed out that section 12 of the Act enabled the Government to appoint Boards providing representations for different interests which would be in a position to help the Central Government to make suitable and practical regulations. In the words of the learned Judge,

"The constitution is calculated to ensure that all aspects including on the one hand the need for securing the safety and welfare of labour and on the other hand the practicability of the provisions proposed from the point of view of the likely expense and other considerations can be thoroughly examined. It is certainly to the public benefit that Boards thus constituted should have an opportunity of examining regulations proposed in the first place, by an administrative department of the Government and of expressing their opinion."

According to him, the constitution of the Board in the manner prescribed served a real purpose and, therefore, the consultation by the Central Government with such a Board was made a condition of the making of the Regulations. When it was contended that the insistence upon consultation might affect the public welfare under emergent circumstances, he pointed out that under section 60 of the Act, which provided for such a contingency, the Central Government might make regulations without previous reference to Mining Boards and, therefore, no such consideration could prevent the Court from holding that the giving of an opportunity to the Board was a condition precedent to the exercise of the power of making regulations. The learned Judge summarised his reasoning thus :

"An examination of all the relevant circumstances, *viz.*, the language used, the scheme of the legislation, the benefit to the public on insisting on strict compliance as well as the risks to public interest on insistence on such compliance leads us to the conclusion that the legislative intent was to insist on these provisions for consultation with the Mining Board as a prerequisite for the validity of the regulations."

This conclusion is strengthened by the fact that in section 60 when providing for the framing of regulations in certain cases without following the procedure enjoined in section 59, the Legislature took care to add by a proviso that any regulation so made 'shall not remain in force for more than two years from the making thereof'. By an amendment made in 1959 the period has been changed to one year.

It is not unreasonable to read this proviso as expressing by implication the Legislature's intention that when the special circumstances mentioned in section 60 do not exist and there is no scope for the application of that section no regulation made in contravention of section 59 will be valid for a single day."

The learned Judge concluded his discussion thus, at page 853 :

"For all the reasons given above, we are of opinion that the provisions of section 59 (3) of the Mines Act, 1952, are mandatory."

Pausing here for a moment, I find it very difficult to hold that this Court held, expressly or by necessary implication, that section 59 (3) of the Act was mandatory only if the concerned Board was in existence. The argument advanced, the question posed, the reasons given and the conclusion arrived at were all against giving such a limited scope to the said judgment.

It was contended that both section 12 and section 59 were mandatory. In posing the question to be decided, the learned Judge clearly referred to "the omission to make *such* a reference". The word "*such*" clearly refers to the omission to make a reference, as no Board was constituted under section 12 of the Act. So, as regards the posing of the question there was absolutely no ambiguity and the learned Judge had clearly in mind what the Court was asked to decide upon. The reasons given by the learned Judge for holding that it was obligatory of the Central Government to consult the Board before making the regulations would equally apply whether the Board existed or not. The conclusion arrived at by the learned Judge that consultation with such a Board was a condition precedent for the exercise of the power would apply to both the cases. If it was a condition precedent for the exercise of the power, how could it cease to be one if a Board was not in existence? The condition is not the existence of the Board, but the consultation with a Board. In one case, the Government would not consult the Board though it existed, and in the other case it could not consult, as the Board did not exist. In either case, the condition was broken. But it is said that the last three paragraphs of the judgment make it clear that the learned Judge was not considering the case where a Board had not been constituted. There, the learned Judge was considering the question whether the Mining Boards constituted under section 10 of the Mines Act, 1923, were continuing to operate at the time the Regulations were made and there was full consultation with the Mining Boards before the Regulations were framed. But the learned Judge was not able to decide that question, as there was not sufficient material on the record. Therefore, this Court directed the Magistrate to decide that question. I fail to see how these paragraphs in any way help us to hold that this Court confined its decision only to a case where a Board has been constituted. On the other hand, the observations in the first of these three paragraphs clearly indicate to the contrary. The relevant observations are :

"As has been pointed out above, it was not disputed before us that at the time when the regulations were framed no new Mining Board had been constituted under the Mines Act, 1952 and consequently no consultation with any Mining Board constituted under the 1952 Act took place."

This shows that the entire judgment up to that point proceeded on the basis that there was no consultation with the Mining Board, as no such Board was constituted. Thereafter, the learned Judge was only considering the alternative contention advanced by the State, namely, that the pre-existing Board was consulted and that that consultation was sufficient compliance with the provisions of section 59 (3) of the Act. If I might analyse the mind of the learned Judge, the process of reasoning may be summarized thus : On behalf of the appellant it was argued that there was no consultation with the Board as it was not constituted under section 12 of the Act and, therefore, the Regulations made under the Act without such consultation were void. The learned Judge accepted the contention. Then it was argued for the Government

that though there was no consultation with the Board constituted under section 12 of the Act, consultation with a pre-existing Board would be enough compliance with the section. As there was no material on the record, the learned Judge could not decide on that question and therefore directed it to be decided by the Magistrate. On the other hand, as it was common case that no Board under section 12 of the Act had been constituted, if the contention of the Government, now pressed before us, was correct, no other question would have arisen, for, according to the State, section 59 (3) could not be invoked in a case where no Board had been in existence. The plea that there was a consultation with the pre-existing Board was taken not by the appellant but by the State and such a plea would be unnecessary if section 59(3) of the Act did not lay down the condition of consultation with the Board when it did not exist.

To my mind, the judgment of this Court is clear and unambiguous on this point and it decided that, as there was no consultation with any Mining Board under section 59 (3) of the Act, as the Board was not in existence, the Regulations were bad. The present argument is an attempt to persuade us to go back on a clear pronouncement on the point by a Constitution Bench of this Court.

That apart, I am satisfied on a true construction of the provisions of section 12 and section 59 (3) of the Act that the Central Government has to exercise the power under section 12 if it intends to exercise the power under section 59 of the Act. Under section 12, "the Central Government may constitute for any part of the territories to which this Act extends or for any group or class of mines, a Mining Board", consisting of persons with specific qualifications representing different interests in the mines. Under section 59, the power to make regulations conferred by section 57 is subject to the condition of the regulations being made after previous publication, and under sub-section (3) thereof "Before the draft of any regulations is published under this section it shall be referred to every Mining Board which is, in the opinion of the Central Government, concerned with the subject dealt with by the regulation, and the regulation shall not be so published until each such Board has had a reasonable opportunity of reporting as to the expediency of making the same and as to the suitability of its provisions". As interpreted by this Court, the said condition is a condition precedent for the making of the Regulations under the said section. If the contention of the learned Solicitor-General be accepted, the condition may have to be disannexed from the power by a situation brought about by conscious withholding of the exercise of the connected power by the Central Government under section 12 of the Act. The Central Government by its own default can ignore the condition imposed in public interest. The construction leading to this anomalous result cannot be accepted unless the provisions compel us to do so. It is a well settled principle of construction that when it is possible to do so, it is the duty of the Court to construe provisions which appear to conflict so that they harmonise. To put it differently, of two possible constructions, one which gives a consistent meaning to different parts of an enactment should be preferred. In the instant case, the two sections can be harmonized without doing violence to the language used. Section 12 is an enabling provision : under it a power is given to the Central Government to appoint a Mining Board. Section 57, read with section 59, confers another power on the Central Government to make regulations subject to, among others, a condition that the draft of the regulations shall be referred to a Mining Board. These two powers are connected : if they are read together, as we should do, in an attempt to reconcile them, it could be reasonably held that the power conferred under section 12 has to be exercised by the Central Government if it intends to make regulations under section 57 of the Act. This construction carries out the full intention of the Legislature in enacting section 59 as interpreted by this Court. Both the powers can be exercised without the one detracting from the other. The construction suggested by the respondents enables the Central Government to defeat the public purpose underlying the imposition of the condition under section 59 of the Act and that suggested by the petitioners enables the exercise of the two powers without the one coming into conflict with the other. I would, on the principle of harmonious construction, prefer to accept the latter construction to the former.

Let us look at the provisions from a different perspective. It is a well established doctrine that when the power is coupled with a duty of the person to whom it is given to exercise it, then the exercise of the power is imperative : see Maxwell on Interpretation of Statutes, 11th Edition, page 234. It has also been held that

“if the object for which the power is conferred contemplates giving of a right, there would then be a duty cast on the person to whom the power is given to exercise it for the benefit of the party to whom the right is given when required on his behalf.”

Dealing with section 51, Income-tax Act, 1918, which provides that the Chief Revenue Authority “may” state the case to High Court, Lord Phillimore observed in *Alcock Ashdown & Co. v. The Chief Revenue Authority, Bombay*<sup>1</sup> :

“No doubt that the section does not say that the authority “shall” state the case, it only says that it may and it is rightly urged that “may” does not mean “shall”, only the capacity or power is given to the authority. But when a capacity or power is given to a public authority there may be circumstances which couple with the power a duty to exercise it, and where there is a serious point of law to be considered there does lie a duty upon the Revenue Authority to state a case for opinion of the Court and if he does not appreciate that there is such a serious point, it is in the power of the Court to control him and to order him to state the case.”

Under the Act, there are two connected powers—a power to appoint a Mining Board and a power to make regulations subject to a condition. The condition imposed on the power confers a right on a Mining Board to be consulted before a regulation is made. A combined reading of section 12 and sections 57 and 59 shows that the power or powers conferred on the Central Government are coupled with a duty to consult the Board whenever the Central Government seeks to exercise the power under section 57. I have no hesitation in holding that the power is coupled with a duty and that the power has to be exercised when the duty demands it. The Central Government in making the Regulations has a duty to consult the Mining Board and the Mining Board has a right to be so consulted ; and to discharge its duty it is incumbent upon the Central Government to exercise the connected power by appointing the Board.

It is said that under section 59 of the Act, the Regulations and the Rules shall be referred to a Mining Board and that under section 58 the Central Government has the power to make a rule providing for the appointment of the Chairman and members of the Mining Board and that if section 59 is mandatory, the Government can never exercise the power under section 58 (a). No such difficulty could arise under the Act before its amendment in 1959. Under section 59 (3), as it stood then, the condition of consultation with a Mining Board was imposed only on the power of the Government to make a regulation and section 57 of the Act which confers a power on the Central Government to make regulations did not contain any clause corresponding to clause (a) of section 58 of the Act. That apart, section 58 (a) may legitimately be invoked by the Central Government only after a Board had been constituted in regard to the future appointments. Anyhow, this argument may have some bearing when this question of construction of the provisions of section 59 was raised before this Court on the last occasion and none at present, as the true construction of the said section was finally settled by this Court.

That apart, a comparative study of the other provisions of the Act would also lead to the same conclusion. Under the Act, there are many enabling provisions empowering the Central Government to appoint specified authorities to discharge different duties and functions described in various sections. Should it be held that the Central Government need not appoint the authorities under any circumstances, the Act would become a dead letter. Even the appointment of the Chief Inspector and Inspectors is left to the discretion of the Central Government : see section 5 of the Act. If the Government need not appoint the Chief Inspector or the Inspectors, the duties and functions allotted to them could not be discharged or performed. A reasonable construction would, therefore, be that if the said duties and functions have to be performed, the Government has to appoint the officers. So too, if the Central Government seeks to exercise the powers under section 57 of the Act, read with

section 59 thereof, it has to appoint the Board. I, therefore, hold on a fair construction of sections 12 and 59 of the Act, that the Central Government has a duty to appoint the Mining Board if it seeks to exercise its power under section 57 of the Act.

The next argument is that the Bihar Board has been consulted in the manner prescribed by section 59 (3) of the Act and, therefore, the regulations made after such consultation are valid. I cannot agree with this contention either. The said Board was appointed under section 10 (1) of the Indian Mines Act, 1923 and it is not disputed that the Board must be deemed to have been duly constituted under the present Act. It is also not disputed that the said Board was only constituted to have jurisdiction over the area comprised in the present Bihar State, that is, it has no jurisdiction over West Bengal. Under section 12 of the Act, the Central Government may constitute for any part of the territories to which this Act extends or for any group or class of mines, a Mining Board. Under section 59, the Central Government shall refer the draft to every Mining Board which, in the opinion of the Central Government, is concerned with the subject dealt with by the regulation. Now, can it be said that the Board constituted for a part of the territories to which the Act extends, namely, to the State of Bihar, could be a Board concerned with the subject dealt with by the regulations, namely, the mines in West Bengal area? The entire object of section 59 is to consult the persons intimately connected with the mining operations of a particular area so that suitable regulations may be made to govern the working of those mines. It could never have been the intention of the Legislature to empower the Government to make regulations in regard to mines in one part of the country by consulting a Board constituted for another part of the country. Such an intention could not be attributed to the Legislature. Indeed, the Central Government, when it constituted the Boards, expressly indicated its intention that all the Boards, including the Board functioning in West Bengal, should be consulted, but as the Board constituted there was not one constituted legally under the Act, the consultation with the said Board had become futile. I, therefore, hold that the Regulations in so far as they purport to regulate the mines situate in West Bengal have not been validly made under the Act inasmuch as a condition precedent imposed by section 59 of the Act on the exercise of the Government's power to make a regulation was not complied with.

In the result, I direct the issue of a writ of prohibition against respondents 1 to 4 restraining them from proceeding with the criminal case launched against the petitioners. The petitioners will have their costs.

ORDER OF THE COURT.—In view of the majority opinion of the Court the Writ Petition fails and is dismissed.

V.S.

*Petition dismissed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR, K.C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

The State of Maharashtra

.. *Appellant\**

*v.*

Laxman Jairam

.. *Respondent.*

*Bombay Prohibition Act (XXV of 1949 as amended), section 66 (2)—Onus—Whether the statement of the accused sufficient to discharge the onus—Criminal Procedure Code (V of 1898), section 342—Examination of the accused under—Effect.*

Under section 342 of the Criminal Procedure Code (V of 1898) the Court has the power to examine the accused so as to enable him to explain any circumstances appearing in evidence against him. Under section 342 (3) the answers given by the accused may be taken into consideration in such enquiry or trial. The object of examination under section 342 of the Code therefore is to give the accused an opportunity to explain the case made against him and that statement can be taken below have accepted this explanation, it must be held that the respondent has discharged the onus placed upon him by section 66 (2) of the Bombay Prohibition Act (XXV of 1949 as amended).

\* CrI. A, No. 58 of 1961.

All that the learned Judge meant to say in the decision of the Supreme Court in *G. S. D. Swamy v. The State*, (1960) S.C.J. 160: (1960) M.L.J. (Cr.) 91: (1960) 1 S.C.R. 461, 471 was that the evidence of the statement of the accused in the circumstances of that case was not sufficient to discharge the onus, but that does not mean that in no case can the statement of an accused person be taken to be sufficient for the purpose of discharging the onus, if a Statute places the onus on him.

Appeal by Special Leave from the Judgment and Order, dated the 17th October, 1960, of the Bombay High Court in Criminal Appeal No. 1235 of 1960.

*R. H. Dhebar*, Advocate, for Appellant.

The Judgment of the Court was delivered by

*Kapur, J.*—This appeal by Special Leave against the decision of the High Court of Bombay dismissing the State's appeal against the acquittal of the respondent arises out of proceedings under section 66 (b) of the Bombay Prohibition Act (XXV of 1949 as amended), hereinafter called the 'Act'.

The respondent was arrested by Police Constable Laxman Sabaji on 8th August, 1959, at 8-15 P.M. on the ground that he was smelling of liquor and had therefore contravened the provisions of the Act. The respondent was taken to the hospital where he was examined by Dr. Dadlani Prabhu Rochiram, P.W., who has deposed that the respondent was smelling of liquor but his speech, behaviour, gait, co-ordination and memory were normal. From this he concluded that the respondent had consumed some alcoholic substance but was not under the influence of liquor. In cross-examination he stated that Tincture Neem would produce blood concentration of 0.148 per cent W/V of ethyl alcohol. The respondent in his examination under section 342 stated:

*Question.*—"What do you wish to say with reference to the evidence given and recorded against you?"

*Answer.*—"I have not consumed prohibited alcohol. I had taken 6 ounces of Neem as I am used to it".

On this evidence the Presidency Magistrate Mr. Lokur acquitted the respondent. He observed:

"Neem is a medicinal preparation containing about 40% of alcohol and is readily available in the market. I do not see why I should not accept the explanation given by the accused that he had taken Neem in order to satiate his craving for alcohol. It has been held by Bavdekar and Chainani, JJ. in Criminal Appeal No. 1611 of 1954, dated 25th February, 1954, that taking an excess dose of medicinal preparation does not amount to consumption of prohibited liquor. In Criminal Appeal No. 1565 of 1959 (*State v. Dominic Robert D'Silva*), where a similar defence was taken up it was held that consumption of 6 ounces of essence of Neem did not constitute an offence. Following these judgments I hold that the accused has not committed any offence. I therefore acquit the accused".

Against this order an appeal was taken to the High Court and one of the grounds taken in the Memorandum of Appeal was that the mere statement of the respondent that he has consumed 6 ounces of Tincture of Neem was not sufficient to rebut the presumption arising out of sub-section (2) of section 66 of the Act. But the High Court dismissed the appeal *in limine*. It is against that order that the State has come by Special Leave to this Court.

The main question raised on behalf of the State is that by the introduction of section 66 (2) in the Act as a result of the Bombay Prohibition (Extension and Amendment) Act, 1949 (XII of 1949) the onus is on the accused person and that that onus had not been discharged in the present case. Section 66 (2) is as follows:—

*Section 66 (2):* "Subject to the provisions of sub-section (3) wherein in any trial of an offence under clause (b) of sub-section (1) for the consumption of an intoxicant, it is alleged that the accused person consumed liquor, and it is proved that the concentration of alcohol in the blood of the accused person is not less than 0.05 per cent, then the burden of proving that the liquor consumed was a medicinal or toilet preparation or an antiseptic preparation or solution, or a flavouring extract, essence or syrup, containing alcohol, the consumption of which is not in contravention of the Act or any rules, regulations or orders made thereunder, shall be upon the accused person, and the Court shall in the absence of such proof presume the contrary".

The argument was put in this way that if the prosecution proves that the concentration of alcohol in the blood of an accused person is more than 0.05 per cent then under section 66 (2) of the Act the burden was on him to show that the liquor which he had consumed was a medicinal or toilet preparation the consumption of which is

not in contravention of the Act or any Rules made thereunder. It was further submitted that in order to discharge the onus mere statement of the accused is not sufficient. Our attention was drawn to the scheme and some of the provisions of the Act.

The prosecution, in the present case, has proved that the respondent's breath was smelling of liquor and that on examination of his blood it was found to contain 0.148 per cent concentration of alcohol but the respondent gave an explanation showing that he had taken 6 ounces of Tincture of Neem and Dr. Dadlani Prabhu Rochiram has deposed that the consumption of 6 to 8 ounces of that substance will produce that amount of concentration of blood. This was accepted by the learned Presidency Magistrate and by the High Court. Therefore on this finding it must be held that the explanation given by the respondent of the cause of his smelling of liquor and of the blood concentration was accepted by the High Court as being sufficient to discharge the onus placed on him. But Mr. Dhebar for the State submits that mere statement of an accused person is not sufficient for the discharge of such onus and relies on a judgment of this Court in *C.S.D. Swamy v. The State*<sup>1</sup>, where Sinha, J. (as he then was) observed :—

“In this case, no acceptable evidence, beyond the bare statements of the accused, has been adduced to show that the contrary of what has been proved by the prosecution, has been established, because the requirement of the section is that the accused person shall be presumed to be guilty of criminal misconduct in the discharge of his official duties “unless the contrary is proved”. The words of the statute are peremptory, and the burden must lie all the time on the accused to prove the contrary”.

All that the learned Judge there meant to say was that the evidence of the statement of the accused in the circumstances of that case was not sufficient to discharge the onus but that does not mean that in no case can the statement of an accused person be taken to be sufficient for the purpose of discharging the onus if a Statute places the onus on him. Under section 342 of the Criminal Procedure Code the Court has the power to examine the accused so as to enable him to explain any circumstance appearing in evidence against him. Under sub-section (3) of that section the answers given by an accused person may be taken into consideration in such enquiry or trial. The object of examination under section 342 therefore is to give the accused an opportunity to explain the case made against him and that statement can be taken into consideration in judging the innocence or guilt of the person so accused. Therefore if the Courts below have accepted this explanation it must be held that the respondent has discharged the onus which was placed on him by section 66 (2) of the Act.

The appeal is therefore dismissed.

K.L.B.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR, K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

Sita Ram and others

.. *Appellants\**

v.

The State of Madhya Pradesh (In both the Appeals)

.. *Respondent.*

*Central Provinces and Berar Sales Tax Act (XXI of 1947), section 26 (2)—Scope—“No prosecution or suit shall be instituted against any person in respect of anything done”—Meaning of—Whether gives protection only to Government servants—Filing false returns and producing false accounts—If acts done under the Act.*

The ground on which the High Court rejected the Reference was that in its opinion the appellants neither acted nor purported to act under any of the provisions of the C. P. & Berar Sales Tax Act (XXI of 1947) when they filed false returns or produced false accounts and in fact they were rendering themselves liable to punishment under the provisions of section 24 of the Act. This view is not sustainable.

1. (1960) S.C.J. 160 : (1960) M.L.J. (CrI.) 91 : (1960) 1 S.C.R 461, 471.

\*CrI. Appeals. Nos, 146 and 147 of 1960,



When the appellants submitted their returns, they did so under section 10 of the Act and when they produced their accounts they did so under section 15 of the Act. Therefore, both the making of the returns and production of the accounts were done under the Act and cannot be said to be outside the provisions of the Act. The words "no prosecution or suit shall be instituted against any person in respect of anything done" are of wider import and would cover cases of all persons including persons other than Government servants. Thus the High Court was in error in rejecting the Reference.

Appeals by Special Leave from the Judgment and Order, dated the 11th February, 1960, of the Madhya Pradesh High Court in Criminal Revisions Nos. 270 to 274 of 1959.

*G. C. Mathur*, Advocate, for Appellants (In both the Appeals).

*I.N. Shroff*, Advocate, for Respondent (In both the Appeals).

The Judgment of the Court was delivered by

*Kapur, J.*—These are two appeals directed against the order of the High Court of Madhya Pradesh rejecting a Reference made by the Sessions Judge against the prosecution of the appellants for contravening the provisions of the C.P. & Berar Sales tax Act (XXI of 1947), hereinafter called the 'Act'.

A firm of which five brothers including the two appellants were partners submitted their sales tax returns for the quarters beginning 1st June, 1947, to the quarter ending 31st December, 1951. A complaint was filed against the partners on 19th July, 1957, on the ground that the returns filed by them were false and the accounts produced were incorrect and therefore an offence under section 24 (1) (b) and (g) of the Act was committed.

On 12th December, 1958, an objection was taken by the accused persons that under section 26 (2) of the Act, the prosecution could not be instituted as it was barred by time, having been instituted more than three months after the commission of the offence. The learned Magistrate did not go into the objection on the ground that it was not the proper forum for raising the objection. Four Revisions were taken to the Sessions Judge who on 4th May, 1959, made a Reference to the High Court for quashing the proceedings. But the High Court rejected the Reference on the ground that a person making a false return neither acts nor purports to act under the Act and therefore section 26 (2) is not applicable to him. It is against that order that these appeals were brought by Special Leave.

In order to decide this question, it is necessary to refer to the relevant provisions of the Act. Under section 10 of the Act every dealer is required to furnish a return when called upon to do so and every registered dealer is required to furnish returns by such dates as may be prescribed. The appellants are registered dealers and they have made returns under that section. Section 15 deals with production and inspection of accounts and section 24 enumerates the offences under the Act. The alleged offence of the appellants falls under section 24 (1) (b) and (g), *i.e.*, failing without sufficient cause to submit any return or furnishing false returns and knowingly producing incorrect accounts, registers or documents or knowingly furnishing incorrect information. Section 26 relates to the protection of persons acting in good faith and limitations for suits and prosecutions. The section when quoted is as follows :

"Section 26 (1).—No suit, prosecution or other legal proceedings shall lie against any servant of the Government for anything which is in good faith done or intended to be done under this Act or Rules made thereunder.

(2) No suit shall be instituted against the Government and no prosecution or suit shall be instituted against any person in respect of anything done or intended to be done under this Act unless the suit or prosecution has been instituted within three months from the date of the act complained of."

For the appellants, it was contended that the words "no prosecution or suit shall be instituted against any person in respect of anything done" in sub-section (2) of section 26 cover their cases also and they fall within the words "any person". The respondent's submission on this point was that the two sub-sections of section

26 should be read together and the intention of the Legislature was to give protection to Government servants in regard to prosecutions or other legal proceedings. That in our opinion, is not what the words used in sub-section (2) mean. They are words of wider import and would cover cases of all persons including persons other than Government servants. There are no words restricting the meaning of "any person" and no reason has been shown why those words should not include the appellants.

The ground on which the High Court rejected the Reference was that in its opinion the appellants neither acted nor purported to act under any of the provisions of the Act when they filed false returns or produced false accounts and in fact they were rendering themselves liable to punishment under the provisions of section 24 of the Act. It observed as follows :—

"The test whether an act is done or intended to be done under a certain law might well be whether the person who committed it can, if challenged, reasonably justify his act under any provision contained in that law."

This opinion is, in our view, not sustainable. When the appellants submitted their returns they did so under section 10 of the Act and when they produced their accounts they did so under section 15 of the Act. Therefore both the making of the returns and production of the accounts were done under the Act and cannot be said to be outside the provisions of the Act.

In our opinion the High Court was in error in rejecting the Reference. The appeals are therefore allowed, the order of the High Court is set aside and the proceedings in the trial Court are quashed.

K.L.B.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR, K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

Krishan Lal Dhawan and others

.. *Appellants\**

*v.*

The Delhi Administration (In both the Appeals)

.. *Respondent.*

*Penal Code (XLV of 1860), sections 120-B and 420—Prevention of Corruption Act (II of 1947), section 5 (1) (d) read with section 5 (2)—Conviction under—Trial before one Special Judge but proceedings and conviction by another Special Judge—Competency of—Criminal Procedure Code (V of 1898), section 350—Applicability—Criminal Law Amendment Acts of (XLVI of 1952) and (II of 1956).*

Section 8 (3) of the Criminal Law Amendment Act (XLVI of 1952) did not contemplate that section 350 of the Criminal Procedure Code (V of 1898) becomes applicable to proceedings before a Special Judge. The amendment made in the Criminal Law Amendment Act by Act II of 1956 by which section 3 (a) was added to it making the provisions of section 350 of the Code applicable to a trial by Special Judge has no retrospective effect. Thus, where a trial commenced before a Special Judge was continued before another Special Judge who convicted the accused the conviction cannot be upheld as the subsequent proceedings before another Judge are not competent.

Appeals by Special Leave from the Judgment and Order, dated the 12th May 1958, of the Punjab High Court (Circuit Bench) at Delhi in Criminal Appeals Nos. 3-D and 1-D of 1958.

A. S. R. Chari, Senior Advocate (M. K. Ramamurthi, R. K. Garg, D. P. Singh and S. C. Aggarwal, Advocates of (M/s. Ramamurthi & Co., with him), for Appellant (In Cr. A. No. 196 of 1960).

N. S. Bindra, Senior Advocate, (I. M. Lall and A. G. Ratnaparkhi, Advocates, with him), for Appellant (In Cr. A. No. 197 of 1960).

H. R. Khanna, R. H. Dhebar and P. D. Menon, Advocates, for Respondent (in both the appeals).

The Judgment of the Court was delivered by

*Kapur, J.*—These two appeals are directed against the judgment and order of the Punjab High Court confirming the conviction of the appellants under sections 120-B and 420, Indian Penal Code and section 5 (1) (d) read with section 5 (2) of the Prevention of Corruption Act and sentencing each of them to an aggregate sentence of six months' rigorous imprisonment.

It is unnecessary to set out the facts in detail but to put them briefly the appellant Albert Moses was the Principal in charge of the Rehabilitation Centres, Malviya Nagar and Kalkaji under the Ministry of Rehabilitation. The appellant, K. L. Dhawan, was a partner in the firm named M/s. Dhawan & Co. and they supplied a surface plate for a sum of Rs. 1,950 to the Works Centre of which the appellant Albert Moses was the Principal.

The trial of the appellants and R. P. Dhawan, who has been acquitted, commenced in the Court of Mr. Jawala Das, Special Judge, Delhi and he heard the case from the date of the institution of the proceedings on 21st May, 1956 to 26th October, 1956. He heard the prosecution evidence which was closed on 26th October, 1956. The case was then taken up by Mr. P. D. Sharma, Special Judge, Delhi, from 20th December, 1956. He examined defence witnesses and finally convicted the appellant of the offences already mentioned and acquitted R. P. Dhawan.

Against the conviction and sentence an appeal was taken to the High Court but the conviction was upheld and also the sentences and against the judgment and order these two appeals by Special Leave have been brought by the two convicted persons. The sole question which has been raised in this Court is that in view of the fact the trial commenced before one Special Judge and another Special Judge took up the proceedings after 20th December, 1956, the proceedings are not competent and therefore, the conviction and the sentence cannot be upheld. Counsel relies upon a judgment of this Court in *Pyare Lal v. State of Punjab*<sup>1</sup>, in which it was held that "section 350 is not applicable when one Special Judge is succeeded by another". In that view of the matter Mr. P. D. Sharma was not competent to proceed with the trial from the stage at which it was left by Mr. Jawala Das.

Counsel for the respondent relies on sub-section (3) of section 8 of the Criminal Law Amendment Act (XLVI of 1952) which makes the provisions of the Code of Criminal Procedure, in so far as they are not inconsistent with that Act, applicable to proceedings before a Special Judge and also provides that a Special Judge shall be deemed to be a Court of Session when trying a case under the Criminal Law Amendment Act (XLVI of 1952). But this question was considered in the case decided by this Court in *Pyare Lal's case*<sup>1</sup>, in which it was held that sub-section (3) of section 8 of Act XLVI of 1952 did not contemplate that section 350 of the Criminal Procedure Code becomes applicable to proceedings before a Special Judge.

It was also held in the case that the amendment made in the Criminal Law Amendment Act by Act II of 1956 by which section 3 (a) was added to it making the provisions of section 350 of the Code applicable to a trial by Special Judges has no retrospective effect. In this view of the matter, the conviction of the appellants must therefore be set aside. The case will be disposed of in accordance with law.

K.L.B.

*Conviction set aside  
and case remanded.*

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1. Cr. A. No. 2409 1960, decided on 30th August, 1961.

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR, J. R. MUDHOLKAR, AND T. L. VENKATARAMA AIIYAR, JJ.

Harikisan

.. Appellant \*

v.

The State of Maharashtra and others

.. Respondents.

*Constitution of India (1950), Article 22 (5)—Order and grounds of detention in English served with oral translation on the detenue not conversant with the language—No compliance with law:*

To a person, who is not conversant with the English language, service of the order and the grounds of detention in English, with their oral translation or explanation by the Police Officer serving them does not fulfil the requirements of the law. Clause (5) of Article 22 of the Constitution of India requires that the grounds of his detention should be made available to the detenue as soon as may be, and that the earliest opportunity of making a representation against the Order should also be afforded to him. In order that the detenue should have that opportunity, it is not sufficient that he has been physically delivered the means of knowledge with which to make his representation. In order that the detenue should be in a position effectively to make his representations against the order, he should have knowledge of the grounds of detention, which are in the nature of the charge against him setting out the kinds of prejudicial acts which the authorities attribute to him. Communication, in this context, must, therefore, mean imparting to the detenue sufficient knowledge of all the grounds on which the order of detention is based.

Communication of the grounds of detention in English (to a person not conversant) with that language though it continues to be the official language of the State, is not enough compliance with the requirements of the Constitution.

Appeal by Special Leave from the Judgment and Order, dated the 10th/11th July, 1961, of the Bombay High Court (Nagpur Bench) in Criminal Application No. 19 of 1961.

A. S. Bobde, B. A. Masodkar, M. L. Vaidya, M. M. Kinkhede and Ganpat Rai, Advocates, for Appellant.

M. C. Setalvad, Attorney General for India and B. Sen, Senior Advocate (R. H. Dhebar, Advocate, with them), for Respondents.

The Judgment of the Court was delivered by

*Sinha, C.J.*—This appeal is directed against the judgment and order, dated 11th July, 1961, of a Division Bench of the Bombay High Court (Nagpur Bench), dismissing the appellant's application, under Article 226 of the Constitution, read with section 491 of the Code of Criminal Procedure, wherein he had prayed for a Writ of *habeas corpus* against the State of Maharashtra and the District Magistrate of Nagpur, directing them to produce the petitioner in Court and to set him at liberty. This application was heard by us on and 8th 9th January, 1962, and after hearing Shri A. S. Bobde for the appellant and the learned Attorney-General for the State of Maharashtra, we directed that the appellant be released forthwith, and that the reasons for our judgment will follow later. We now proceed to set out our reasons for the order passed on that day.

It appears that an order of detention, under section 3 (1) (a) (ii) of the Preventive Detention Act (IV of 1950) hereinafter referred to as the Act was made by the District Magistrate of Nagpur on 10th April, 1961. The order of detention is in these terms :

"No. CC/X-(2) of 1961  
Office of the District Magistrate,  
Nagpur, Dt. 10th April, 1961.

*Order of detention under section 3 (1) (a) (ii) of the Preventive Detention Act, 1950.*

Whereas I am satisfied that it is necessary to prevent Shri Harikisan Kishorilal Agarwal of Nagpur from acting in a manner prejudicial to the maintenance of public order and that therefore, it is necessary to detain him.

Now, therefore, in exercise of the powers conferred on me by Section 3 (1) (a) (ii) of the Preventive Detention Act, 1950, I, Dinkarrao Hanjantrao Deshmukh, I.A.S., District Magistrate, Nagpur, hereby direct that the said Shri Harikisan Kishorilal Agarwal be so detained.

Given this 10th day of April, 1961 under my signature and seal.

Seal of the  
D. M., Nagpur

Sd/D. H. Deshmukh,  
District Magistrate, Nagpur."

He also directed that the appellant should be detained in the District Prison, Thana, and that for the purpose of the Bombay Conditions of Detention Order, 1951, be treated as a Class II Prisoner. The grounds of detention were served on the same day. The substance of the grounds is that since his release from previous detention in October, 1960, he had been instigating persons at Nagpur to defy and disobey reasonable directions and lawful orders issued by competent authorities, from time to time, prohibiting and regulating processions and assemblies at Nagpur; that by use of highly provocative words, expressions and slogans in meetings and processions in Nagpur, in which he took a prominent part, he had instigated persons on several occasions at Nagpur to indulge in acts of violence and mischief and to create disturbance in the city of Nagpur; and that he had been acting, since October, 1960, in a manner prejudicial to the maintenance of public order, in that city. And then follow 'notable particulars' of his activities, running into five closely typed pages and contained in many paragraphs. In his petition to the High Court, the petitioner raised a number of grounds of attack against the legality of the order of his detention, and most of those grounds have been reiterated in this Court. We do not think it necessary to go into all the points raised, on behalf of the appellant, by the learned counsel. In our opinion, it is enough to say that we are satisfied that, in the circumstances of this case, the provisions of Article 22 (5) of the Constitution have not been fully complied with, and that, therefore, the appellant had not the full opportunity provided or contemplated by that Article of making his representation against the order of detention.

In this connection, it is necessary to state the following facts. The appellant wrote a letter to the District Magistrate of Nagpur on 19th April, 1961, to the effect that he had been served with an order of detention, dated 10th April, 1961, and that the order and the grounds of detention being in English, he was unable to understand them, and, therefore, asked for a Hindi version of the same so that he may be able to follow and understand the charges levelled against him and take necessary steps for his release from jail. He raised some other questions also in that letter, but it is not necessary to refer to them here. To that letter the District Magistrate replied by his letter, dated 23rd April, 1961, the second paragraph of which, in the following terms, sets out his views of the matter:

"The order of detention and the grounds of detention already communicated to you are given in English which is the official language in this district. It is not possible to supply any translation of the same nor is it legally necessary under the Preventive Detention Act, 1950. The order and the grounds of detention served on you were fully explained to you by the Police Officer in the presence of the D. S. P., Nagpur City."

The High Court, dealing with this contention on behalf of the detenué, came to the conclusion that under the Constitution English still continued to be the official language of the State of Maharashtra, and that service of the order in English upon the detenué was sufficient compliance with the requirements of clause (5) of Article 22 of the Constitution. It also held that the failure of the District Magistrate to supply the grounds in Hindi did not have the effect of preventing him from making his representation to the authorities. Furthermore, the High Court pointed out that the District Magistrate had stated in his letter that the grounds were explained to the appellant in Hindi by the Police Officer at the time the order and the grounds were served upon him. In the view of the High Court, therefore, the explanation or translation of the grounds by the Police Officer at the time he served those on the appellant should be deemed to be enough to enable him to make an effective representation against his detention.

Mr. Bobde, for the appellant, has vehemently argued that the requirements of the Constitution had not been complied with in as much as clause (5) of Article 22 of

the Constitution required that the grounds on which the order of detention had been based had to be communicated to the detained person. His argument further was that "communication" of the grounds was not equivalent to serving the grounds in English upon a person who was not conversant with the English language, and that oral translation by the police officer, said to have been made to the detenue, was not sufficient compliance with the requirements of the constitutional provisions, which must be fully satisfied in order that the detenue may be in a position to make an effective representation against the order of detention. He also contended that we do not know in what terms the police officer translated the lengthy document or whether his translation was correct.

On behalf of the State of Maharashtra, the learned Attorney-General first attempted to show that the appellant knew English. In this connection he has referred to the affidavit of the District Magistrate, the exact words of which are as follows :

"He (the detenue) had also asked me to supply the grounds in Hindi to enable him to understand the same. I admit that I had replied to this letter and had declined to communicate the grounds in Hindi. I deny that this has been done with a view to keep the petitioner in dark as to the grounds of his detention. The petitioner as per my information, is an educated man and can understand English. The question that the petitioner did not understand the grounds, therefore, does not arise. I deny that the petitioner is entitled to receive the grounds in Hindi. The grounds were supplied to the petitioner in the Court language and also they were explained to him by the Police Inspector Shri W. B. Bobde who had served them on the petitioner....."

That statement of the District Magistrate is apparently based on the following statement, in the affidavit of Shri W. B. Bobde, the Police Inspector :

"The order of detention as well as the grounds of detention were translated by me orally in Hindi and explained to Shri Harikisan Kishorilal Agarwal, in the presence of the District Superintendent of Police, Nagpur City."

It has not been found by the High Court that the appellant knew enough English to understand the grounds of his detention. The High Court has only stated that "he has studied upto 7th Hindi Standard, which is equivalent to 3rd English Standard." The High Court negatived the contention raised on behalf of the appellant not on the ground that the appellant knew enough English, to understand the case against him, but on the ground, as already indicated, that the service upon him of the order and grounds of detention in English was enough communication to him to enable him to make his representation. We must, therefore, proceed on the assumption that the appellant did not know enough English to understand the grounds, contained in many paragraphs, as indicated above, in order to be able effectively to make his representation against the order of detention. The learned Attorney-General has tried to answer this contention in several ways. He has first contended that when the Constitution speaks of communicating the grounds of detention to the detenue, it means communication in the official language, which continues to be English; secondly, the communication need not be in writing and the translation and explanation in Hindi offered by the Inspector of Police, while serving the order of detention and the grounds, would be enough compliance with the requirements of the law and the Constitution; and thirdly, that it was not necessary in the circumstances of the case to supply the grounds in Hindi. In our opinion, this was not sufficient compliance in this case with the requirements of the Constitution, as laid down in clause (5) of Article 22. To a person, who is not conversant with the English language, service of the order and the grounds of detention in English, with their oral translation or explanation by the police officer serving them does not fulfil the requirements of the law. As has been explained by this Court in the case of *The State of Bombay v. Atma Ram Sridhar Vaidya*<sup>1</sup>, clause (5) of Article 22 requires that the grounds of his detention should be made available to the detenue as soon as may be, and that the earliest opportunity of making a representation against the order should also be afforded to him. In order that the detenue should have that opportunity, it is not sufficient that he has been physically delivered the means of knowledge with which to make his representation. In order that the detenue should be in a position effectively to make his representation against the order, he should

1. (1951) S.C.J. 208 : (1951) 1 M.L.J. 389 : (1951) S.C.R. 167.

have knowledge of the grounds of detention, which are in the nature of the charge against him setting out the kinds of prejudicial acts which the authorities attribute to him. Communication in the context, must, therefore, mean imparting to the detenu sufficient knowledge of all the grounds on which the order of detention is based. In this case the grounds are several, and are based on numerous speeches said to have been made by the appellant himself on different occasions and different dates. Naturally, therefore, any oral translation or explanation given by the police officer serving those on the detenu would not amount to communicating the grounds. Communication, in this context, must mean bringing home to the detenu effective knowledge of the facts and circumstances on which the order of detention is based.

We do not agree with the High Court in its conclusion that in every case communication of the grounds of detention in English, so long as it continues to be the official language of the State, is enough compliance with the requirements of the Constitution. If the detained person is conversant with the English language, he will naturally be in a position to understand the gravamen of the charge against him and the facts and circumstances on which the order of detention is based. But to a person who is not so conversant with the English language, in order to satisfy the requirements of the Constitution, the detenu must be given the grounds in a language which he can understand, and in a script which he can read, if he is a literate person.

The Constitution has guaranteed freedom of movement throughout the territory of India and has laid down detailed rules as to arrest and detention. It has also, by way of limitations upon the freedom of personal liberty, recognised the right of the State to legislate for preventive detention, subject to certain safeguards in favour of the detained person, as laid down in clauses (4) and (5) of Article 22. One of those safeguards is that the detained person has the right to be communicated the grounds on which the order of detention has been made against him, in order that he may be able to make his representation against the order of detention. In our opinion, in the circumstances of this case, it has not been shown that the appellant had the opportunity, which the law contemplates in his favour, of making an effective representation against his detention. On this ground alone we declare his detention illegal, and set aside the Order of the High Court and the order of detention passed against him.

V.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, A. K. SARKAR AND K. N. WANCHOO, JJ.

The Bagalkot Cement Co., Ltd.

*Appellant \**

v.

R. K. Pathan and others

*Respondents.*

*Industrial Employment (Standing Orders) Act (XX of 1946) Schedule, clause 5—Scope—Conditions of—Procedure in applying for leave and holidays—Quantum and extent of leave and holidays—Fixing of—If within the powers of the Certifying Officer under the Act.*

The object of the Industrial Employment (Standing Orders) Act, was to require the employers to make the conditions of employment precise and definite and the Act ultimately intended to prescribe those conditions in the form of Standing Orders so that what used to be governed by a contract heretofore would now be governed by the statutory Standing Orders and it would not be reasonable to hold that conditions of employment to which the Preamble of the Act specifically refers would not include a provision for the quantum of leave and the quantum of holidays to which the employee would be entitled. Therefore, the word "conditions" in clause 5 of the Schedule has to be reasonably construed in a broad and liberal sense. A provision or a stipulation as to leave and holidays would necessarily include a provision for the quantum of holidays and leave and this construction would be consistent with the meaning of the word "condition" as employed in the Preamble to the Act.

The substantive provision for the granting of leave and holidays along with the conditions in respect of them have to be made by the Standing Orders under clause 5 of the Schedule.

The claim for leave and holidays can become the subject-matter of an industrial dispute and if such a dispute is referred for adjudication to an Industrial Tribunal, the Tribunal can fix the quantum of holidays and leave. What the Tribunal can do on such reference is now intended to be achieved by the Standing Orders themselves in respect of Industrial Establishments to which the Act applies. The Certifying Officer as well as the appellate authority, are, in substance industrial authorities and if they are given power to make provision for leave and holidays as they undoubtedly are given power to provide for termination of employment and suspension or dismissal for misconduct, there is nothing inconsistent with the spirit of the Schedule or with the object of the Act.

Appeal by Special Leave from the Judgment and Order, dated the 15th October 1959, of the Appellate Authority (Chief Labour Commissioner, Central, New Delhi) in Appeal under section 6 of the Industrial Employment (Standing Orders) Act, 1946.

*B. Narayanaswami*, Advocate and *S. N. Andley* and *Rameshwar Nath*, Advocates of *M/s. Rajinder Narain & Co.*, for Appellant.

*M. K. Ramamurthi*, Advocate (*amicus curiae*), for Respondent.

The Judgment of the Court was delivered by

*Gajendragadkar, J.*—This appeal by Special Leave raises a short question about the scope and effect of clause 5 in the Schedule to the Industrial Employment (Standing Orders) Act, 1946 (XX of 1946) (hereinafter called the Act). That question arises in this way. The appellant Bagalkot Cement Co., Ltd. is a Limited Company registered under the Indian Companies Act, 1913; it carries on the business of manufacturing cement and for that purpose, it owns a factory as well as a limestone quarry at Bagalkot in the State of Mysore. As required by section 3 of the Act, the appellant submitted draft Standing Orders on the 3rd March, 1958 to the Certifying Officer and the Regional Labour Commissioner (Central), Madras, in order that they should be certified. The Certifying Officer considered the draft submitted by the appellant, heard the appellant and its employees, the respondents and passed an order of certification on the 16th June, 1959. While considering the draft for the purpose of certification, the Certifying Officer, however, made certain amendments in, and additions to the said draft. Amongst the additions made, clause (7) in paragraph 11 was one and it is with this addition made by the Certifying Officer that we are concerned in the present appeal.

Paragraph 11 of the draft Standing Orders submitted by the appellant dealt with the question of leave. Paragraph 11 (1) of the draft provided that holidays with pay will be allowed as provided for in the Factories Act, 1948, and other holidays in accordance with law and contract. Clauses (2) to (6) dealt with allied matters. In the Standing Orders as they were finally certified, clause (1) of paragraph 11 was slightly changed and it provided that holidays with pay will be allowed as provided for in the Mines Act. No grievance is made of this alteration. Clause (7) has been added to paragraph 11. It reads thus :

“(7). The workmen shall be allowed during the course of a year :—

(a) Ten festival holidays with pay for the celebration of important festivals (which will be fixed before the commencement of every calendar year in consultation with the workmen) including the Republic Day (26th January) and the Independence Day (15th August) and/or any other paid holidays as may be declared and notified by the Government from time to time. Those workmen that are required to work on festivals and National Holidays shall be given an equal number of compensatory holidays on day convenient to the company, and

(b) Fifteen days' casual leave with wages. This will include all kinds of leave due to sickness or any other cause.

(c) Casual leave will not be allowed for more than 3 days at a time except in the case of sickness and emergencies at the discretion of the company.

(d) Wages shall be allowed for those days remaining unavailed by the workers at the end of the year.

(e) Fourteen days annual leave to all classes of workers who have put in 265 attendances in a year as defined in the Mines Act. This includes statutory leave.

All leave should be applied for only in the prescribed form. The workmen after filling the particulars of the leave required by them shall hand over the same to the head of the section in which they are working.”



The appellant apparently contended before the Certifying Officer that it was outside his jurisdiction to deal with the topics covered by clause (7) which he wanted to add but its objection was overruled.

Against the order passed by the Certifying Officer certifying the Standing Orders with the additions and amendments made by him, the appellant preferred an appeal under section 6 of the Act to the appellate authority, viz., the Chief Labour Commissioner (Central), New Delhi, on the 5th July, 1959. The appellate authority, in substance, agreed with the view taken by the Certifying Officer and retained the addition made by him by the insertion of clause (7) to paragraph 11. He, however, made slight modifications by directing that in clause (a) there will be seven festival holidays instead of ten festival holidays and in clause (b) there will be ten days' casual leave instead of fifteen days. Clause (d) was amended by the appellate authority by substituting a new clause in its place. The substituted clause reads thus :

"Casual leave will not be allowed to be accumulated. Unavailed casual leave shall lapse at the close of the calendar year."

Then in regard to clause (e), the appellate authority held that the said clause amounted to a repetition of statutory provision. Therefore, the said clause was amended to read thus :

"Annual leave with wages will be allowed as per provisions of the Mines Act."

The appellate authority made certain other amendments in the Standing Orders as they were certified by the Certifying Officer and ultimately, the Standing Orders were certified with the modifications and alterations suggested by the order of the appellate authority. The order of the appellate authority was passed on 15th October, 1959.

Against this order, the appellant applied for Special Leave to this Court and Special Leave was granted to it on the 1st February, 1960. It is with the Special Leave thus granted that the appellant has come to this Court and on its behalf Mr. Narayana-swami has urged that the addition made by clause (7) in paragraph 11 of the Standing Orders is outside the jurisdiction of the certifying authority. He contends that the jurisdiction conferred on the certifying authority by clause (5) in the Schedule does not empower the certifying authority to deal with the substantive question of the extent and quantum of leave and holidays. It only requires the Standing Orders to provide for conditions subject to which leave and holidays can be granted and the procedure in respect thereof and the authority which may grant such leave and holidays. The quantum of leave and holidays which should be granted to the workmen is outside the purview of the Schedule and as such, cannot be included in the Standing Orders. That is how the narrow question which arises for our decision in the present appeal is to determine the scope and effect of clause (5) in the Schedule.

Before dealing with this question, it would be convenient to consider broadly the scheme of the Act. The Act was passed in 1946 because the Legislature thought that it was "expedient to require employers in industrial establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them." Prior to the passing of the Act, conditions of employment obtaining in several industrial establishments were governed by contracts between the employer and their employees. Sometimes the said conditions were reduced to writing and in many cases they were not reduced to writing but were governed by oral agreements. Inevitably in many cases, the conditions of service were not well defined and there was ambiguity or doubt in regard to their nature and scope. That is why the Legislature took the view that in regard to industrial establishments to which the Act applied, the conditions of employment subject to which industrial labour was employed, should be well defined and should be precisely known to both the parties. With that object, the Act has made relevant provisions for making Standing Orders which, after they are certified, constitute the statutory terms of employment between the industrial establishments in question and their employees. That is the principal object of the Act,

The Act applies to every industrial establishment wherein one hundred or more workmen are employed or were employed on any day of the preceding twelve months. It can be extended even to establishments whose complement of labour is less than one hundred and it does not apply to any industry to which Chapter VII of the Bombay Industrial Relations Act, 1946, applies or to any industrial establishment to which the provisions of the Madhya Pradesh Industrial Workmen (Standing Orders) Act, 1959, apply. In other words, normally, Standing Orders have to be drafted by the employer and their certification obtained under the Act wherever the employer employs more than one hundred industrial workmen : section 1 (3). The certifying authority under the Act means a Labour Commissioner or a Regional Labour Commissioner and includes any officer appointed by the appropriate Government by notification in the Official Gazette to perform all or any of the functions of a Certifying Officer under the Act : section 2 (c). The Act provides for an appeal against the order passed by the Certifying Officer and the "appellate authority" means an Industrial Court, wherever it exists or in its absence an authority appointed by the appropriate Government by notification in the Official Gazette to exercise in such area as may be specified in the notification the functions of an appellate authority under the Act : section 2 (a). "Standing Orders" are defined to mean rules relating to matters set out in the Schedule : section (g). Thus, the matters which have to be covered by the Standing Orders and in respect of which the employer has to make a draft for submission to the Certifying Officer are matters specified in the Schedule. Section 3 requires the submission of the draft of Standing Orders within six months from the date on which the Act becomes applicable to an industrial establishment. Under section 4, the Standing Orders become certifiable if provisions are made therein for every matter set out in the Schedule and they are found to be otherwise in conformity with the provisions of the Act. After the amendment of this section made in 1956, the Legislature has imposed upon the Certifying Officer and the appellate authority the duty to adjudicate upon the fairness or reasonableness of the provisions of any Standing Orders. Prior to the amendment, it was not open to the said authorities to examine the fairness of the Standing Orders submitted by the employer. The result of section 4, therefore, is that the Standing Orders have to provide for all the topics specified in the Schedule and they have to be in conformity with the Act. Their reasonableness can be examined by the appropriate authorities and suitable modifications can be made by them in accordance with their decision. Section 5 provides for the procedure which has to be followed by the Certifying Officer before certifying the Standing Orders. The procedure is intended to give an opportunity to both the parties to be heard before the final order is passed. Section 6 provides for an appeal and section 7 lays down that the Standing Orders shall come into operation on the expiry of 30 days from the date on which authenticated copies thereof are sent as required by section 5, sub-section (3), or where an appeal is preferred, on the expiry of seven days from the date on which the copies of the appellate order are sent under section 6 (2). Section 8 requires the Certifying Officer to keep a Register of Standing Orders and under section 9, the said Standing Orders have to be prominently posted by the employer in English and in the language understood by the majority of the workmen on special boards. Section 10 deals with the duration and modification after they are certified, shall not be liable to modification until the expiry of six months from the date on which they came into operation. Section 10 (2) empowers both the employer or the workman to apply for a modification in the said Standing Orders. It would thus be clear that after they are certified, the Standing Orders have to remain in force for six months unless, of course, they are modified in the meanwhile by consent. After six months are over, an application for modification in the Standing Orders can be made either by the employer or the employees and the problem would be considered after following the procedure prescribed by the Act for certifying the original Standing Orders. Section 11 confers the necessary powers of a Civil Court on the Certifying Officer and the appellate authority and section 12 prohibits the admission of oral evidence which has the effect of adding or otherwise varying or contradicting Standing Orders as finally certified under the Act, in any Court, Sec-

tion 13 provides for penalties and the procedure to enforce them. Section 13-A deals with the problem of interpretation of the Standing Orders and section 13-B provides for exemption of industrial establishments therein specified. Section 14 confers on the appropriate Government power to exempt, conditionally or unconditionally any industrial establishment, and section 15 confers on the appropriate Government the power to make Rules to carry out the purposes of the Act, and, in particular, to provide for the matters covered by clauses (a) to (e) of sub-clause (2). Section 15 (3) contains the salutary provision that every rule made by the Central Government under section 15 has to be placed before the House in the manner prescribed by it. The Schedule to the Act contains 11 clauses. Clauses 1 to 10 deal with the several topics in respect of which Standing Orders have to make a provision and clause 11 refers to any other matter which may be prescribed. This last clause shows that an addition may be made by the appropriate Government if it is thought necessary to do so. That, in brief, is the scheme of the Act.

Mr. Narayanaswami contends that having regard to the nature and scope of the several clauses in the Schedule, it would be appropriate to construe clause 5 as not including a provision for the quantum and extent of leave and holidays. His argument is that clause 5 is really intended to provide merely for the conditions and the procedure to be adopted in applying for leave and holidays. Clause 5 reads thus :

"Conditions of, procedure in applying for, and the authority which may grant, leave and holidays."

How many holidays the employee will have and how much leave, either casual or on medical grounds, he would be entitled to get, are matters outside the scope of the Schedule ; they would be governed by the relevant provisions of any other law or by contract between the parties; they cannot be the subject matter of Standing Orders. The Standing Orders would provide for the conditions subject to which leave and holidays can be applied for, the procedure in applying for the same and for the authority which may grant the same. That being so, the Certifying Officer and the appellate authority exceeded their jurisdiction in making substantive provisions in that behalf by paragraph 11 (7). That is the case for the appellant as presented by Mr. Narayanaswami.

In support of this contention, reliance has been placed on clause 3 in the Schedule which refers to shift working. It is urged that since the clause refers to shift working, the substantive provision in respect of shift working as well as the conditions subject to which it should be allowed would legitimately fall within its purview. If the Legislature had intended that the substantive provision as to leave and holidays should be the subject-matter of Standing Orders, it may well have referred to leave and holidays only in clause 5 without any further addition. The additional words introduced in clause 5 are words of limitation and they show that the substantive provision as to leave and holidays is outside the purview of that clause. It may be conceded that there is some force in this contention.

There are, however, other considerations which have to be borne in mind in construing clause 5. The object of the Act, as we have already seen, was to require the employers to make the conditions of employment precise and definite and the Act ultimately intended to prescribe these conditions in the form of Standing Orders so that what used to be governed by a contract heretofore would now be governed by the statutory Standing Orders and it would not be reasonable to hold that conditions of employment to which the Preamble of the Act specifically refers would not include a provision for the quantum of leave and the quantum of holidays to which the employee would be entitled. Therefore, the word "conditions" in clause 5 of the Schedule has to be reasonably construed in a broad and liberal sense. The dictionary meaning of the word "condition" is a provision or a stipulation. Now a provision or a stipulation as to leave and holidays would necessarily include a Provision for the quantum of holidays and leave and this construction would be consistent with the meaning of the word "condition" as employed in the Preamble to the Act. Mr. Ramamurthi who appeared *amicus curiae* for the respondents at our request contended that to adopt the narrow construction of the word "conditions" in clause 5 would

defeat the very purpose of clause 5. He argued that merely providing for the procedure of application and for the authority who would grant leave and holidays without stipulating as to the quantum of leave and holidays would be almost meaningless. In our opinion, there is force in this contention and so, we are inclined to adopt the broad and liberal construction of the word "condition" in clause 5.

Besides, the first three clauses dealing with the conditions, the procedure and the authority would apply both to leave and holidays and it is not easy to appreciate what conditions could be prescribed by the Standing Orders for the purpose of holidays. No doubt Mr. Narayanaswami suggested that the conditions in the context of holidays may mean conditions as to holidays with pay, or without pay or with half pay and that is what is contemplated by the first clause in relation to holidays. Theoretically, it may be conceivable that the word "conditions" may have that meaning in respect of holidays; but it seems to us that it would serve no useful purpose merely to provide for such conditions and to prescribe the procedure to be adopted in applying for leave and holidays unless the quantum of leave and the quantum of holidays are also intended to be prescribed by the Standing Orders. On the broad construction of clause 5, it becomes a self-sufficient and reasonable provision. The Standing Orders will provide for the leave to which the employees are entitled and will prescribe the number of holidays which they will be able to enjoy. Having provided for the quantum of leave and holidays, the Standing Orders will also provide for the conditions in respect of them, for the procedure in applying for them and for the authority which may grant them. It is true that it is not easy to understand why an application has to be made for holidays, but it may be that if there are sectional holidays, employees belonging to a particular section entitled to them may have to apply for them. Therefore, in our opinion, it cannot be said that the authorities below have adopted an unreasonable construction of clause 5 in the Schedule when they held that they were entitled to make the additional provisions in respect of leave and holidays which they have purported to make by adding clause 7 in paragraph 11 of the Standing Orders.

In this connection, reference may be made to the Model Standing Orders framed by the Central Government in 1946. Clause 9 of the Model Orders provides that holidays with pay will be allowed as provided for in Chapter VI of the Factories Act, 1948, and other holidays in accordance with law, contract, custom and usage. In fact, it is significant that paragraph 11 (1) of the draft submitted by the appellant has also provided that holidays with pay will be allowed as provided for in the Factories Act and other holidays in accordance with law and contract. If this provision is legitimately included in the Standing Orders and that too under clause 5 of the Schedule, it is difficult to understand why a more specific provision cannot be made under the said clause by clearly stating the number of holidays to which the employees would be entitled and that is precisely what paragraph 11 (7) purports to do.

Then clause 10 of the Model Standing Orders provides for casual leave. It lays down that a workman may be granted casual leave of absence with or without pay not exceeding 10 days in the aggregate in a calendar year. Then it lays down further conditions in respect of the grant of the said casual leave. It would be noticed that the quantum of casual leave to which the employee is entitled is thus specifically provided by clause 10 of the Model Standing Orders. It is perfectly true that if clause 5 of the Schedule is read in the narrow sense for which Mr. Narayanaswami contends, clause 10 of the Model Standing Orders would be invalid and from that point of view, the existence of clause 10 in the Model Standing Orders cannot be of any assistance in interpreting clause 5 of the Schedule. But if clause 5 is construed in the broad sense for which Mr. Ramamurthi contends, it would follow that clause 10 of the Model Standing Orders is consistent with the aim and object of the Schedule and that, incidentally, may support the argument for the broad construction. That is about all.

In regard to the argument based on the scope of the 10 clauses in the Schedule, it is certainly not correct to say that the scope of the Schedule is intended to be very

narrow. Take for instance, clause 8 which deals with the termination of employment or clause 9 which deals with the suspension or dismissal for misconduct, and acts or omissions which constitute misconduct. These are matters of general importance and it is conceded that all relevant and material provisions in respect of these matters have to be included in the Standing Orders. Therefore, it would not be inconsistent with the scheme of the Schedule if we were to hold that the substantive provision for the granting of leave and holidays along with the conditions in respect of them have to be made by the Standing Orders under clause 5 of the Schedule.

It would be recalled that section 10 of the Act provides for the duration of the Standing Orders and if any Standing Orders are found by experience to be unreasonable or inconvenient either by the employer or the employees, an application can be made for the modification of the said Standing Orders after the expiration of six months from the date on which they came into operation. Therefore, there would be no hardship in requiring the Standing Orders to include a provision as to leave and holidays. The provisions made in that behalf can be modified after following the procedure prescribed by section 10. It is not disputed that the claim for leave and holidays can become the subject matter of an industrial dispute and if such a dispute is referred for adjudication to an Industrial Tribunal, the Tribunal can fix the quantum of holidays and leave. What the Tribunal can do on such reference is now intended to be achieved by the Standing Orders themselves in respect of Industrial establishments to which the Act applies. We have noticed that the Certifying Officer as well as the appellate authority are, in substance, industrial authorities and if they are given power to make provision for leave and holidays as they undoubtedly are given power to provide for termination of employment and suspension or dismissal for misconduct, there is nothing inconsistent with the spirit of the Schedule or with the object of the Act. Therefore, we are not satisfied that the authorities below were in error in holding that it was competent to them to make the additional provision in the Standing Orders as prescribed by para. 11 (7).

In the result, the appeal fails and is dismissed. No order as to costs.

V.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P.B. GAJENDRAGADKAR, A.K. SARKAR AND K.N. WANGHOO, JJ.

Employers in relation to the Bhowra Colliery

.. *Appellants\**

*v.*

The Eastern Coal Company Workmen represented by the Collieries' Union.

.. *Respondents.*

*Coal Mines Provident Fund and Bonus Schemes Act (XLVI of 1948)—Bonus Scheme under—Para. 3 (b)—Malis employed to look after and maintain gardens in bungalows of the Management occupied by officers—Domestic and personal work—Not entitled to bonus under the Scheme.*

Domestic means as of the home. The *malis* who were working in the bungalows occupied by the officers, were working in the homes of the officers. They were, therefore, on domestic work. The work they were doing would not cease to be domestic work because the bungalows belonged not to the officers but to the management. Whether a work is domestic or not would depend on its nature. The nature of that work would not change because the *mali* was working not under the orders of the officer occupying the bungalow but under the management, nor because the bungalow did not belong to the officer but to the Management. Nor for the same reason does the fact that the *malis* were employed by the Management and not by the Officers make any difference.

Paragraph 3 of the Bonus Scheme contemplated *malis* who were employees of the colliery owner and were yet on domestic work.

These *malis* were on personal work. The word "Personal" is obviously used in the sense of work for an individual as distinguished from work for the Coal mine, as an institution. These *malis* were undoubtedly working for the officers as individuals. Therefore they were on personal work.

The *malis* are not entitled to bonus under the scheme.

Appeal by Special Leave from the Award, dated the 7th December, 1959, of the Central Government Industrial Tribunal, Dhanbad, in Reference No. 42 of 1959.

S.C. Banerjee and P.K. Chatterjee, Advocates, for Appellants.

Janardan Sharma, Advocate, for Respondents.

The Judgment of the Court was delivered by

Sarkar, J.—The appellants, the Bhowra Kankance Coal Co., Ltd., own the Bhowra and other collieries. On the Bhowra Colliery there are a number of residential bungalows belonging to the appellants occupied by their officers employed in the colliery. The appellants employ certain *malis* for working as such in these bungalows and their duty is to look after and maintain the gardens there. A dispute arose between the appellants and their workmen as to whether these *malis*, who were fourteen in number, were entitled to bonus. By an order made on 23rd June, 1959, under the Industrial Disputes Act, 1947, the Government of India referred this dispute along with another with which we are not concerned in this case, for adjudication to the Industrial Tribunal, Dhanbad. The points referred concerning the dispute above mentioned were in these terms :

"(1) Whether the withdrawal of the benefit of bonus provided in the Coal Mines Bonus Scheme by the Management of the Bhowra Colliery from the following garden *mazdoors/malis* is justified. If not, to what relief are they entitled and from what date ?

(2) Whether the garden *mazdoors/malis* referred to above are employed on domestic and personal work within the meaning of paragraph 3(b) of the Coal Mines Bonus Scheme, 1948, and if not, to what relief are they entitled and from what date ? "

The points so referred were decided by the Tribunal against the appellants by an award made on 7th December, 1959 and the present appeal is against that award.

Till 1st January, 1955, the Bhowra and certain other collieries managed as a group, were owned by the Eastern Coal Company Ltd., and on that date these collieries were sold to the appellants. At the time when this sale was being arranged, the workmen in these collieries raised a dispute that their services should be treated as continuous in spite of the transfer of the collieries from one owner to another by the sale and that the conditions of their service and the facilities which they were enjoying under the previous owners should be guaranteed and continued by the succeeding owners, that is the appellants, after the latter took over the collieries. At the instance of the Conciliation Officer appointed under the Act this dispute was settled by an agreement made on 14th January, 1955 to which the Conciliation Officer, the workmen, the previous owners and the appellants were parties. Paragraph 3 of this agreement provided as follows :

"Agreed that the existing service conditions and the facilities will be continued, excepting pension."

Now in 1948 an Act called the Coal Mines Provident Fund and Bonus Schemes Act had been passed by section 5 of which the Central Government was empowered to frame a bonus scheme for the payment of bonus to the employees of coal mines. The Central Government had framed a Bonus Scheme under this provision in 1948 and since then the previous owners had been paying the *malis* employed for the bungalow gardens belonging to the Bhowra Colliery, bonus in terms of it. In 1951 they once stopped the bonus but that caused an industrial dispute and they thereupon restored the bonus. Upto the acquisition of the Bhowra Colliery by the appellants the position thus was that these *malis* had been receiving bonus since 1948 excepting for a short period during which it had been stopped as earlier mentioned. After they became the owners of the Bhowra Colliery, the appellants however stopped the payment of bonus to these *malis*. This raised the industrial dispute which had led to this appeal.

Paragraph 3 of the Bonus Scheme framed under the Act, so far as relevant for this case, is in these terms :

Paragraph 3. Except as hereinafter provided every employee in a coal mine to which this Scheme applies shall be eligible to qualify for a bonus.

Exceptions :—An employee in a coal mine shall not be entitled to a bonus under the Scheme for the period during which—

- (a) .....
- (b) he is employed as a *mali*, sweeper or domestic servant on domestic and personal work ;
- (c) .....

One of the questions raised in this appeal is whether the bungalow *malis* were entitled to bonus under this paragraph. The appellants contended before the Tribunal that *malis* as a class were excepted from the benefit of the Bonus Scheme by the provision in *Exception (b)* in this paragraph. They further contended in the alternative that these *malis* were excepted in any event because they were *malis* employed on domestic and personal work within the meaning of the exception. The Tribunal rejected these contentions of the appellants and held (a) that these *malis* were entitled to bonus under paragraph 3 of the agreement of 14th January, 1955 and (b) that they were not employed on domestic and personal work and were therefore not within the exception. For these reasons the Tribunal held that the withdrawal of the bonus by the appellants was not justified.

It is not clear on what ground the Tribunal held that the *malis* were entitled to bonus under paragraph 3 of the agreement of 14th January, 1955. It may be that the Tribunal thought that the Bonus Scheme framed by the Central Government formed a condition of service of the *malis* or a facility to which they were entitled and which the appellants undertook by the agreement of 14th January, 1955 to continue. If this was the point of view, then of course the further question still remains whether the *malis* were on domestic and personal work for if they were, then they would not be entitled to the bonus as a facility or a condition of their service under the Scheme.

It was however contended on behalf of the respondent workmen in this Court that the right to bonus was a condition of the service of the *malis* and a facility to which they were entitled independently of the Bonus Scheme and that this is what the Tribunal had held. The record however is not very clear on this question. The appellants dispute the contention of the workmen and further say that in any event the Tribunal had no jurisdiction to decide that question for the question referred to it was the right of the *malis* to bonus under the Bonus Scheme.

We think that the appellants' contention is well founded. What had been referred was the question "Whether the withdrawal of the benefit of bonus provided in the Coal Mines Bonus Scheme... is justified." On the language of the order of reference it seems to us that the dispute referred was as to the right as provided in the Bonus Scheme and not as to any other right. This also was the workmen's case before the Tribunal as appears from its written statement filed there. In the statement of case filed in this appeal also, the respondent took the same position. We therefore think that if the Tribunal had held that the *malis* were entitled to the bonus under the agreement of 14th January, 1955 independently of the Bonus Scheme it had exceeded its jurisdiction and its award cannot be upheld.

The question still remains as to whether on a proper construction of paragraph 3 of the Bonus Scheme these *malis* had any right to bonus. That was undubitably the question referred to the Tribunal. The words requiring construction are "on domestic and personal work." The Tribunal held that *malis* working in bungalows belonging to the appellants were not working for the home or household of private persons or individuals and were therefore not on domestic work. It also held that as the *malis* work under the direction and control of the appellants and were liable to be transferred from one bungalow to another or to some other work they were not on personal work. We are unable to accept this construction of paragraph 3 of the Bonus Scheme. Domestic means as of the home. We feel no doubt that the *malis*

who were working in the bungalows occupied by the officers, were working in the homes of the officers. They were, therefore, on domestic work. The work they were doing would not cease to be domestic work because the bungalows belonged not to the officers but to the appellants. Whether a work is domestic or not would depend on its nature. Suppose an officer has employed his own *mali* for working in the bungalow garden, that *mali* would surely be on domestic work. This is not disputed. The nature of that work would not change because the *mali* was working not under the orders of the officer occupying the bungalow but under the appellants, nor because the bungalow did not belong to the officer but to the appellants. Nor for the same reason does the fact that the *malis* were employed by the appellants and not by the officers make any difference. The fact that *malis* might be transferred to other jobs and cease to be *malis* altogether is also irrelevant. On such transfer they might become entitled to bonus. The exception in paragraph 3 deprives them of the bonus only for the time they are *malis* on domestic and personal work.

Paragraph 3 of the Bonus Scheme contemplated *malis* who were employees of the colliery owners and were yet on domestic work. The Tribunal thought that paragraph 3 only contemplated cases of *malis* appointed by the officers who were paid some allowance by the colliery owners for keeping *malis* in the gardens of the bungalows occupied by them. It may be that *malis* so engaged would be the employees of the colliery owners, as the term employee is defined in the Act under which the Bonus Scheme was framed, but we see no reason to restrict *malis* on domestic work referred to in paragraph 3 to such *malis* only. As we have said earlier, whether a *malis* is on domestic work or not would depend on the nature of the work. As the work which the *malis* with whom we are concerned did, was domestic work, these *malis* must be deemed to be within the exception mentioned in paragraph 3. They would not cease to be *malis* on domestic work because they had been working in the bungalows belonging to the appellants or were under their control and orders.

We further feel no difficulty in holding that these *malis* were on personal work. The word 'personal' is obviously used in the sense of work for an individual as distinguished from work for the Coal mine, as an institution. These *malis* were undoubtedly working for the officers as individuals. Therefore they were on personal work.

For these reasons in our view the *malis* in the present case were not entitled to any bonus under the Bonus Scheme. As in our opinion the order of reference does not raise any question as to whether the *malis* were entitled to bonus apart from the Bonus Scheme, it is unnecessary for us to express any opinion on that question and we do not do so.

The result is that this appeal is allowed and we set aside the award of the Tribunal in so far as it is concerned with the two points of dispute earlier set out which had been referred to it. We do not think it a fit case to make any order for costs.

V.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—J. L. KAPUR AND RAGHUBAR DAYAL, JJ.

Kanbi Karsan Jadav

.. *Appellant\**

v.

The State of Gujarat

.. *Respondent.**Criminal Trial—Evidence of the approver—Corroboration—Extent of.*

What the law requires in the case of an accomplice evidence is that there should be such corroboration of the material parts of the story connecting the accused with the crime as will satisfy reasonable minds that the approver can be regarded as a truthful witness. The corroboration need not be direct evidence of the commission of the offence by the accused. If it is merely circumstantial



evidence of his connection with the crime it will be sufficient and the nature of the corroboration will depend on and vary with the circumstances of each case.

Besides the evidence of the approver three important facts which connected the accused with the commission of the offence were :—His pointing out the dead body, his pointing out the silver buttons of the deceased which were stained with human blood and the presence of his hairs on a *pania* (scarf) on which there were the hairs of the deceased also. This would be sufficient evidence in the circumstances of the present case to connect the accused with the commission of the offence.

Appeal by Special Leave from the Judgment and Order dated the 14th April, 1959, of the former Bombay High Court (Rajkot Bench) at Rajkot in Criminal Appeal No. 84 of 1958.

*Nur-ud-din Ahmed* and *K.L. Hathi*, Advocates, for Appellant.

*H. R. Khanna* and *R. H. Dhebar*, Advocates, for Respondent.

The Judgment of the Court was delivered by

*Kapur, J.*—The appellant and two others were convicted by the Additional Sessions Judge, Gohilwad, under sections 302 and 201 of the Indian Penal Code for the murder of Kanji and they were sentenced to imprisonment for life under the former section and to seven years' rigorous imprisonment under the latter. The sentences were concurrent. On appeal the High Court set aside the conviction of Nanji Ravji but upheld the convictions and sentences of the appellant and Karamshi Bhavan. The appellant has come in appeal to this Court by Special Leave.

The deceased Kanji was rather an unsavoury character in village Chiroda and it is alleged that he had illicit connection with Shirmati Shantu the sister of Karamshi and also used to follow about Smt. Baghu the sister of the appellant for a similar object. It is stated that five days before the occurrence the appellant Karsan, Karamshi, Nanji and Gumansinh approver met and decided to murder the appellant. With that object in view Gumansinh approver was to decoy the deceased to the Vadi of the appellant and there the murder was to be committed. At about sunset on 19th March, 1958, the deceased was decoyed to the place as previously arranged and there he was murdered by the appellant who gave him a few blows with a sharp cutting instrument called *Dharia*. According to the statement of the approver the dead body was wrapped in the scarf of the deceased and was carried by the appellant from the place of the murder to the dry bed of the river and there it was buried in a pit. Nothing was heard of the murder or of the deceased till on 26th March, 1958, a brother of the deceased made a report to the police about his disappearance and that he suspected the three uncles of the appellant. Subsequently the appellant and the other accused persons were taken into custody by the Police. One of them while in the custody of the police, was allowed to go to the village and he asked the help of Shamji and Manilal, P.Ws. He also made a confession to them and they reported the matter to the Police. On 31st March, 1958, Gumansinh and Karamshi made confessions which were recorded by a Magistrate. Between 26th March, and 31st March, recoveries of various articles were made. At the instance of the appellant, it is stated, the dead body and then the head of the deceased was recovered from a distant well. At the instance of Nanji on 28th March, 1958 a scarf was discovered in the pit in which the dead body was, according to the approver, buried. On the scarf, there were some hairs which on analysis by the Chemical Examiner were found to be similar to the hairs of the appellant and of the deceased. A day previous, i.e., 27th March, 1958, at the instance of the appellant silver buttons which were stained with human blood were discovered from the field of the appellant. A small stick like a baton belonging to the deceased was also found at his instance.

The High Court rejected the confession of Karamshi on the ground that it was not voluntary. It acquitted Nanji on the ground that there were no corroboration in regard to him of the approver's statement, the place where the dead body was buried was not discovered at his instance, his production of stick and a shirt and trousers from his house was of no consequence, and the oral evidence was contrary to the medical evidence and Karamshi's confessional statement could not be used against Nanji.

In regard to the appellant the High Court accepted the testimony of the approver as being a reliable piece of evidence. It attached no importance to the recovery of the cutting instrument, *dharia*, nor to the discovery of the stick (*dhoka*) at his instance. But the High Court did rely upon the discovery of the dead body of the deceased, i.e., the trunk and the head, at the instance of the appellant and of the blood-stained buttons also at his instance and attached importance to the scarf recovered from the pit where the dead body was alleged to have been first buried and which had hairs both of the appellant as well as of the deceased.

It was argued for the appellant that the evidence of the approver, even though it had been accepted as true, was not corroborated in material particulars connecting the appellant with the offence. On the other hand it was contradicted. The approver had stated that the dead body was buried in a pit in the dry bed of the river but when that pit was dug up the dead body was not found there and only a piece of *ulna* bone and a heel of a human foot were found and all these recoveries had been made earlier and so could not be called corroborative in material particulars. It was further submitted that there was no evidence to show as to when and how the body of the deceased was removed from the pit, dismembered and thrown into the well. The recovery of the scarf, it was pointed out, was an innocuous circumstance because on the evidence produced it had not been shown to belong to the appellant but to his father and the evidence of the Chemical Examiner was not sufficient to prove that the hairs on the scarf were of the appellant or of the deceased because the Chemical Examiner was certainly no expert on this matter and his evidence was not admissible under section 45 of the Evidence Act, and at the most, according to the Chemical Examiner's Report the hairs resembled those of the appellant. And secondly according to the approver the dead body of the deceased was wrapped in his own *pania* (scarf). It was further submitted that the statement in regard to the recovery of the trunk and the head will only show that the appellant knew where the trunk and the head were, which at the most would lead to an inference of an offence under section 201 and not of section 302.

What the law requires in the case of an accomplice's evidence is that there should be such corroboration of the material parts of the story connecting the accused with the crime as will satisfy reasonable minds that the approver can be regarded as a truthful witness. The corroboration need not be direct evidence of the commission of the offence by the accused. If it is merely circumstantial evidence of his connection with the crime it will be sufficient and the nature of the corroboration will depend on and vary with the circumstances of each case. *Vemireddy Satyanarayan Reddy v. State of Hyderabad*<sup>1</sup>.

The confessional statement made by the approver on 31st March, 1958 gave the following facts connecting the appellant with the murder. (1) The appellant gave a *dharia* blow to the deceased. The *dharia* had already been discovered and it has been disregarded from the evidence by the High Court as being of no importance. The next thing stated by the approver was that the deceased's body was tied in a *pania* (scarf). He did not state that the scarf in which it was bound belonged to the appellant. The next fact stated by him was that the appellant carried the body of the deceased and then it was buried in a pit and lastly he stated that the appellant had told him that the head of the deceased had been thrown into a well. None of these recoveries in the circumstances of this case are corroborative of the statement of the approver to the extent of connecting the appellant with the offence committed. On the other hand, they are somewhat contradictory of the statement because the *pania* (scarf) which was found in the pit has now been stated to belong to the appellant. The dead body was not found in the pit, the head had already been discovered and the trunk had also been taken out of the well. In these circumstances it was submitted that the approver's statement cannot be said to have been corroborated in material particulars.

But there are other circumstances which have to be considered even if the evidence of the approver is held not to be very helpful to the prosecution. Firstly, there is the pointing out of the dead body by the appellant from the well ; secondly, the discovery of the blood-stained (stained with human blood) buttons at the instance of the appellant ; thirdly the scarf which has been held to belong to the appellant and which was found from the pit pointed out by the co-accused Nanji and fourthly by the presence of the hairs of the appellant and of the deceased on that scarf.

The mere fact that the dead body was pointed out by the appellant or was discovered as a result of a statement made by him would not necessarily lead to the conclusion of the offence of murder. But there are other circumstances which have to be considered. The discovery of the buttons with bloodstains at the instance of the appellant is a circumstance which may raise the presumption of the participation of the appellant in the murder. In *Wasim Khan v. The State of Uttar Pradesh*<sup>1</sup>, it was held that the recent and unexplained possession of stolen property would be presumptive evidence against a prisoner on a charge of robbery as also of a charge of murder. But it must depend upon the circumstances of each case. The third piece of evidence to be considered is the recovery of the *pania* i.e., scarf. No doubt there is no statement by the approver that the scarf in which the dead body was taken was that of the appellant. But a scarf has been found which the High Court has held as belonging to the appellant and hairs both of the deceased as well as of the appellant were found on that scarf. It was argued that the finding of the hairs was of no consequence and at least the Chemical Examiner was not the proper expert who could depose as to the similarity or otherwise of the hairs. The writers on medical jurisprudence, however, have stated that from the microscopic examination of the hairs it is possible to say whether they are of the same or of different colours or sizes and from the examination it may help in deciding where the hairs came from. In *Taylor's Medical Jurisprudence* (1956 Edn.), Volume I, at page 122, some cases are given showing that hairs were identified as belonging to particular persons.

Thus, we have besides the evidence of the approver three important facts which connect the appellant with the commission of the offence. His pointing out the dead body, his pointing out the silver buttons of the deceased which were stained with human blood and the presence of his hairs on a *pania* (scarf) on which there were the hairs of the deceased also. In our opinion this would be sufficient evidence in the circumstances of the present case to connect the appellant with the commission of the offence.

We, therefore, dismiss the appeal.

V.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—B. P. SINHA, *Chief Justice*, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR, J. R. MUDHOLKAR AND T. L. VENKATARAMA AIYAR, JJ.

Dalbir Singh and others

.. *Appellants\**

v.

The State of Punjab

.. *Respondent.*

*Pepsu Police (Incitement to Disaffection) Act (I of 1953), section 3—Penalty for causing disaffection in the Police force—Constitutional validity—Constitution of India 1950 Article 19—If offended—“In the interests of public order”—What constitutes—Impugned Act it has force of Parliamentary legislation contemplated by Article 33 of the Constitution—Constitution of India (1950), Article 136—Appeal to Supreme Court by Special Leave—Finding of fact and appreciation of oral evidence—Cannot be canvassed.*

Section 3 of the Pepsu Police (Incitement to Disaffection) Act (I of 1953) is concerned with ensuring discipline among the forces charged with the maintenance of public order but as the powers of

1. (1956) S.C.J. 437: (1956) 2 M.L.J. (S.C.) 9: (1956) S.C.R. 191.

\*Crl. A. No. 102 of 1960.

6th February, 1962.

the President were exercised by virtue of the delegation contained in section 3 of the Act XXII of 1953 under which only the powers of the State Legislature were vested in him, any law enacted by him would not have the force of Parliamentary legislation contemplated by Article 33.

The expression "in the interests of public order" though undoubtedly wider than the previous phrasing "for the maintenance of public order" could not mean that the existence of any remote or fanciful connection between the impugned Act and public order was sufficient to sustain the validity of the law, but that on the other hand, the connection between the act prohibited or penalised and public order should be intimate; in other words there should be a reasonable and rational relation between it and the object sought to be achieved, *viz.*, public order. The nexus should thus be proximate not far fetched, problematical or too remote in the chain of its relation with public order.

The impugned enactment seeks to lay an embargo on certain activities in the interests of the Police service which is the arm of the State charged with the duty of ensuring and maintaining public order. The efficiency of that service and its utility in achieving the purpose for which it is formed and exists is sought to be secured by penalising attempts to undermine its loyalty and dissuading the members of that force from performing their functions and being available to the State as a disciplined body. Any breach in the discipline by its members must necessarily be reflected in a threat to public order and tranquillity. If the police force itself were indisciplined they could hardly serve as instruments for the maintenance of public order or function properly as the machinery through which order could be maintained among the general public. The impugned provision in so far as it penalised the creation of disaffection among members of the police force or the incitement of the members of the police force to withhold their services from the Government could properly be sustained as enacted "in the interest of public order." Attempts to induce indiscipline among the police do not stand on any different footing.

In considering an appeal which comes by Special Leave the Supreme Court normally accepts as final every finding of fact reached by the High Court as well as its appreciation of oral testimony and if there is evidence which could serve as a basis for any finding reached by the High Court the same cannot be canvassed before the Supreme Court.

Appeal by Special Leave from the Judgment and Order, dated the 7th October, 1954, of the Punjab High Court in Criminal Revision No. 610 of 1959.

*Hardev Singh and T. Kumar*, Advocates, for Appellants.

*S.M. Sikri*, Advocate-General for the State of Punjab and *N. S. Bindra*, Senior Advocate (*P.D. Menon*, Advocate, with them), for Respondent.

The Judgment of the Court was delivered by

*Rajagopala Ayyangar, J.*—This appeal by Special Leave against the decision of the High Court of Punjab raises for consideration principally the constitutional validity of section 3 of the Pepsu Police (Incitement to Disaffection) Act (I of 1953) which will be referred to hereafter as the impugned Act.

The four appellants were at one time members of the Pepsu Police force and were charged, before the First Class Magistrate at Fardikot, with having committed three offences: (1) under section 26 of the Pepsu Public Safety Ordinance (No. 7 of Samvat 2006), (2) under section 33 of the said Ordinance, and (3) under section 3 of the impugned Act. We shall be referring to the provisions of the relevant enactments in due course. The accused pleaded not guilty and were tried by the learned Magistrate who by his judgment dated 28th August, 1958, held the prosecution case fully established against all the accused. He convicted the four appellants under section 26 of the Public Safety Ordinance and sentenced them to imprisonment for six months. The third appellant alone was convicted of the offence under section 33 of the same Ordinance and was sentenced to imprisonment for six months. Appellants 1, 2 and 4 were further convicted of offences under section 3 of the impugned Act and sentenced to imprisonment for six months, the several sentences against the respective accused being directed to run concurrently. The appellants filed an appeal to the Sessions Judge at Bhatinda who upheld the convictions but reduced the sentences. In respect of the offence under section 26 of the Public Safety Ordinance the sentence passed against the four appellants was reduced to imprisonment for three months while in respect of the third accused who had been additionally sentenced under section 33 of the Ordinance, the same was reduced to imprisonment for 1½ months and the sentences on appellants 1, 2 and 4 under section 3 of the impugned Act was reduced to imprisonment for three months, the sentences again being directed to run concurrently. With these modifications the appeals stood dismissed. The appellants thereafter preferred a revision to the High Court and this was heard by a learned Single Judge who while accepting the revision of

the appellants in so far as it related to their conviction and sentence under section 26 of the Ordinance, maintained the other convictions and sentences but reduced the sentences. It is from this judgment of the High Court that this appeal has been preferred by the four appellants.

It would be seen from the above narrative that the appeal is concerned with the propriety of the conviction of appellants 1, 2 and 4 of an offence under section 3 of the impugned Act and of the third appellant under section 33 of the Ordinance, all the appellants having been acquitted by the High Court of the charge against them under section 26 of the Ordinance. It is therefore not necessary to refer to the terms of section 26 or the offence constituted by it. In the Courts below including the High Court no challenge was made as regards the legality of any of the provisions of law of the violation of which the appellants were found guilty but before us though learned Counsel did not raise any contention regarding the validity of section 33 of the Pepsu Public Safety Ordinance, challenged the constitutionality of section 3 of the impugned Pepsu Police (Incitement to Disaffection) Act which appellants 1, 2 and 4 were found to have violated and for which they were sentenced to a term of imprisonment.

Learned Counsel for the appellants raised for our consideration three points : (1) the constitutional validity of section 3 of the impugned Act, (2) If section 3 were constitutional and valid whether appellants 1, 2 and 4 were proved to have been guilty of an offence for violating that provision, and (3) whether appellant 3 was properly held guilty of an offence under section 33 of the Pepsu Public Safety Ordinance.

We shall first take up for consideration the attack on the validity of section 3 of the impugned Act. Patiala and East Punjab States Union, commonly called Pepsu was one of the States specified in Part B of the First Schedule to the Constitution when the Constitution was brought into force in January, 1950. For reasons not necessary to be stated here, the administration of Pepsu was taken over by the President under Article 356 of the Constitution. The powers of the State Legislature were declared by the Presidential Proclamation issued on 4th March, 1953, to be "exercisable by or under the authority of Parliament" (*vide* Article 356 (1) (b)). Thereafter Parliament enacted Act XXII of 1953 which received the assent of the President on 17th May, 1953, which was entitled : "The Patiala and East Punjab States Union Legislature (Delegation of Powers) Act, 1953". Section 3 of this enactment provided :

"The power of the Legislature of the State of Patiala and East Punjab States Union to make laws which has been declared by the proclamation to be exercisable by or under the authority of the Parliament is hereby conferred on the President."

There are other provisions which are contained in the other sub-sections of section 3 but these have no relevance for this appeal. In exercise of the powers thus delegated to him by Parliament the President enacted Pepsu Act (I of 1953) whose Long Title runs :

"An Act to provide a penalty for spreading disaffection among the police and for kindred offences."

It is the 3rd section of this enactment whose validity is challenged in this appeal and that reads :

"3: *Penalty for causing disaffection, etc.*—Whoever intentionally causes or attempts to cause, or does any act which he knows is likely to cause, disaffection towards any Government established by law in India amongst the members of a police force, or induces or attempts to induce, or does any act which he knows is likely to induce, any member of a police force to withhold his services or to commit a breach of discipline shall be punishable with imprisonment which may extend to six months, or with fine, or with both."

The attack upon the validity of this provision was rested on its being violative of the freedom guaranteed by Article 19 (1) (a), the submission being that the section was not saved by Article 19 (2).

Before considering the arguments advanced it is necessary to mention, for being put aside, that in construing the validity of section 3 of the impugned Act

the provision contained in Article 33 of the Constitution has no relevance. That Article enacts :

"Article 33.—Parliament may by law determine to what extent any of the rights conferred by this Part shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them."

No doubt, the impugned provision is concerned with ensuring discipline among the forces charged with the maintenance of public order but as the powers of the President were exercised by virtue of the delegation contained in section 3 of Act XXII of 1953 under which only the powers of the State Legislature were vested in him, any law enacted by him would not have the force of Parliamentary legislation contemplated by Article 33.

Article 33 being out of the way the very short question that has to be considered is whether the impugned provision is saved by Article 19 (2), for it is common ground that that provision does not violate any freedom other than that of "free speech and expression" guaranteed by Article 19 (1) (a): Article 19 (2) as it stands after the amendment by the Constitution First Amendment Act of 1951 reads :

"19 (2). Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restriction on the exercise of the right conferred by the said sub-clause in the interest of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence."

Of the criteria set out in this clause the one relevant in the present context is that which refers to "in the interests of..... public order." The contention urged by learned Counsel was that section 3 was too wide in that it embraced within itself not merely matters which might have relevance to circumstances intimately connected with the maintenance of public order, but also those whose connection with it might be remote or fanciful. While not seriously disputing that seducing the loyalty of the police force, or inducing the members thereof not to do their duty might imperil public order and so far within the limit of restrictions permissible of imposition under Article 19 (2), learned Counsel laid stress on the fact that the impugned section made it an offence to induce a member of the police force to "commit a breach of discipline", laying special emphasis on the fact that the words "breach of discipline" besides being vague, might include within itself acts which might be innocent as well as others of varying degrees of culpability.

The content of the expression "in the interests of..... public order" has been the subject of detailed and elaborate consideration by this Court in *Superintendent, Central Prison, Fahegarh v. Ram Manohar Lohia*<sup>1</sup>, where the effect of the First (Constitution) Amendment by which the words "for the maintenance of public order" were replaced by the words "in the interests of public order" was considered in the light of the previous decisions of this Court on that topic. Subba Rao, J., speaking for this Court said that the expression "public order" in the juxtaposition of the different grounds set out in Article 19 (2) was synonymous with "public peace, safety and tranquillity". He also pointed out that the expression "in the interests of public order" though undoubtedly wider than the previous phrasing "for the maintenance of public order" could not mean that the existence of any remote or fanciful connection between the impugned act and public order was sufficient to sustain the validity of the law, but that on the other hand, the connection between the act prohibited or penalised and public order should be intimate; in other words there should be a reasonable and rational relation between it and the object sought to be achieved, viz., public order. The nexus should thus be proximate—not far fetched, problematical or too remote in the chain of its relation with public order.

Keeping this exposition in mind, the question to be considered is whether the connection between what is prohibited or penalised by the impugned provision and public order, i.e., the ensuring of tranquillity and orderly life is so remote or fanciful

1. (1960) S.C.J. 567 : (1960) M.L.J. (Cri.) 340 : (1960) 2 S.C.R. 821.

as to lead to an inference that there is no proximate connection between the two. We have no hesitation in answering this question against the appellants. The impugned enactment seeks to lay an embargo on certain activities in the interests of the Police service which is the arm of the State charged with the duty of ensuring and maintaining public order. The efficiency of that service and its utility in achieving the purpose for which it is formed and exists is sought to be secured by penalising attempts to undermine its loyalty and dissuading the members of that force from performing their functions and being available to the State as a disciplined body. Any breach in the discipline by its members must necessarily be reflected in a threat to public order and tranquillity. If the Police force itself were indisciplined they could hardly serve as instruments for the maintenance of public order or function properly as the machinery through which order could be maintained among the general public. As we have pointed out earlier, learned Counsel did not seriously contest that the impugned provision in so far as it penalised the creation of disaffection among members of the police force or the incitement of the members of the police force to withhold their services from the Government could properly be sustained as enacted "in the interests of public order". We consider that attempts to induce indiscipline among the police do not stand on any different footing. We do not further consider well-founded the submission of learned Counsel that the word "discipline" or the phrase "breach of discipline" is vague. We have therefore no hesitation in rejecting this challenge to the validity of section 3 of the impugned Act.

The next question that was urged by learned Counsel was that the High Court was wrong in considering that the three appellants 1, 2 and 4 were guilty of any contravention of section 3 of the Act. We do not consider that this submission is justified. It is needless to point out that in considering an appeal which comes before us by Special Leave this Court normally accepts as final every finding of fact reached by the High Court as well as its appreciation of oral testimony and that if there is evidence which could serve as a basis for any finding reached by the High Court the same cannot be canvassed before us. If the submission of learned Counsel is viewed in the light of this principle it appears to us that there is hardly any scope for argument as regards what might be termed the merits of the case. One of the witnesses whose evidence has been accepted by the Courts below and which is referred to in the judgment of the learned Judge in the High Court was Krishan Dayal, P.W. 4, who deposed to the accused saying "Police brothers, come and join us, stop the office work; We will sit here in dharma, start hunger strike. . . . . and would not allow the office work to run". It is clear from this evidence that the accused had induced or had attempted to induce members of the Police force to withhold their services as also to commit a breach of discipline by staying away without doing their duty. In our opinion, it is not shown that the conviction of appellants 1, 2 and 4 of an offence under section 3 of Act I of 1953 was improper or illegal.

The last of the points arising in the appeal is as regards the conviction of Lal Singh—the third appellant—of an offence under section 33 of the Ordinance. Section 33 of the Ordinance runs:

"Whoever induces or attempts to induce any public servant or any servant of local authority to disregard or fail in his duties as such servant shall be punishable with imprisonment which may extend to one year, or with fine or with both."

As regards this appellant this is what the learned Judge of the High Court stated:

"As against Lal Singh there is evidence of P.W. 11, Kartar Singh and P.W. 18, Balwant Singh, Foot-Constable that he asked them to disobey their officers and should give up Government work. His offence under section 33 of the Ordinance is substantiated."

As we have pointed out earlier, the validity of section 33 of the Ordinance was not challenged and the only question therefore was whether the third appellant was properly held guilty of the offence. It was not disputed that the two prosecution witnesses 11 and 18 did state on oath the matters referred to by the learned Judge. In view of what we have stated earlier as regards the manner in which this Court

deals with appeals under Article 136 there is no ground shown for interfering with the conviction of the third appellant or the sentence passed.

Before parting with the case it is necessary to advert to one matter. In the course of his arguments learned Counsel for the appellant drew our attention to certain police rules framed by the State Government which prohibited policemen from joining unions and sought to raise a point that the said rule was unconstitutional as in violation of Article 19 (1) (b) and that all the activities of the four accused were in reality an attempt to form an union and that therefore we should consider the legality of this rule of the Police force in considering the propriety of their convictions. Though there is a reference to the rule in the judgment of the High Court, it is referred to only incidentally and as part of the narrative in detailing the activities of the accused. The offence with which the accused were charged was certainly not the violation of that rule, which it might be pointed out did not create any offence, so that the validity of that rule was wholly irrelevant to their guilt when charged with substantive offences under the various enactments we have noticed earlier. It need hardly be pointed out that the fact that a person is engaged in asserting a fundamental right affords no defence to a charge of having contravened a valid penal statute while so engaged. In the High Court the validity of the Police rule was never challenged and in the circumstances we declined to permit learned Counsel to argue any question before us in relation to the validity of that rule.

The appeal fails and is dismissed.

V.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR, M. Hidayatullah and Raghubar Dayal, JJ.

Thakur Narwar Singh

.. Appellant \*

v.

The State of Madhya Pradesh

.. Respondent.

*Penal Code (XLV of 1860)—Offences committed in 1948 in the State of Jhabua in 1948—If punishable after the State became part of India under the Penal Code, in prosecution commenced in 1955.*

In 1948 when the offences were committed by the accused the law in the State of Jhabua was the Indian Penal Code and that law was continued by the Ordinance of the Rajpramukh (Ordinance I of 1948) and the Part B States (Laws) Act III of 1951 section 6 and any penalty incurred in respect of any offence committed in 1948 is punishable under the Indian Penal Code as applied to Jhabua State.

Appeal by Special Leave from the Judgment and Order, dated the 28th September, 1956, of the Madhya Pradesh High Court (Indore Bench) at Indore in Cr. A. No. 8 of 1956.

B. K. Banerjee and Thakur Das Taneja, Advocates, for Appellant.

I. N. Shroff, Advocate, for Respondent.

The Judgment of the Court was delivered by

Kapur, J.—This appeal is directed against the judgment and order of the High Court of Madhya Bharat upholding the conviction of the appellant under sections 380 and 451 of the Indian Penal Code. The question for decision is whether the appellant could be tried in 1955 under the Indian Penal Code for offences committed by him in 1948 when the State of Jhabua, in which the offences were committed, was not a part of the Dominion of India and whether the State Penal Code did contain any provisions corresponding to the sections of the Indian Penal Code under which the appellant has been convicted.

In Jhabua State there is a Thikana Jhaknawda which was a Jagir. Its Thakur, Thakur Narayan Singh, died on 11th November, 1945, without leaving a son. His



two widows adopted Gajendrapal Singh, the second son of His Highness the Raja of Jhabua on 15th July, 1946. Representations made by the appellant claiming the succession to the Thikana were rejected by His Highness. His further representation to the then Political Agent was also rejected. It is alleged that the appellant entered into a conspiracy with about 150 persons and on 18th January, 1948, forcibly entered the Thikana and took possession of it and remained in unlawful possession for about 7 months when he gave up the possession. The prosecution against him and 15 others under sections 121, 295 and 455 of the Indian Penal Code started on 7th October, 1955. He was convicted under sections 451 and 380 of the Indian Penal Code but all the other accused persons were acquitted by the Sessions Judge. Against his conviction the appellant took an appeal to the High Court but his appeal was dismissed and he has come in appeal to this Court by Special Leave.

When the appeal was heard on 9th January, 1962, the question whether the appellant could be tried in 1955 under the Indian Penal Code for offences committed in 1948 in the erstwhile State of Jhabua and whether there were similar provisions in the penal laws of that State at the time of the commission of the offences was raised. As this question had not been raised in any of the Courts below we adjourned the hearing of the appeal to enable the parties to place the necessary material before us. The argument was confined to this question only as we did not find any substance in any of the other points in the appeal.

According to the Report of the Council of Administration on the administration of Jhabua State for 1935-41 page 48, the then Raja of Jhabua State by notification applied amongst other laws the Penal Code of India to the State of Jhabua. By Ordinance I of 1948 issued by the Rajpramukh after the State of Jhabua became part of the State of Madhya Bharat which was replaced by Regulation of Government Act (XIV of 1948) the laws already in force in Jhabua were continued in that part of the State of Madhya Bharat. On 22nd February, 1951, the Part B States (Laws) Act, 1951 (III of 1951) was enacted. Section 6 of that Act relates to repeals and savings. It provided :

“ If immediately before the appointed day, there is in force in any Part B State any law corresponding to any of the Acts or Ordinances now extended to that State, that law shall, save as otherwise expressly provided in this Act, stand repealed :

Provided that the repeal shall not affect :—

- (a) the previous operation of any law so repealed or.....
- (b) any right, privilege, obligation or liability, acquired, accrued, or incurred, under any law so repealed
- (c) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed.....and any such.....remedy may be..... enforced.....any and such penalty.....may be imposed as if this Act had not been passed.”

Thus it is clear that in 1948, when the offences were committed by the appellant, the law in the State of Jhabua was the Indian Penal Code and that law was continued by the Ordinance of the Rajapramukh and the Repealing Act and any penalty incurred in respect of any offence committed in 1948 is punishable under the Indian Penal Code as applied to Jhabua State.

This appeal is therefore without force and is dismissed.

V.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—S. K. DAS, K. SUBBA RAO AND RAGHUBAR DAYAL, JJ.

Sankatha Singh and others

Appellants \*

The State of Uttar Pradesh

Respondent.

*Criminal Procedure Code (V of 1898), sections 369 and 424—Criminal Appeal before the Sessions Judge—Absence of the appellant and his counsel on hearing date—Dismissal on merits—Application for restoration and rehearing—Court has no jurisdiction—Inherent powers—Cannot be invoked where specifically prohibited.*

A criminal appeal cannot be dismissed for the default of the appellants or their counsel. The Court has either to adjourn the hearing of the appeal to enable them to appear, or should consider the appeal on merits and pass the final order. The appellate Judge himself perused the judgment of the Magistrate and the record and did consider the merits, as he says in his order: "I find no ground for any interference". The mere fact that he had not expressed his reasons for coming to that opinion does not mean that he had not considered the material on record before coming to the conclusion that there was no case for interference. His omission to write a detailed judgment in the circumstances may be not in compliance with the provisions of section 367 of the Criminal Procedure Code and may be liable to be set aside by a superior Court, but will not give him any power to set it aside himself, and rehear the appeal. Section 369, read with section 424 of the Code, makes it clear that the appellate Court is not to alter or review the judgment once signed, except for the purpose of correcting a clerical error.

Section 369, read with section 424 of the Code, specifically prohibits the altering or reviewing of its order by a Court. Inherent powers cannot be exercised to do what the Code specifically prohibits the Court from doing.

Appeal by Special Leave from the Judgment and Order, dated the 19th March, 1959 of the Allahabad High Court in Criminal Revision No. 1299 of 1957.

S. P. Sinha, Senior Advocate (P. C. Agarwala, Advocate, with him), for Appellants.

G. C. Mathur and C. P. Lal, Advocates, for Respondent.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—Sankatha Singh and others appeal against the order of the Allahabad High Court dismissing their application for revision of the order of the Sessions Judge, Gyanpur, holding the order of his predecessor for the re-hearing of an appeal which had been dismissed earlier to be *ultra vires* and without jurisdiction and directing the Magistrate to take immediate steps to execute the order passed by it, according to law.

The appellants were convicted by the Magistrate, I Class, Gyanpur, of offences under sections 452, and 323 read with section 34, Indian Penal Code. Kharpattu, one of the appellants, was also convicted of an offence under section 324, Indian Penal Code. They appealed against their conviction. The appeal was fixed for hearing on 30th November, 1956. On that date, neither the appellants nor their counsel appeared in Court and the learned Sessions Judge dismissed the appeal. The relevant portion of his order is:

"The appellants have been absent, and their learned counsel has also not appeared to argue the appeal on behalf of the appellants. I have perused the judgment of the learned Magistrate and seen the record. I find no ground for any interference. The appeal is accordingly dismissed.

On 17th December, 1956, an application was presented by the appellants praying that the case be restored to its original number so that justice be done to them. In explaining their absence from Court on the date of hearing, it was said that they reached the Court somewhat late due to the Ekka, by which they were travelling, over-turning accidentally on the way and, as a result, their getting injuries. The application was allowed, on 2nd July, 1957, by the learned Sessions Judge, Sri Tej Pal Singh, who had dismissed the appeal. His reasons for allowing the application appear, from his order, to be that the application, supported by an affidavit, showed that there was sufficient cause for the non-appearance of the appellants-accused at the time of the hearing of the appeal, that section 423 of the Code of Criminal Procedure

(hereinafter called the Code) enjoined the appellate Court to dispose of the appeal on merits after hearing the appellant or his pleader and the Public Prosecutor, that no notice was ever issued to the appellants as required by section 422 of the Code, that section 367 of the Code laid down what a judgment should contain and that his judgment of 30th November, 1956, amounted to no judgment as it did not contain some of those salient points, that the judgment was without jurisdiction as the case was not really considered and no independent judgment was arrived at and that it was necessary that the appeal be re-heard in the ends of justice.

Sri Tripathi, who succeeded Sri Tej Pal Singh as Sessions Judge, and before whom the appeal was put up for re-hearing, was of the opinion that the appellate Court had no power to review or restore an appeal which had been disposed of and that therefore the order of his predecessor, dated 2nd July, 1957, was *ultra vires* and passed without jurisdiction.

Against this order, the appellants went in revision to the High Court. The learned Judge of the High Court agreed with the views of Sri Tripathi and accordingly, dismissed the revision application.

The sole point for determination in this appeal is whether Sri Tej Pal Singh could set aside his first order, dated 30th November, 1956, dismissing the appeal, when neither the appellants nor their counsel appeared and could order the re-hearing of the appeal. We are of opinion that he could not do so and that therefore the view taken by the High Court is correct.

A criminal appeal cannot be dismissed for the default of the appellants or their counsel. The Court has either to adjourn the hearing of the appeal to enable them to appear, or should consider the appeal on merits and pass the final order. Sri Tej Pal Singh was aware of this as his order itself indicates. He did not dismiss the appeal for default. He himself perused the judgment of the Magistrate and the record and did consider the merits, as he says in his order : ' I find no ground for any interference '. The mere fact that he had not expressed his reasons for coming to that opinion does not mean that he had not considered the material on record before coming to the conclusion that there was no case for interference. His omission to write a detailed judgment in the circumstances may be not in compliance with the provisions of section 367 of the Code and may be liable to be set aside by a superior Court, but will not give him any power to set it aside himself, and re-hear the appeal. Section 369, read with section 424 of the Code, makes it clear that the appellate Court is not to alter or review the judgment once signed, except for the purpose of correcting a clerical error.

Sri Tej Pal Singh was in error when he thought that section 423 of the Code enjoined the appellate Court to dispose of the appeal after hearing the appellant or his pleader and the Public Prosecutor. He omitted to notice the words ' if he appears ' after the expression ' and hearing the appellant or his pleader '. If none of these appears at the hearing the appellate Court can proceed with the disposal of the appeal on merits. Of course, a notice to the appellant or his counsel of the date of hearing is an essential precedent for the hearing of the appeal, in view of section 422 of the Code. Sri Tej Pal Singh states, in his order, dated 2nd July, 1957 :

"It will also appear that the conditions of section 422, Criminal Procedure Code, were also not fulfilled, as no notice was ever issued to the appellant".

He again missed noticing that a notice of the hearing of the appeal has to be given either to the appellant or to his pleader and need not be given to both. He does not say in his order that no notice of the date of hearing had been given to the appellants' Counsel. The practice, usually, is to give notice of the date of hearing of the appeal to the Counsel who informs the appellant, and not to the appellant personally. The application for restoration indicates that the appellants knew of the date of hearing.

It has been urged for the appellants that Sri Tej Pal Singh could order the re-hearing of the appeal in the exercise of the inherent powers which every Court

possesses in order to further the ends of justice and that Sri Tripathi was not justified in any case to sit in judgment over the order of Sri Tej Pal Singh, an order passed within jurisdiction, even though it be erroneous. Assuming that Sri Tej Pal Singh, as Sessions Judge, could exercise inherent powers, we are of opinion that he could not pass the order of the re-hearing of the appeal in the exercise of such powers when section 369, read with section 424 of the Code, specifically prohibits the altering or reviewing of its order by a Court. Inherent powers cannot be exercised to do what the Code specifically prohibits the Court from doing. Sri Tripathi was competent to consider when the other party raised the objection whether the appeal was validly up for re-hearing before him. He considered the question and decided it rightly.

It is also urged for the appellants that Sri Tej Pal Singh had the jurisdiction to pass orders on the application presented by the appellants on 17th December, 1956, praying for the re-hearing of the appeal and that therefore his order could not be said to have been absolutely without jurisdiction. We do not agree. He certainly had jurisdiction to dispose of the application presented to him, but when section 369 of the Code definitely prohibited the Court's reviewing or altering its judgment, he had no jurisdiction to consider the point raised and to set aside the order dismissing the appeal and order its re-hearing.

We therefore see no force in this appeal and accordingly dismiss it.

V.S.

*Appeal dismissed.*

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# THE SUPREME COURT JOURNAL.

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## SEVENTEENTH AMENDMENT OF THE CONSTITUTION.\*

By

M. K. NAMBIYAR, LL.M. (LONDON), BAR-AT-LAW.

Next to Liberty comes Property in the hierarchy of human rights. The institution of property has evolved through ages into the basic framework of civilised society. Property has always been respected both in Ancient India, and down through centuries in the British regime. In fact, when the Government of India Act, 1935, was in the making, the Joint Parliamentary Committee recommended that "some general provision should be inserted in the Constitution Act safeguarding private property against expropriation." Provision was therefore made that no Bill for the transference of public ownership of any land, or for the extinguishment or modification of rights therein, shall be introduced or moved in the Dominion Legislature without the previous sanction of the Governor-General or in a Provincial Legislature without the previous sanction of the Governor. 'Public Purpose' and 'compensation' were also made conditions precedent for the acquisition of private property.

In 1950, the People of India gave unto themselves the present Constitution to secure to all its citizens Justice, social, economic and political. Right to property which was an ordinary right prior to the Constitution was transformed into a Fundamental Right; and the institution of property was safeguarded by a double process: Article 19 declared that every citizen shall have the right to *acquire, hold and dispose* of property, subject only to a law imposing reasonable restrictions in the interests of the general public or for the protection of the interests of any scheduled tribe; Article 31 reinforced that right against State action. No person could be deprived of his property save by authority of law; nor could any property be compulsorily acquired save for a public purpose, and in pursuance of a law providing for compensation. The constitutional safeguards were thus complete. The institution of property became one of the basic freedoms guaranteed by the Constitution.

To-day, the XVIIth Amendment of the Constitution is on the anvil. The amending Bill for the purpose was introduced in the Lok Sabha on 6th May, 1963. It contains only two operative provisions. One clause amends Article 31-A, and the other, the IXth Schedule to the Constitution. Originally, when the Constitution was framed, there was neither Article 31-A nor a IXth Schedule. To know the changes sought by the new amending Bill, one should know the retrograde processes of the last twelve years of the working of the Constitution.

Both before and after the Constitution, several States had passed Zamindari Abolition Acts. The Zamindars feeling aggrieved, appealed to the Courts that

\* Inaugural address delivered on 6th August, 1963 at Bangalore at the Conference of Southern States on the Seventeenth Amendment of the Constitution.

the Acts contravened the fundamental rights conferred on them by the Constitution. The High Court of Patna (A.I.R. 1951 Patna, page 91) held that the Bihar Act was unconstitutional, while the Allahabad and Nagpur High Courts, dealing with similar Acts, held them valid. Appeals were preferred to the Supreme Court against these decisions; and there were also petitions filed directly to the Supreme Court under Article 32, impugning the validity of those Acts. The Union Government came out with what has now become the First Amendment to the Constitution. By this Amendment, two new Articles and one Schedule were added to the Constitution. The new Article 31-A provided that no law providing for the acquisition by the State of any estate or of any rights therein shall be deemed to be void on the ground that it abrogates or abridges any of the Fundamental Rights. With one sweep, all Fundamental Rights became non-available to the owner of an estate which was then understood to be a zamindari. Jagirs, inams and muafi or other similar grants came within an 'estate'. The only safeguard provided was that the law should receive the assent of the President.

The next Article was Article 31-B. It provided that, without prejudice to Article 31-A, none of the Acts and Regulations specified in the IXth Schedule shall be deemed to be void, or ever to have become void, on the ground that they were inconsistent with any of the Fundamental Rights. The legislative axe cut away the Zamindari's root and branch; and the Zamindars had to be content with the meagre compensation paid to them, since the new Article 31-A drew the iron curtain against the enforcement of any Fundamental Rights. The judicial verdict was overborne by Parliament. The Zamindars were deprived of their Fundamental Right to property; and appeal to the Supreme Court against the Amendment became futile.

Soon, the scope of the original Article 31 came up for consideration before the Supreme Court of India. Article 31 (1) interdicted deprivation of property except by law; and Article 31 (2) stated that no property shall be acquired except for public purpose in pursuance of a law providing for compensation. What was the difference between deprivation of property on the one hand, and acquisition on the other? The majority of the Judges came to the view that clauses (1) and (2) of Article 31 were not mutually exclusive, but should be read together and understood as dealing with the same subject, viz., the prosecution of the right to property by means of the limitations on State power, deprivation contemplated in clause (1) being no other than acquisition or taking possession of property referred to in clause (2). Whether the property was destroyed or acquired by the State made no difference to the owner. According to the Court, Article 31 gave complete protection to private property as against governmental action, no matter by what process a person is deprived of his possession. The conclusion reached by the Supreme Court was far-reaching. If any law merely deprived a person of his property, he was still liable to be compensated, no matter whether the property was acquired in the sense that the title thereto had passed to the State or not. Though Article 31 uses the word 'compensation', and not 'just compensation' as in the American Constitution, the Supreme Court of India came to the view that compensation in Article 31 was really just compensation, or, in other words, the fair equivalent in money value of the property taken. The result was that any deprivation of property by the Government was liable to be paid for in full money value.

These decisions of the Supreme Court caused a flutter in the Governments of the Union and of the States. Out came a new amending Bill to the Constitution, which by that time had become the Fourth. For the old Article 31, a new Article 31 was substituted. That made two important changes. One was that mere deprivation would not amount to acquisition of property, unless its ownership was transferred to the State or to a Corporation owned or

controlled by the State. Therefore, mere deprivation would not be tantamount to acquisition, and had not to be paid for in compensation. The second change was that no law of acquisition shall be called in question in any Court on the ground that the compensation provided by that law was not adequate. It therefore followed that the State could acquire private property on payment of, say, even one per cent of its money value. Article 31-A was also re-aligned with the significant formula that it shall be deemed always to have been so substituted. Under the new Article 31-A, no law providing for the acquisition by the State of any estate or the taking over the management of any property by the State for a limited period either in public interest or in order to secure the proper management or the amalgamation of two or more Corporations or the extinguishment or modification of any rights of managing agents, secretaries or treasurers, etc., Corporations or the extinguishment or modification of mineral rights shall be deemed to be void on the ground that it abrogated or abridged Articles 14, 19 or 31. The only safeguard granted was that the law should receive Presidential sanction. To the IXth Schedule was added another seven Acts.

About the time when the Fourth Amendment Bill was before the Select Committee, proceedings were pending in the Madras High Court in regard to the validity of the Malabar Tenancy Act, which had been challenged on the ground that it infringed Articles 14, 19 and 31. There was apprehension in several circles that, if the challenge before the High Court failed, the matter would be taken up to the Supreme Court. Though the IVth Amendment Bill contained no reference at all to *jennani* property in Malabar or Kerala, overnight in the Select Committee, to which the amending Bill had been referred, was added an *Explanation* to the word 'Estate', stating that it included in the States of Madras and Travancore-Cochin any *jennani* right, and that this should be deemed always to have been inserted in the Constitution. When the Fourth Amendment emerged, *jennani* property had become an estate.

The Fourth Amendment to the Constitution came on 27th April, 1955. Thereafter, any person could be deprived of his property if a law was enacted for the purpose; but if, on the other hand, it was to be acquired, the Government was under no obligation to pay its market value. Under Article 19 (5), the right to acquire, hold and dispose of property still stood; but ownership and possession of property lay entirely at the will and mercy of the Government. All that it had to do was to secure the enactment of a law, providing for a feeble price, and the owner had no remedy.

Of course, there was the pre-requisite of 'public purpose'! But 'public purpose' acquired an elastic connotation. Whatever advanced the general interests of the community become a public purpose. Acquisition of land for a co-operative society for the construction of houses for its members has been held to be a public purpose, even though the direct and immediate beneficiaries are members of the society. Whatever results in benefit or advantage to the public has been said to be a public purpose. For instance, acquisition of lands for a company manufacturing refrigerators has been held to be for a public purpose. In a Welfare State, the welfare of the citizen is the welfare of the State; and the border line between private benefit and public purpose is becoming thinner every day. In implementation of a housing scheme in Madras, acquisitions have been made even of dwelling houses. 'Public purpose' has ceased to be an effective safeguard against arbitrary acquisition.

Public opinion does not appear to have been alive to the inequities of the Fourth Amendment. The definition of 'Estate' in the Fourth Amendment extended not merely to the Zamindaris, *jagirs* or *inams*, wherein there were middlemen between the tiller and the Sovereign, but also to every species of landed property that could be called Estate by law. For instance, in Bombay, every

yard of land is an estate. Every State soon enacted Ceiling Acts; and those Ceiling Acts were assented to by the President with little or no alteration. In the name of agrarian reform, the lands of a citizen in excess of an arbitrary ceiling were wrested and given away, sometimes to the landless and sometimes to others, paying little or no compensation. Landed property has always been considered *immovable* and the middle classes had always thought of land, as an immovable investment. But what was immovable now became the most movable; and appeals to the Courts against such arbitrary Acts were met with the bar of Article 31-A which shielded them from attack under Articles 14, 19 or 31. The Ceiling Acts in States where lands could be brought within the 'estate' therefore became impregnable.

Nor did the political party in power fail to take advantage of the clause in Article 31 that the adequacy of compensation would not be justiciable. The Land Acquisition Act of 1894 was passed at a time when the citizen of India enjoyed no Fundamental Right. On acquisition of property the owner was entitled to its market value, and, what is more, in addition, a solatium of 15%. The State respected the right of the citizen to his property. But the Fourth Amendment has encouraged several States to bring amendments to the Land Acquisition Act, denying the citizen the market value for his property, much less any solatium. None of the Ceiling Acts of any State which had come to the Supreme Court, could be effectively scrutinised because of the bar of Article 31-A. Presidential assent secured immunity to these Acts from attack in the Courts. It was in this state of affairs that the Kerala Agrarian Relations Act came up for consideration before the Supreme Court. One of the two petitions related to ryotwari land; and ryotwari land in the erstwhile Madras State, now forming part of Kerala, could not come within the definition of an 'estate' in Article 31-A. For the first time, the veil covered by Article 31-A was pierced. The Kerala Act had also secured Presidential assent. But, when the Supreme Court examined its provisions, it felt that the Act was indefensible and struck it down.

The proposed XVIIIth Amendment is the Government's answer to the Supreme Court decision. As the Statement of Objects and Reasons of the Amendment Bill frankly avows, "the Kerala Agrarian Relations Act, 1961, was struck down by the Supreme Court in its application to ryotwari lands transferred from the State of Madras to Kerala..... It was held that the provisions of this Act were violative of Articles 14, 19 and 31 of the Constitution and that the protection of Article 31-A of the Constitution, was not available to these lands as they were not estates." Reference to the protection of Article 31-A is quite amusing, when the object and purpose of that Article 31 is to deny the citizen the protection of Articles 14, 19 and 31. What the Bill therefore purports to do is to bring ryotwari lands within the fold of an estate and thus within the bar of Article 31-A. To call ryotwari an estate is a contradiction in terms. The Bill seeks to secure immunity to all legislative measures relating to land situate anywhere in India from any challenge under Fundamental Right.

Article 31-B of the Fourth Amendment is more stringent in its provisions than Article 31-A. While Article 31-A excludes Acts coming within its purview from challenge under Articles 14, 19 and 31, Article 31-B excludes the operation of all Fundamental Rights and not merely the three specified above, in respect of Acts detailed in Schedule IX. It may be recalled that while Articles 14, 19 and 31 confer the more important Fundamental Rights on the citizen, there is also Article 26 in the Constitution which grants any religious denomination or any section thereof the right to establish religious institutions of their choice and also to own and acquire property. It is common knowledge that there are innumerable temples and churches and charitable institutions which hold extensive lands; and Article 31-B would destroy the Fundamental Right of such

denominations in relation to Acts included in Schedule IX, in virtue of Article 31-B. As against such Acts, not even Article 26 nor any other Article granting Fundamental Rights can furnish any protection. In one sweep, all the existing Acts are removed from the peril of attack under any Fundamental Right.

The Bill is the culmination of a series of efforts to exclude all lands throughout India from the protection of the Fundamental Rights conferred on the citizen. In the Constitution, Articles 14, 19 (5) and 31 still continue to exist; but they will not be available against legislative and executive excesses against a citizen's land. Why this should be done, it is far to seek. Over all the lands in India, the party in power desires to have its strangle-hold for absolute and unquestioned disposition, undeterred by 'Fundamental Rights' and unhampered by judicial review. Law is but the handmaiden of policy; and the Legislature is only a machinery to register the policy of the party in power, or, in the ultimate analysis, the will of the few who are in control of the reins.

A bare glimpse at the Kerala Agrarian Relations Act which is now sought to be validated would reveal the nature of its inequity. The Act, in substance and in effect, seeks, by legislative action, firstly, to take away the landlord's property and give it to the tenant, and, secondly, to take away the lands from those who own or hold above the ceiling fixed by the Act, and give them to others. The object is sought to be achieved by several shifts and contrivances. On a day appointed to be notified by the Government under section 41 of that Act, the right, title and interest of the landowners over lands held by cultivating tenants vest in the Government only for assignment to the tenant. Similarly, under section 59, with effect from a day to be notified by the Government, it is unlawful to own or hold lands above a ceiling fixed by the Act. The excess lands have to be surrendered to the Government also for assignment to others. The vesting and surrender are but thinly veiled devices to give the legislative process an appearance of acquisition for a public purpose instead of naked deprivation of one citizen's property for the purpose of giving it to another.

Ceiling fixed is 15 acres of double *nilam* or its equivalent, for a family of father, mother and three minor children, and  $7\frac{1}{2}$  acres for an adult. They are the units for the ceiling under the Act. But the large mass of people in Kerala lives as joint families, Mitakshara, Namboodiri, Aliyasanthana or Marumakkathayam, with unity of possession and of ownership of their properties. In the Mitakshara family, the wife or daughter has no share; in the matriarchal families neither the wife nor children of a male has any right. In all such families forming the bulk of land-owning classes, neither the adult unmarried nor 'the family' under the Act has property that is ordinarily susceptible to separate holding, much less to surrender. The share in the joint family property is taken into account for the ceiling. But the problem still remains as to who should hold and who should surrender.

Granted that the freedom to remain joint should be foregone to effectuate the Act, it is not known how the shares of each person should be adjusted for deprivation or retention for the purpose of the ceiling. When the husband and wife belong to different families, fixation of the ceiling for ownership and surrender is likely to create problems of difficulty and delicacy. Each individual citizen has a Fundamental Right to own property, and also to equality and equal protection of laws. Neither minority nor marriage is a ground to deprive a person of this right. Divorce is secured by law to all classes. Death, divorce, marriage and majority are but inevitable in a changing world. No ground exists as to why a citizen, minor or major, married or unmarried, should be deprived of what he holds, to find himself later without any source of livelihood. The Act secures all the vices of a Communist Society without any of its virtues—of security of food or of work, or of medical attention. By disregarding the individual as the unit for the ceiling, the Act resulted in grave injustice and irremediable injury.

Dr. S. Von Fravandrafar of Austria, delegate to the Tenth Conference of Agricultural Economics held in Mysore in the year 1958, said in Madras, as reported in "The Hindu," that "the size of holding in his country was such as to produce enough for a family to maintain a good standard of living and to get the income comparable with other industries, and that their aim was to do away with too small farms." But an agriculturist in Kerala State is denied by the low-ceiling provisions the opportunity to earn an income from the profession of agriculture comparable with other industries. No country in the world has fixed a ceiling at so low a level as  $7\frac{1}{2}$  acres or 15 acres. The compensation to be paid to the person whose lands are forcibly taken and transferred to others is not the market value of the land, nor even the low purchase price obtained from the assignees. Such compensation payable to a person surrendering the land shall be the aggregate of the full value of any structures, etc., and a percentage of the market value of the land, starting from 60% and again gradually descending on a slab to 25%. The purchase price of the lands both under section 45 and section 72 of the Act, in truth and in law, would belong to the owner or holder of the land. But the vast surplus left with the Government, after payment of the 'compensation,' is expropriated by the Government. And all other Ceiling Acts which are sought to be insulated against Fundamental Rights follow almost the same pattern.

The Third Five-Year Plan states: "The objective of planned development is not only to increase production, but also to secure a social and economic order based on the values of freedom and democracy, in which justice, social, economic and political, shall inform all the institutions of national life." Efficient production depends on factors which are not advanced by the methods adopted in the Act. What to-day is a ceiling of 15 acres is likely to be an acre or two by legislative amendment in a few more years. The feeling of insecurity in the minds of the landowners has robbed agricultural production of all incentive. And Article 31 (2) of the Constitution which makes compensation non-judicial enables a State by legislative action to reduce compensation to a vanishing point.

Should the present Bill become law, the Legislatures in the country would have uncontrolled power over all landed property in India. Article 31-A does not exclude even urban properties from its tentacles. If any land or building comes within the enumerated heads in the definition of 'Estate,' Article 31-A would operate and deny the citizen the Fundamental Rights in respect thereto. Lands even in large towns are held under ryotwari pattas, and any urban property would not then be saved from arbitrary legislation. And once the present Bill becomes law, a Legislature could pass an Act, taking the property of a political rival and hand it over to anyone of its choice. Acts of expropriation and confiscation, Acts directly transferring one man's estate to another and other similar partial, arbitrary and discriminatory exertions of legislative power would be absolutely immune from challenge in the Courts of law. The Bill would then transform a Government of laws into a Government of men, uncontrolled and absolute. That such iniquitous Acts would never be passed or thought of by any State does not appear to be justified by experience. A few years back, a *sthanam* in Malabar was sought to be converted into a *tarwad* by the passing of a special Act by the Madras Legislature. The three readings of the Bill took just a few minutes in the Assembly, and a few more minutes in the Council. Writ Petitions had to be filed in the Supreme Court to get the Act declared unconstitutional.

Madras Act, XXIII of 1961, provides that compensation payable on acquisition of land for the purpose of housing schemes of the State Government shall be either the market value or the average market value during the five years

immediately preceding, whichever is less. That it was not fixed at the average of 50 years is indeed fortunate. If the same property or adjacent property similarly situated is acquired for a hospital, the current market value along with 15% solatium would have to be paid. To the owner, it makes no difference whether his land is acquired for a hospital or for a housing scheme. But it makes all the difference in the compensation that he is paid. More recently, the Madras Legislature has passed Act LV of 1961 to provide for the taking over of the management of private forests in Gudalur and Nilgiri Taluks. The Act states that this is in public interest or in order to secure proper management of such forests. There is already in Madras the Preservation of Private Forests Act (Madras Act XXVII of 1949), which prohibits even an owner from felling a tree or clearing the jungle without a permit from the Collector of the District. Nevertheless, the Legislature has now thought it necessary to empower the Government to divest these forests completely from the possession of their owners. What is more, 'Forest' is defined to include waste or arable land and any other class of land declared by the Government to be a forest by notification issued in this behalf. Gudalur and Nilgiri Taluks have extensive forests with tea, coffee, rubber or cardamom estates. Presumably, the Act is passed under the shelter of Article 31-A (1) (b), which states that "no law providing for the taking over of the management of any property by the State for a limited period either in public interest or in order to secure the proper management of the property shall be deemed . . . to be void on the ground that it is inconsistent with Articles 14, 19 or 31." There is a provision in the Act for the Government to create improvements. With the heavy salaries of the officers of management, and the power of improvement, it would not be impossible for the owners of these properties to be improved out of their property by the time the management ends.

In the State of Maharashtra, there are several sugar manufacturing companies which own their own sugar farms, extending sometimes to ten or twelve thousand acres. They have their own laboratories and scientific assistance; and they have been evolving several varieties of sugarcane suitable to the soil, some of which yield a sugar recovery almost the highest in the world. Such mechanised farms have been recommended for exclusion from ceiling by the successive Planning Commission Reports. Nevertheless, the Maharashtra Ceiling Act (Act XXVII of 1962) has granted them no exemption; and a company which owns about 10,000 acres would now be able to retain about 100 acres under the Ceiling Act. Such companies which play so important a part in the sugar economy of the country are now faced with a situation which might eventually drive them into liquidation. Even to-day, scarcity of sugar has raised new problems for the country. Under the Act, the surplus sugarcane farms would have to be distributed to persons eligible under the Act, or handed over to the State farms. The compensation fixed, as usual, is miserably low. One significant provision in the Act is that, on the appointed day when the sugarcane farms are taken over, the standing sugarcane would also vest in the Government; and the payment to be made for such sugarcane is merely the cost of cultivation. And, if the date of vesting synchronises with the time for cutting, the value of such sugarcane which the Government would take would run to several lakhs, while the cost of cultivation to be paid would be quite low. The loss to the companies would be colossal; and it would appear that proposals are afoot to allow the company to cut and carry away its own sugarcane on payment of an agreed amount to the Government. In other words, the Government reaps lakhs of rupees for letting the owners the privilege of reaping what they had sown and raised. A few Acts patterned on this model every year would certainly obviate any need to raise taxes to meet the annual budget of the Government. What a travesty of justice! And these are but a few illustrative Acts of the way in which the Governmental mind is moving.

The primary purpose of land legislation is to secure the maximum production of food. Twelve years of planning and promises of self-sufficiency have proved vain. Admittedly, the land reform legislation has not increased production; and every year precious foreign exchange worth millions is utilised to import what India could produce. In the United Kingdom also there is an Agriculture Act of 1947 (10 & 11 Geo. 6 C.48); but the provisions of that Act are intended to ensure efficient farming. It is the duty of an owner of agricultural land to manage the land in accordance with the rules of good estate management, and the duty of an occupier to farm the land in accordance with the rules of good husbandry. If an owner or occupier fails to comply with his responsibilities, the Minister of Agriculture and Fisheries may place him under supervision, give him directions, or, if necessary, dispossess him. None of the Ceiling Acts of India contain any provisions whatever that those to whom land is distributed should be burdened with any obligation of efficient cultivation. The recipient of the Government's bounty could keep his land fallow, or lease or sell the same and enjoy a few years' life of ease. Would such gifts, unencumbered by any duty, advance the interests of the Nation?

Articles 14, 19 and 31 are enacted in the Constitution to operate as a fetter on the legislative and executive power of a State. They are the strongest bulwark of a citizen in the enjoyment of his property. Without them, he is exposed to the perils and dangers of absolutism and despotism. It was realised long ago by the Supreme Court of the United States that

"It must be conceded that there are such rights in every free government beyond the control of the State. A Government which recognised no such rights which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all, but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is, nevertheless, a despotism. It may be doubted, if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many."

The Kerala Agrarian Relations Act was the only Act that broke through the barrier of Article 31-A and secured judicial investigation. When the highest Court in the land found that it was tainted with the vice of naked and arbitrary discrimination, the present Bill has now emerged to raise the Act that had been laid in its grave, and to defy all judicial review. As against one Act struck down by the Supreme Court the Bill attempts to fortify one hundred and twenty-two Acts, and to erect an impenetrable wall also for similar Acts for the future, against any judicial probe.

If the Bill becomes part of the fundamental law of the land, the consequences are plain. No Land Act made by any Legislature thereafter, however harsh, oppressive or unjust, however arbitrary in application, discriminatory in operation or confiscatory in effect, could ever be touched by a Court of Law, nor injury caused thereby, however grave, ever be redressed.



## **RULES FRAMED BY THE BAR COUNCIL OF INDIA**

### **PART I.**

#### **Short Title and Definitions.**

1. **Definitions.**—In these rules, unless the context otherwise requires :—
  - (a) 'Act' means the Advocates Act, 1961 as amended from time to time ;
  - (b) 'Advocate' means an Advocate entered in any roll under the provisions of the Act ;
  - (c) 'Casual Vacancy' means a vacancy caused otherwise than by the expiry of the term ;
  - (d) 'Chairman' means the Chairman of the Bar Council of India ;
  - (e) 'Council' means the Bar Council of India ;
  - (f) 'Prescribed' means prescribed by the rules ;
  - (g) 'Rules' means the Rules made by the Council ;
  - (h) 'Secretary' means the Secretary of the Bar Council of India, and includes any person howsoever designated and entrusted for the time being with the duties of the Secretary ;
  - (i) 'State Council' means a Bar Council constituted under section 3 of the Act ;
  - (j) 'Vice-Chairman' means the Vice-Chairman of the Bar Council of India.

### **PART II.**

#### **Rules made under Section 15 of the Act.**

#### **CHAPTER I**

##### **Election of Members, Chairman and Vice-Chairman.**

2. Not less than 60 days before the expiry of the term of any of the elected members of the Council, the Secretary shall give notice to all State Councils concerned requiring them to elect their members to the Council, on or before the date of such expiry in the manner hereinafter prescribed and communicate forthwith their names and addresses to the Secretary.
3. At the first meeting of the Council which comes into existence after the expiry of the term of the elected members under section 54 of the Act, the Council shall draw lots to determine which of the members shall retire at the expiry of the second year and which of the members shall retire at the expiry of the fourth year. The term of expiry shall be calculated in each case from the date of the first meeting of the Council.
4. Every vacancy in the office of the elected members of the Council shall be notified to the State Council concerned which shall elect one of their members by secret ballot on the date notified for election. The name of each candidate shall be proposed and seconded at the meeting held for the election. If the number of candidates duly nominated is only one, he shall be declared elected.
5. The result of the election shall be communicated forthwith to the Council, and sent forthwith to the State Gazette for publication.
6. In case of doubt or dispute arising out of such election, any member of the State Council may bring it to the notice of the Council in writing within 10 days of the publication of the result and the Council or any of its committees to which the matter is referred by the Council may, after making such enquiry as it thinks fit, give its decision which shall be final. If the election is set aside, a fresh election shall be held in the manner hereinbefore prescribed.
7. The Council shall at its meeting elect the Chairman and the Vice-Chairman. The members seeking election to either office shall be proposed and seconded. In case of a contest, voting shall be by a show of hands. In the case of equality of votes, the election shall be decided by lot.
8. The Chairman and the Vice-Chairman shall hold office for such period as the Council may at the time of the election provide, or until he ceases to be a member, whichever is earlier.
9. If the Chairman or the Vice-Chairman ceases to be a member of the Council for any reason, the vacancy shall be filled up by the election at the next meeting of the Council in the manner provided in rule 12.
10. The result of the election shall be sent forthwith to the Gazette of India for publication.

11. In case of doubt or dispute concerning the election, any member of the Council may, within 10 days, after such publication file an application (Election Petition) addressed to the Council. The Chairman, or in his absence the Vice-Chairman, or in the absence of both, the Attorney-General, and in the absence of the Attorney-General, the Solicitor-General, shall refer the same to a tribunal consisting of five members of the Council from amongst the members other than the contestant. The tribunal shall make such enquiry as it deems fit and give its decision which shall be final. The decision of the majority shall prevail.

12. At the first meeting of the Council after the expiry of the term of the office of elected members of the Council under section 54 of the Act, and thereafter at all meetings for the election of the Chairman or the Vice-Chairman, the Attorney-General and in his absence, the Solicitor-General, shall preside unless there is a Chairman in office.

## CHAPTER II

### Committee's Constitution functions and Procedure.

13. The Council may appoint from amongst its members one or more committees as it may deem necessary, in addition to those specified in the Act and delegate such powers, duties and functions to such committees as it deems fit.

14. Any casual vacancy in the above committees shall be filled up by co-option.

15. The committee or the sub-committee shall choose its Chairman for the meeting.

16. The Council may, by resolution, delegate any of its functions other than those imposed on it by statute, to any of its committees, and any act done or duty performed in accordance with such delegation shall be deemed to be done or performed by the Council.

17. The Council shall have the following standing committees :—

(i) An Executive Committee as provided in section 10 (2) (a) of the Act ;

(ii) A Legal Education Committee as provided in section 10 (2) (b) of the Act ;

(iii) A Disciplinary Committee as provided in section 9 (2) of the Act.

The term of office of the members of the Standing Committees shall be two years from the date of the election, unless otherwise determined by the Council.

18. The Executive Committee

(a) Candidates for election shall be proposed and seconded and in the case of contest, the election shall be by show of hands, and in the case of equality of votes, the election shall be decided by drawing lots.

(b) A casual vacancy in the committee shall be filled up by election by the Council.

(c) The Chairman shall preside, and in his absence the committee shall elect a Chairman for the meeting.

(d) The Committee shall be the executive authority of the Council and shall be responsible for giving effect to the resolutions of the Council. It shall have power :—

(1) to provide for the election of members of the Council;

(2) to manage the funds of the Council ;

(3) to invest the funds of the Council in the manner directed by the Council from time to time;

(4) to grant leave to members of the staff, other than casual leave ;

(5) to prescribe books of account, registers and files for the proper management of the affairs of the Council ;

(6) to appoint and supervise the work of the members of the staff and prescribe their conditions of service ;

(7) to appoint auditors and fix their remuneration ;

(8) to consider the annual audit report and place it before the Council with its comments for its consideration ;

(9) to maintain a library and under the directions of the Council, publish any journal, treatise or pamphlets on legal subjects ;

(10) to prepare and place before the Council, the annual administration report and the statement of account ;

(11) to provide for proper annual inspection of the office and its registers;

(12) to authorise the Secretary to incur expenditure within prescribed limits ;

(13) to consider and report on applications for transfer from one State Roll to another ;

(14) to fix travelling and other allowances to members of the committee of the Council, and to members of the staff;

(15) to delegate to Chairman and/or the Vice-Chairman any of its aforementioned powers ;

(16) to do all other things necessary for discharging the aforesaid functions.

19. Legal Education Committee.

(a) Candidates for election from the Council to the committee shall be proposed and seconded. In case of contest, election shall be by a show of hands. If there is equality of votes, the election shall be decided by drawing lots.

(b) The names of the remaining five members of the committee to be co-opted shall be proposed and seconded by the members of the Council. In case of more than five persons being proposed, they shall be chosen by a show of hands. If there is equality of votes, the Chairman of the meeting shall have a casting vote.

20. A casual vacancy in the committee shall be filled in by the Council from amongst its members or non-members as the case may be in the manner specified in rule 19 above.

21. The committee shall choose its Chairman.

22. The committee shall have the following powers and duties ;

(i) to lay down the standards of legal education for the Universities ;

(ii) to visit and inspect Universities and report the results to the Council ;

(iii) to recommend to the Council the conditions, if any, subject to which foreign qualifications in law obtained by persons other than citizens of India may be recognised for admission as Advocates under the Act ;

(iv) (a) to recommend to the Council for recognition any degree in law of any university in the territory of India under section 24 (1) (c) (iii) of the Act.

(b) to recommend the discontinuance of any recognition already made by the Council.

### CHAPTER III

Powers and duties of Chairman, Vice-Chairman and Secretary.

(a) Chairman

23. Save as otherwise provided in these rules, and subject to the resolutions of the Council, the Chairman shall exercise general control and supervision over the affairs of the Council.

24. He shall preside over the deliberations of the Council and of all committees of which he is a member.

25. He shall cause the meetings of the Council or the committees to be convened at such time and place as he may fix. He shall also settle the items for agenda of the meetings of the Council.

26. He shall have power to punish any employee of the Council by way of censure or reprimand and may initiate proceedings for suspension, removal or dismissal.

27. He shall be the authority to sanction the disbursement of salaries of the staff and to order payment of any bill outstanding against the Council.

Vice-Chairman

28. The Vice-Chairman shall exercise all the powers and discharge all the functions of the Chairman in his absence or under his direction.

### CHAPTER IV

**General Rules and procedure for the conduct of meetings other than those of the Disciplinary Committee.**

29. Notice of every meeting of the Council and the Committee shall ordinarily be sent by the Secretary not less than 15 days before the date of the meeting, except when the Chairman or any two members require a meeting to be called on short notice, on grounds of urgency. No proceeding shall be invalidated merely on the ground that the rule requiring notice is not strictly complied with.

30. Notice of the meeting shall specify the time and place of the meeting and shall contain the agenda fixed for the meeting.

31. No member shall be entitled to bring forward for the consideration of the meeting any matter of which he has not given ten days' notice to the Secretary, unless the Chairman in his discretion permits him to do so.

32. The minutes of the previous meeting shall ordinarily be read and recorded at the subsequent meeting.

33. The quorum for the meeting of the Council shall be seven and for all other committees, except the Executive Committee and the Legal Education Committee, the quorum shall be two. The quorum for the Executive Committee and the Legal Education Committee shall be four.

34. The Chairman may in his discretion, if urgent action by the Council becomes necessary, permit the business of the Council to be transacted by circulation of the papers to the members. The action proposed to be taken, shall not be taken, unless agreed to by not less than 9 members. Any action so taken shall be forthwith intimated to all members of the Council. The papers shall be placed before the next meeting of the Council for confirmation.

35. The Council or any committee may adjourn from day to day or any particular day, without further notice.

36. Save as otherwise provided in these rules, the decision on any matter shall be by majority and in the case of equality of votes, the Chairman of the meeting shall have a casting vote.

37. No matter once decided shall be reconsidered for a period of three months unless the Council by a two-thirds majority of the members present so permits.

38. Any committee may refer for advice any question of doubt, difficulty or importance to the Council.

## CHAPTER V

### Financial Rules.

39. All monies received on behalf of the Council shall be acknowledged by a receipt signed by the Secretary or any other person authorised by the Executive Committee. Amounts received shall be credited into the account of the Council in the Bank on the next working day of the Bank.

40. The books of account and registers shall be strongly bound and paged. On the 1st or title page, the number of pages, the books or the register contains shall be entered, and the entry shall be signed by the Secretary. Corrections in the entries shall be made in red ink and attested by the Accountant. Easures shall on no account be permitted.

41. Receipt forms shall be numbered consecutively and bound into books of 100 forms. On the front page of each book shall be entered the first and last number of receipts. Receipts shall be in duplicate. The first part shall remain in the book and the second part shall be given to the payer. All receipts shall be signed by the Secretary or by such authority or person as the Council may determine.

42. Payments of Rs. 50 and over shall ordinarily be by cheque.

43. Bills presented for payment shall be examined by the Accountant and on his being satisfied that the claim is admissible, and the payment is duly authorised, he shall pay the amount after obtaining a receipt. The entry in the account book shall show if the payment is by cash or by cheque. The bill and the relevant receipt shall be posted together and shall be numbered consecutively in the year as payment voucher and shall be posted in a bound book with fly leaves.

44. Salary bills shall be in such forms as the Executive Committee may settle.

45. A bill presented for payment three months after the money becomes due, shall not be paid without the sanction of the Executive Committee.

46. The Executive Committee may fix the amount of a permanent advance to be made to the Secretary and to the Accountant as the case may be.

47. The Accountant shall maintain an acquittance register in the following form or in such other form as the auditor may direct :—

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Name	Designation	Pay	Dearness allowance etc.	Total salary (add cols. 3 & 4)	Contribution towards provident fund
1	2	3	4	5	6

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Net salary payable (Col. 5 minus 6)	Instalment amount towards provident fund loan taken	Amount of interest payable on the principal loan amount outstanding	Total	Signature with date
7	8	9	10	11

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48. All monies received and spent shall be immediately brought to account in a day book and ledger. The cash book shall be balanced at the close of every month and signed by the Secretary and the Accountant.

49. (1) The Chairman and/or the Vice-Chairman or any other person authorised by the Council shall be entitled to incur expenditure sanctioned in the budget without any further authority.

(ii) The Chairman and/or the Vice-Chairman shall have authority to spend or incur expenditure of a contingent nature not exceeding Rs. 2,000 a month for the purposes of the Council.

50. The Chairman and/or the Vice-Chairman shall be the authority to sanction travelling allowance and daily allowance bills of the members.

51. The account of the Council shall be audited once a year.

52. The annual statement of income and expenditure of the year so audited shall be laid before the Executive Committee not later than the 30th of June each year.

53. The funds of the Council may be invested as follows :

(i) in the State Bank of India or any other scheduled bank ;

(ii) in any of the securities specified in section 20 of the Indian Trusts Act, 1882.

54. Budget estimates of income and expenditure for the coming year shall be made by the Executive Committee and laid before the Council for approval before the 31st of March every year.

55. All cheques shall be signed or endorsed and all bills, notes and other negotiable instruments shall be drawn, accepted and made on behalf of the Council by the Chairman and/or the Vice-Chairman of the Council or such other member as may be authorised by the Council in that behalf.

56. All monies and securities belonging to the Council shall stand in the name of the Council.

57. The Council shall open a Provident Fund Account in a Bank authorised by the Council in its name and the contribution of the Council shall be deposited in the said account every month.

58. Whenever any amount out of the Provident Fund is payable to a member of the staff, the Chairman and/or the Vice Chairman shall be entitled to withdraw the amount so payable from the Fund and pay it to the members of the staff in accordance with the Provident Fund Rules of the Council.

(The above rules in Parts I and II are effective from the 15th December 1962, the date on which they were adopted by the Bar Council of India).

## **RULES UNDER SECTION 15 (1) AND SECTION 15 (2) (k) OF THE ADVOCATES ACT, 1961.**

### **Qualifications and conditions of service of the Secretary, Accountant and other members of the staff.**

#### **1. The Secretary shall—**

(a) be a law graduate or barrister-at-law ;

(b) be a citizen of India ; and

(c) have been either—

(i) Registrar of the Supreme Court or of a High Court in India, or

(ii) an advocate with 10 years' practice at the Bar, or

(iii) Secretary of a Bar Council for at least 10 years.

(d) be ordinary not less than 40 years and not more than 50 years of age.

Provided that if at any time, the Bar Council of India considers that a person having the necessary qualifications is not available, it may relax any of the qualifications mentioned in sub-rules (c) and (d) of this rule.

2. The Secretary shall draw a salary in the grade of Rs. 1,000—60—1,600.

3. The Secretary shall be paid all allowances payable by the Supreme Court and at the same rates as are payable to officers in the Supreme Court drawing the same salary.

4. The Secretary shall be the Chief Executive Officer of the Bar Council and shall perform *inter alia* the following duties :—

(i) attend all meetings of the Council or of the committees unless otherwise directed ;

(ii) keep records and minutes of the proceedings of the Council and of its committees ;

(iii) keep in his custody the property of the Council including the seal of the Bar Council of India.

(iv) exercise general control and supervision over the employees of the Council ;

(v) arrange for the deposit of the monies received on behalf of the Council in Bank and see to the security of the cash in hand ;

(vi) act as Secretary of all committees and convene meetings of the Council or its committees, unless otherwise decided by the Council ;

(vii) appoint such temporary staff as may be necessary with the permission of the Chairman to transact urgent work ;

- (viii) issue requisite notifications as prescribed and circulars as may be required.
- (ix) attend to the correspondence of the Council and on behalf of the committees ;
- (x) act as Registrar of the Disciplinary Committees, issue notices and subpoenas and be in charge of all work in proceedings under Chapter V of the Act including the grant of certified copies of documents and evidence or statements of witnesses ;
- (xi) shall be the custodian of the records, registers, accounts, furniture, library and such other property as the Council might acquire from time to time ;
- (xii) perform such other duties as may be assigned to him by the Council or the committees or the Chairman.

5. The Secretary shall retire on attaining the age of 60 years provided that the Bar Council may extend his term by a period not exceeding 2 years if it thinks fit.

#### **Accountant.**

6. The person to be the Accountant should have obtained a degree in B.Com. of any University in India or its equivalent and have served as an Accountant in a limited company or a reputed commercial concern for not less than 5 years.

7. The person to be appointed to be the Accountant shall draw pay in the scale of Rs. 270-15-555.

8. The person appointed to discharge the duties of the Accountant shall also discharge such additional work of the Bar Council as may be entrusted to him.

#### **Other staff.**

9. The Accountant and other members of the staff shall be entitled to city compensatory and house rent allowance and dearness allowance as are payable to persons drawing similar salary in the Supreme Court of India.

10. All employees of the Bar Council of India shall be entitled to the benefit of provident fund and gratuity in accordance with such rules as may be framed in that behalf by the Executive Committee.

11. All the employees of the Bar Council shall be subject to other conditions of service as to leave and such other matters as may be resolved in this behalf by the Executive Committee of the Bar Council.

[The above rules are effective from the 24th November, 1962 the date on which they were adopted by the Bar Council of India].

### **PART III**

The rules in chapters I, II and III have come into force from the date of publication in the Gazette of India i.e., 29th June, 1963. The rules in Chapter IV will come into force on the date on which Chapter V of the Advocates Act 1961 will come into force, or on such other date as may be notified in the Government of India Gazette by the Bar Council of India.

### **PART III**

**Rules under sections 20, 21 and 49 read with other sections of the Act.**

#### **CHAPTER I**

**Common Roll, Seniority and Transfer.**

##### **Common Roll.**

1. (a) The council shall prepare and maintain a common roll of advocates which shall comprise the entries made in all the State rolls and the names of all advocates entitled as of right to practise in the Supreme Court immediately before the appointed day, but whose names are not entered in any State Roll.

(b) The Common Roll shall consist of two parts, the first part containing the names of Senior Advocates and the second part containing the names of other Advocates.

(c) The names of all Senior Advocates on the State Rolls and of all Senior Advocates of the Supreme Court whose names are not entered on any State Roll shall be entered in part I of the Common Roll in the order of seniority, as hereinafter prescribed.

(d) The seniority of a Senior Advocate enrolled before the appointed day shall be determined in accordance with the date of his enrolment as an advocate or the entry in the Register of Vakils, Pleaders or Attorneys as the case may be, whichever is earlier.

(e) The names of Advocates entered in Part II of the State Rolls and the names of Advocates enrolled by the Supreme Court before the appointed day (not being senior advocates), whose names are not entered in any State Roll shall be entered in Part II of the common roll in the order of seniority in the manner hereinafter prescribed.

(f) The seniority of an advocate, entered in a State Roll shall be determined in accordance with the seniority in that roll.

(g) The seniority of an advocate not being a senior advocate of the Supreme Court, enrolled by the Supreme Court before the appointment day, but whose name is not entered in any State Roll shall be determined in accordance with the date of his enrolment as an advocate of the Supreme Court.

(h) Subject to the provisions of clause (f), in the case of an advocate whose name was entered on the rolls of more than one High Court, the date of enrolment in the High Court in which he was first enrolled shall be taken as the date for determining the seniority notwithstanding the fact that his name was removed from that roll by reason of his enrolment in another High Court.

(i) If the date of enrolment of two or more persons is the same, the seniority shall be determined by the date of birth.

(j) All alterations and additions communicated to the Council under section 19 by a State Council shall be carried out in the Common Roll from time to time.

### Disputes as to Seniority.

2. If any dispute arises with respect to the seniority of any person in the Common Roll, it shall be referred to the Council and its decision shall be final.

### Transfer under section 18.

3. (a) Any person whose name is entered on any State Roll, may make an application to the Council for transfer in the form prescribed for the transfer of his name from that Roll to the Roll of any other State Council. The application shall be accompanied by (i) a certified copy of the entry in the State Roll relating to the applicant and (ii) a certificate from the State Bar Council stating that this Certificate of Enrolment has not been recalled and that the applicant is entitled to practice on the date of his application. The Council may order the transfer after an enquiry.

## RULES UNDER SECTIONS 18 & 49 (b) OF THE ADVOCATES ACT, 1961.

Form of application for transfer from Roll.

THE BAR COUNCIL OF INDIA.

Form No.....

**Application for transfer to another Roll under Section 18 & 49 (b) of the Advocates Act, 1961.**

From

.....  
.....

To,

The Secretary,

The Bar Council of India,

NEW DELHI.

Sir,

My name is entered in the roll of the Bar Council of.....under section 17 (1) (a)/17 (1) (b) of the Advocates Act, 1961, and I have been ordinarily practising at.....

The date of my enrolment is.....My roll number is.....BC...../  
.....(Common roll No.....).

I state that there are/are not disciplinary proceedings pending against me.

I request a transfer of my name to the roll of the Bar Council of.....

After the transfer of my name on the roll of the Bar Council of.....I intend to practise ordinarily at.....My permanent address will be as follows :

.....  
.....

I enclose herewith :—

(i) A certified copy of the entry in the State Roll.

(ii) A certificate from the State Bar Council stating that my certificate of Enrolment has not been recalled and that

I am entitled to practise on the date of application.

I hereby declare that the facts stated herein are true.

Date :—

Signature of the Advocate.

## CHAPTER II

### Rules framed under sections 16 (3) and 49 (g) of the Act.

Restrictions on Senior Advocates—Senior Advocates shall, in the matter of their practice before any Court, Tribunal, person or other authority mentioned in Section 30 of the Act, be subject to the following restrictions :—

(a) A senior advocate shall not file a vakalat or act in any Court, or Tribunal, or before any person or other authority mentioned in Section 30 of the Act.

*Explanation.*—"To Act" means to file an appearance of any pleading or application in any Court, or Tribunal, or before any person or other authority mentioned in section 30 of the Act, or to do any act other than pleading required or authorised by law to be done by a party in such Court, or Tribunal, or before any person or other authority mentioned in the said section either in person or by his recognised agent or by an advocate or an attorney on his behalf ;

PROVIDED that a senior advocate may continue to appear without an advocate in Part II of the Common Roll in cases in which he had been briefed for the prosecution or the defence in a criminal case, if he was so briefed before he is designated as a Senior Advocate or before coming into operation of the Rules in this Chapter as the case may be.

(b) A Senior Advocate shall not appear without an advocate on record in the Supreme Court or without an advocate in Part II of the Common Roll in any Court, or Tribunal, or before any person or other authority mentioned in section 30 of the Act.

(c) Where a Senior Advocate has been engaged prior to the coming into force of the Rules in this Chapter, he shall not continue thereafter unless an advocate in Part II of the Common Roll is engaged along with him.

(d) He shall not accept instructions to draft pleadings, affidavits, advice on evidence or to do any drafting work of an analogous kind in any Court, or Tribunal, or before any person or other authority mentioned in section 30 of the Act or undertake conveyancing work of any kind whatsoever. This restriction however shall not extend to settling any such matter as aforesaid in consultation with an advocate in Part II of the Common Roll.

(e) He shall not accept directly from a client any brief or instructions to appear in any Court, or Tribunal, or before any person or other authority in India.

(f) A Senior Advocate who had acted as an Advocate (Junior) in a case, shall not after he has been designated as a Senior Advocate, advise on grounds of appeal or appear in a Court of appeal or in the Supreme Court, except with an advocate as aforesaid.

(g) A Senior Advocate may in recognition of the services rendered by an Advocate in Part II of the Common Roll appearing in any matter pay him a fee which he considers reasonable.

## CHAPTER III

### Rules under section 49 (h) of the Act.

Fees leviable under the Act—(a) A Bar Council may levy fees within the prescribed limits in any of the matters specified hereunder.

(b) Every election petition to the State Council in respect of any election to that body shall be accompanied by a fee of Rs. 50/.

(c) Every candidate who wants to attend a course of legal training prescribed under the rules of the State Councils shall file with his papers such fee not exceeding Rs. 50 as the State Council may direct.

(d) Any such candidate proposing to attend an examination conducted by the State Council shall pay a sum not exceeding Rs. 100/- as examination fee as provided in the Rules of the State Council.

(e) Every complaint of professional misconduct under section 35 or 36 of the Act preferred by a person shall be accompanied by a fee of Rs. 25/-.

(f) Every appeal filed under section 37 of the Act shall be accompanied by a fee of Rs. 50.

(g) Every application for an authenticated copy of any certificate, order or other proceeding, entry on any roll or a list of marks, or any document or deposition in a disciplinary proceedings, shall be accompanied by a fee of Re. 1 and the copying charges at rates prescribed by the High Court in the case of a State Council, and the Supreme Court in the case of the Council.

(h) In disciplinary proceedings, summons to witnesses shall only be issued on payment of requisite batta and/or chares according to the rates prescribed by the High Court or the Supreme Court as the case may be.



(i) Every interlocutory application, including a petition for excusing delay or for obtaining stay of proceedings of a disciplinary committee shall be accompanied by a fee of Rs. 2 in the case of the Disciplinary Committee of a State Council, and a fee of Rs. 5 in the case of the Disciplinary Committee of the Bar Council of India.

## CHAPTER IV

### Rules under section 49 (f) of the Act

Disciplinary Committee of the Council—(i) Candidates for election to the Committee shall be proposed and seconded and in case of contest, the election shall be decided by a show of hands and in the case of equality of votes, the Chairman shall exercise his casting vote.

(ii) Any casual vacancy shall be filled in by the Council by election from amongst its members or non-members as the case may be.

(iii) The Attorney-General shall not be eligible for membership of the Committee.

(iv) If the Vice-Chairman is a member of the Committee, he shall be the President of the Committee and if he is not, the seniormost advocate amongst the members of the Council on the Committee shall be the President.

The following procedure shall be followed in enquiries before the Disciplinary Committee :—

(1) In any case falling under section 36 (1), when the Council, has reason to refer a case of conduct to the Committee, it shall cause the complaint, if any, and all affidavits, documents or records in its possession to be sent to the Committee.

(2) The Disciplinary Committee shall, if it does not summarily reject the complaint, and in all cases referred to it by the Council *suo motu*, fix a date for hearing of the case.

(3) At the hearing, the complainant of the person if any, who is aggrieved by the misconduct of the advocate, shall be entitled to appear in person or by Counsel in support of the complaint. Where the complainant or the aggrieved party does not appear in person or by counsel, the Council may proceed with the matter and in a fit case may appoint a counsel for assisting the Council on payment of fees if necessary.

(4) Notices issued under these Rules shall be served by Registered Post (Acknowledgement Due) or in such other manner as the Committee may direct.

(5) The President of the Committee shall fix a date, hour and place of the enquiry which shall not ordinarily be later than sixty days from the receipt of the reference. The Secretary shall give notice of such date, hour and place to the complainant or other person aggrieved, the advocate concerned, and the Attorney-General and shall also serve on them copies of the complaint and all relevant documents at least 15 days before the date fixed for the enquiry.

(6) The Advocate concerned shall submit his statement of defence together with any document or affidavits in support of his defence within a time which shall be intimated to him in or at the same time as the notice referred to above. The complainant or the person aggrieved shall be entitled to file a reply together with such documents on which he proposes to rely in support thereof within such time as may be allowed by the President of the Committee.

(7) In any such enquiry, the advocate may appear either in person or by counsel.

(8) The Committee shall hear the Attorney General or his Counsel and the parties or their counsel, and determine the matter on documents and affidavits unless the Committee is of the opinion that it would be in the interests of justice to permit cross-examination of the dependents or to take oral evidence, in which case, the procedure followed in the trial of a civil suit shall, as far as may be followed.

(9) The advocate concerned shall be a competent witness on his own behalf.

(10) The finding of the majority of the members of the committee shall be the finding of the Committee. The reasons given in support of the finding may be given in the form of a judgment and in the case of a difference of opinion, any dissenting member shall be entitled to record his dissent giving his own reasons. It shall be competent for the Committee to award such costs as it thinks fit. The Committee may make any of the orders which it is entitled to make under section 36 (4) of the Act. The order shall be communicated to the complainant or the aggrieved party and the advocate concerned as soon as may be by the Secretary.

(11) The parties shall be entitled to obtain copies of documents, affidavits and oral evidence, if any, on payment of such fees as may be prescribed by the Council.

Any person aggrieved by the order of the Committee under Section 36 or 37 of the Act, may, within sixty days of the date on which the order is communicated to him prefer an appeal to the Supreme Court.

Any order awarding costs shall be executed in the manner provided in the Act.

**PROCEDURE TO BE FOLLOWED BY THE DISCIPLINARY COMMITTEE OF THE  
STATE BAR COUNCILS UNDER SECTION 49 (f) OF THE ACT.**

1. The procedure hereinbefore prescribed in these Rules excepting Rule 12 shall be followed '*mutatis mutandis*' by the Disciplinary Committees of the State Bar Councils save and except that—

(a) a reference to the Attorney-General in the said Rules shall mean :

(i) in the case of a Disciplinary Committee of the Bar Council of Delhi, a reference to the Additional Solicitor-General of India ;

(ii) in the case of a Disciplinary Committee of any other State Council, a reference to the Advocate-General, and

(b) any reference to Section 36 (i) shall mean a reference to

Section 35 (1) for the purpose of these Rules.

2. (a) Any person aggrieved by an order of the Disciplinary Committee of a State Council may, within 60 days from the date on which the order is communicated to him, prefer an appeal to the Council by a memorandum in writing which shall be accompanied by a certified copy of the order appealed against and the Council shall pass such order thereon as it may deem fit.

3. The provisions of sections 5 and 12 of the Indian Limitation Act shall apply to any such appeal.

4. In any such appeal, the parties shall be entitled to be represented by counsel at the time of hearing.

5. The President of the Committee of the Council shall fix the hour, date and place of the enquiry which shall ordinarily be not earlier than 10 days from the filing of the memorandum of appeal. The Secretary shall give notice of such hour, date and place to the parties to the State Council and to the Advocate-General of the State concerned or to the Additional Solicitor-General of India as the case may be.

6. At the hearing of any such appeal, the parties may appear in person or by counsel.

7. Any order for costs made in the appeal shall be executed in the manner provided in the Act.

8. On an appeal being preferred as aforesaid, the State Council concerned shall on receipt of the notice of the filing of the same forward to the Council the entire record of the proceedings in the matter.

These Rules shall come into force from such date as may be notified.

**Note.**—The Rules contained in Part III of these Rules were published in the Gazette of India in the issue dated 29th June, 1963 (at pages 417 to 419, Part III, section 4).

[SUPREME COURT.]

S. K. Das, A. K. Sarkar, M. Hidayatullah  
and N. Rajagopala Ayyangar, JJ.  
13th March, 1963.

Naunihal Kishan v.  
R. S.Ch. Partap Singh.  
C.A. No. 594 of 1960.

*Displaced Persons (Debts Adjustments) Act (LXX of 1951)—Definition of 'Debtor' under section 2 (6) and meaning of word 'Debt' in sections 2 (9) and 5 (1), Punjab Relief of Indebtedness Act (VII of 1934).*

Even apart from the terms of section 16 (4), (Displaced Persons Debts Adjustments) Act the liability under the mortgage in favour of the appellant would squarely fall within the definition in section 2 (6). The matter is, however, put beyond the range of controversy by the specific provision in regard to all usufructuary mortgages by section 16 (4) of the Act. In this connection we might refer to the decision of this Court in *Rajkumari Kaushalya Devi v. Bawa Prima Singh*, (1961) 1 S.C.J. 125 : (1960) 3 S.C.R. 570, where it was ruled that a mortgage debt was within the definition of the word 'debt' in section 2 (6) of the Act. No doubt, that case was not concerned with the distinction between cases where the creditor has a right to proceed personally against the debtor and cases where he has not, as in the case of a pure usufructuary mortgage, but the decision is useful as indicating that the expression 'pecuniary liability' in section 2 (6) has to be understood not in isolation but with reference to other provisions of the Act and particularly section 16. We are therefore clearly of the opinion that every usufructuary mortgage, whatever its nature, is within the definition of 'debt' under the Act for the purpose of scaling down under section 16 and that it is wholly immaterial whether or not the creditor is entitled to proceed personally against the debtor and recover the amount of the mortgage.

K. L. Gosain, Senior Advocate (C. L. Sareen and R. L. Kohli, Advocates with him), for Appellants;

Roop Chand and Naunit Lal, Advocates, for Respondent No. 1.

Naunit Lal, Advocate, for Respondent No. 2.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

P. B. Gajendragadkar, M. Hidayatullah  
and J.C. Shah, JJ.  
13th March, 1963.

Pulavarthi Venkata Subba Rao v.  
Vallur Jagannadha Rao.  
C.A. No. 17 of 1959.

*Madras Agriculturist Relief Act (IV of 1938)—Joint Hindu Family—'Agriculturist'—Amendment of law—Res judicata, applicability.*

Indeed, the decision of the High Court is supported by *Arunachala Mudaliar v. Muruganatha Mudaliar*, (1953) S.C.J. 707 : (1953) 2 M.L.J. 796 : (1954) S.C.R. 243, in respect of the character of the property inherited by the two sons of Narasimha Rao, and this fundamental fact could not be questioned. We must then start with the conclusion that the judgment-debtors are agriculturists. Before we consider the other objections to the claim of the respondents to have the decree scaled down, we will deal with another argument on this part of the case. It is contended that the High Court was in error in interfering with the finding that the respondents are not agriculturists in an application for revision under section 115, Civil Procedure Code. This, in our opinion, is not a correct summing up of what the High Court did. The High Court had called for a finding and it was to be subject to objections by the parties. The High Court could have called for the evidence and itself given a finding. In re-examining the evidence with a view to reaching a correct finding on the question whether the judgment-debtors were agriculturists or not, the High Court was not interfering in revision with a finding of fact, but was drawing the correct inference from evidence it had itself ordered to be recorded before considering the law applicable to the case. In our opinion, this objection has no validity.

Only a decision by the Court could be *res judicata* whether statutory under section 11 of the Code of Civil Procedure, or constructive as a matter of public policy on which the entire doctrine rests. The respondents claim to raise the issue over again because of the new rights conferred by the Amending Act, which rights include, according to them, the re-opening of all decrees which had not become final or which had not been fully executed. The respondents are entitled to take advantage of the amendment of the law unless the law itself barred them, or the earlier decision stood in their way. The earlier decision cannot strictly be regarded as on a matter which was "heard and finally decided". The decree might have created an estoppel by conduct between the parties; but here, the appellants are in an unfortunate position, because they did not plead this estoppel at any time. They only claimed that the principle of *res judicata* governed the case or that there was an estoppel by judgment. By that expression, the principle of *res judicata* is described in English law. There is some evidence to show that the respondents had paid two sums under the consent decree, but that evidence cannot be looked into in the absence of a plea of estoppel by conduct which needed to be raised and tried. The appellants are, however, protected in respect of these payments by the Proviso to clause (iii) of section 16 of the Amending Act.

D. Narasaraaju, Advocate-General for the State of Andhra Pradesh (T. V. R. Tatachari, Advocate, with him), for Appellants.

T. Satyanarayana, Advocate, for Respondents.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

K. Subba Rao, Raghubar Dayal and  
J. R. Mudholkar, JJ.  
14th March, 1963.

Dr. Raghubir Saran vs.  
The State of Bihar  
Cr. A. No. 87 of 1961

*Constitution of India (1950), Article 136—High Court's power to expunge remarks made against the person who was neither a party nor a witness in the proceedings—Section 561-A, Criminal Procedure Code (V of 1898).*

Now, the question is whether in such circumstances this Court in exercise of its powers under Article 136 of the Constitution should interfere with the order of the High Court. Is it such an exceptional case which calls for the interference of this Court? The High Court in exercise of its discretion, for the reasons given by it, refused to expunge the remarks. It is certainly not a case meriting the interference of this Court in its extraordinary jurisdiction.

That apart, I entirely agree with the observations of the High Court. A judicial officer does not surrender his judgment in medical matters to the *ipsi dixit* of the doctor. The opinion of a doctor has great weight, provided it is supported by the material on which he formed the opinion. If he does not disclose the particulars of the clinical results, how can the Court come to a conclusion that the accused were so ill as to be released on bail? In the circumstances the Magistrate said that the doctor was grossly negligent. It is not possible to say that the said observation is either irrelevant or without foundation.

B. B. Tawakley, Senior Advocate (E. Udayaratnam and R. C. Prasad, Advocates, with him), for Appellant.

D. P. Singh. M. K. Ramamurthi, R. K. Garg and S. C. Agarwal, Advocates of M/s. Ramamurthi & Co., for Respondent No. 1.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

S.K. Das, A. K. Sarkar, K. N. Wanchoo  
and K. C. Das Gupta, JJ.  
15th March, 1963.

The State of Uttar Pradesh v.  
Mohammad Naim.  
Cr. A. No. 81 of 1962.

*Criminal Procedure Code (V of 1898), section, 561-A—Observations of Mr. Justice Mullah, Lucknow Bench of the Allahabad High Court against the Indian Police Force to ask for expunging—Locus Standi of the U.P. State—General Clauses Act (X of 1897).*

It is undoubtedly open to the High Court to expunge remarks from a judgment in order to secure the ends of justice and prevent abuse of the process of the Court.

In the case before us the learned Judge chose to make sweeping and general observations against the entire police force of the State.

We consider that the remarks made by the learned Judge in respect of the entire police force of the State were not justified on the facts of the case nor were they necessary for the disposal of the case before him. The learned Judge conceded that the general remarks he made were not based on any evidence in the record; he said that he drew largely from his knowledge and experience at the Bar and on the Bench. Learned counsel for the appellant has very frankly stated before us that the learned Judge has had very great experience in the matter of criminal cases and was familiar with the method of investigation adopted by the local police. He has contended, however, that it was not proper for the Judge to import his personal knowledge into the matter. We do not think that in the present case we need go into the question as to the extent to which a Judge or Magistrate may draw upon his experience in assessing or weighing evidence or even in judging the conduct of a person. We recognise the existence of exceptional circumstances in a case where the Judge or Magistrate may have to draw upon his experience to determine what is the usual or normal conduct with regard to men and affairs. We say this with respect, but it appears to us that in the present case even allowing for the great experience which the learned Judge had in the matter of criminal trials, his statement that "there was not a single lawless group in the whole country whose record of crime came anywhere near the record of that organised unit which is known as the Indian Police Force" was wholly unwarranted and, if we may say so, betrayed a lack of judicial approach and restraint.

C. B. Agarwala, Senior Advocate, G. C. Mathur, Shankar Sahai and C. P. Lal, Advocates with him), for Appellant.

J. P. Goyal, Advocate, for Hon'ble Chief Justice and his Companion Judges of the Allahabad High Court (on notice).

*Appeal allowed.*

[SUPREME COURT.]

P. B. Gajendragadkar, M. Hidayatullah  
and J. C. Shah, JJ.  
19th March, 1963.

Mirza Raja Pushpavathi Vijayaram  
Gajapathi Raj Manne Sultan Bahadur v.  
Sri Pushavathi Visweswar Gajapathiraj  
Rajkumar of Vizianagram.  
C. As. Nos. 170-177 of 1961.

*Impartible estate—Devolution by primogeniture—Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)—Hindu Law.*

Since the decision of the Privy Council in *Shiba Prasad Singh v. Rani Prayag Kumari Devi* L.R. 59 I.A. 331, it must be taken to be well-settled that an estate which is impartible by custom cannot be said to be the separate or exclusive property of the holder of the estate. If the holder has got the estate as an ancestral estate and he has succeeded to it by primogeniture, it will be a part of the joint estate of the undivided Hindu family.

On the whole, we do not think that a case has been made out for our interference with the conclusion thus reached by the Court of Appeal.

The result is, the appeals preferred by defendants 1 and 2 fail and are dismissed. Therefore, we do think that the argument based on the trust deed executed by Chitti Babu really supports the plaintiff's case that the buildings in question had been incorporated by Chitti Babu with the impartible Zamindari estate.

In the result the plaintiff's appeals also fail and are dismissed.

G.S. Pathak, Senior Advocate, for Appellant (In C.As. Nos. 170-171 of 1961) and Respondent No. 1 (In C.As. Nos. 172-177 of 1961).

M. C. Setalvad, Senior Advocate, C. K. Daphtary, Solicitor-General of India, for Appellant (In C.As. Nos. 172-173 of 1961) and Respondent No. 1 (In C. As. Nos. 170-171 of 1961) and Respondent No. 2 (In C.As. Nos. 174-177 of 1961).

A. V. Viswanatha Sastri, Senior Advocate, for Appellants (In C.As. Nos. 174-175 of 1961) and Respondents Nos. 3 and 4 (In C.As. Nos. 170-173 of 1961) and Respondents Nos. 4 and 5 in C.As. Nos. 170-177 of 1961).

C. B. Agarwala, Senior Advocate (K. K. Jain, Advocate, with him), for Appellant (In C.As. Nos. 176 and 177 of 1961) and Respondent No. 4 (In C.As. Nos. 174-175 of 1961).

G.R.

*Appeals by both the parties dismissed.*

[SUPREME COURT.]

P. B. Gajendragadkar, K. N. Wanchoo  
and K. C. Das Gupta, JJ.  
20th March, 1963.

Sirsilk Ltd. v. Government of A.P.

C.As. Nos. 220, 423 and 424 of 1962.

Industrial Disputes Act (XIV of 1947), sections 17, 17 (1), 18 (1), 18 (3)—Order 23, Rule 3, Civil Procedure Code. (V of 1908.)

In *State of Bihar v. D.N. Ganguly and others*, (1959) S.C.J. 533 : (1959) 1 M.L.J. (S.C.) 178 : (1959) 1 An. W.R. (S.C.) 178 : (1959) M.L.J. (Crl.) 323 : (1959) S.C.R. 1191, dealing with an argument urged before this Court that where a settlement has been arrived at between the parties while an industrial dispute is pending before a tribunal, the only remedy for giving effect to such a settlement would be to cancel the reference, this Court observed that though the Act did not contain any provision specifically authorising the industrial tribunal, to record a compromise and pass an award in its terms corresponding to the provisions of Order 23, rule 3 of the Code of Civil Procedure, it would be very unreasonable to assume that the industrial tribunal would insist upon dealing with the dispute on the merits even after it is informed that the dispute has been amicably settled between the parties, and there can be no doubt that if a dispute before a tribunal is amicably settled, the tribunal would immediately agree to make an award in terms of the settlement between the parties.

We therefore allow the appeals and direct the Government not to publish the awards sent to it by the industrial tribunal in these cases in view of the binding nature of the settlements arrived at between the parties under section 18 (1) of the Act. In the circumstances we order the parties to bear their own costs.

S. K. Bose and B. P. Maheshwari, Advocates, for Appellant (In C.A. No. 220 of 1962).

M. G. Setalvad, Senior Advocate (S. K. Bose and Sardar Bahadur, Advocates, with him), for Appellants (In C.As. Nos. 423 and 424 of 1962).

K. R. Chaudhuri and P. D. Menon, Advocates, for Respondent No. 1 (In all the Appeals).

G.R.

*Appeals allowed.*

[SUPREME COURT.]  
*K. Subba Rao, Raghubar Dayal*  
and *J.R. Mudholkar, JJ.*  
21st March, 1963.

G. S. Bausal v.  
The Delhi Administration.  
Cr. A. No. 219 of 1960.

*Penal Code (XLV of 1860), section 367—Gist of offence.*

The decision of this Court in *Dr. Vimla v. The Delhi Administration*, (Criminal Appeal No. 213 of 1960 decided on 29th November, 1962), is clearly distinguishable from the present case.

Neither she (*Dr. Vimla*) got any economic or non-economic advantage by making the said false documents nor the Insurance Company incurred any economic or non-economic loss by her so doing. Therefore, this Court held that she was not guilty of forgery. But in the present case, the appellant clearly secured an economic advantage by making the false documents by (i) saving the money which he would have otherwise spent in obtaining a succession certificate, and (ii) getting the money belonging to his father as his heir. Even otherwise he secured a non-economic advantage as he got himself relieved of the trouble of getting the certificate of proof to the satisfaction of the rationing authority and the Post Master General of his credential to receive the money. He was, therefore, guilty of making the false documents both dishonestly and fraudulently. The High Court is right in coming to the conclusion which it did.

*A. S. R. Chari*, Senior Advocate (*J. B. Dadaachanjit, O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J.B. Dadachanji & Co.*, with him), for Appellant.

*Frank Anthony*, and *R.N. Sachthey*, Advocates, for Respondent.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

*B. P. Sinha, C.J., J. C. Shah* and *N. Rajagopala Ayyangar, JJ.*  
25th March, 1963.

*Mrs. Chandnee Widyavati Madden v. Dr. C.L. Katial.*  
C.A. No. 559 of 1962.

*Specific performance of the contract—Condition precedent for the sale.*

In this view of the matter, the High Court was entirely correct in decreeing the suit for specific performance of the contract. The High Court should have further directed the defendant to make the necessary application for permission to the Chief Commissioner, which was implied in the contract between the parties. The defendant has to make the necessary application for permission to the Chief Commissioner, which was implied in the contract between the parties. As the defendant-vendor, without any sufficient reasons, withdrew the application already made to the Chief Commissioner, the decree to be prepared by this Court will add the clause that the defendant, within one month from to day, shall make the necessary application to the Chief Commissioner or to such other competent authority as may have been empowered to grant the necessary sanction to transfers like the one in question, and further that within one month of the receipt of that sanction she shall convey to the plaintiffs the property in suit. In the event of the sanction being refused, the plaintiffs shall be entitled to the damages as decreed by the High Court. *Motilal v. Nanhelal* (L.R. 57 I.A. 333), approved.

*A. Ranganatham Chetty*, Senior Advocate (*S. K. Mehta* and *K. L. Mehta*, Advocates, with him) for Appellant.

*M. C. Setalvad*, Senior Advocate (*Hardayal Hardy* and *S. N. Anand*, Advocates, with him), for Respondents.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

*P. B. Gajendragadkar, K. N. Wanchoo*  
and *K. C. Das Gupta, JJ.*  
25th March, 1963.

*Varada Bhavanarayana Rao v. The State of A.P.*  
C.A. No. 340 of 1961.

*Madras Estates Land (Reduction of Rent) Act (XXX of 1947)—Burden of proof—Section 101 of the Evidence Act.*

The decision of this Court in *Dist. Board, Tanjore v. Noor Mohd.* (1952) 2 M.L.J. 586. A.I.R. 1953 S.C. 446, has generally been taken to lay down the law that

when the question arise. in any case before the Courts whether certain lands constitute an "estate" the burden of proving that they constitute an estate is upon the party who sets up that contention. On a closer examination however it appears that this decision cannot be considered to be an authority for this proposition. The judgment of Mr. Justice Mahajan (as he then was) states "That it was conceded by Mr. Somayya, the learned counsel for the respondent that the burden of proving that certain lands constitute an 'estate' is upon the party who sets up the contention." The judgment proceeded on the basis of this concession by counsel and contains no discussion on the question and consequently no pronouncement. The other learned Judge, Mr. Justice Chandrasekhara Aiyer has also stated "that the respondent has not successfully discharged the onus that rests on him to show that Kunanjeri was an 'estate' within the meaning of the Act." His view that such onus did rest on the respondent was also apparently based on the concession made by counsel. It will not be proper therefore to treat the judgment of this Court in *Dist. Board, Tanjore case*, as a decision on the question of burden of proof in such cases.

Applying these principles we find that the plaintiff who asks the Court for a declaration that the area covered by the Title Deed 1082 is not an estate must prove that it is not an "estate". If no evidence were given on either side the plaintiff would fail. For we have found that there is no presumption in law either that the area in question is an estate or that it is not an estate. It follows from this that the plaintiff who is to prove that the suit lands do not form an estate must show that the minor inams were granted subsequent to the date of the inam grant of the named village. The plaintiff has clearly failed to discharge this burden.

*N. V. Ramadas and T. V. R. Tatachari*, Advocates, for Appellant.

*P. Rama Reddy and P.D. Menon*, Advocates, for Respondent No. 1.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

*A.K. Sarkar, K. N. Wanchoo and  
K. C. Das Gupta, JJ.*  
26th March, 1963.

*Bijayananda Patnaik v.  
Satrughna Sahu.*  
C.A. No. 603 of 1962.

*Representation of People Act (XLIII of 1951), sections 82, 90 (3) and 116-A—Order 23, rule 1 (1) of the Civil Procedure Code (V of 1908).*

We are of opinion that the High Court should have allowed the application for unconditional withdrawal made by Satrughna Sahu, the appellant before it. Further the High Court in this connection need not have referred to the affidavits filed on behalf of the other two defeated candidates before it, for such affidavits were irrelevant, if Satrughna Sahu, the appellant before the High Court, was entitled to withdraw the appeal unconditionally and the High Court could not refuse such withdrawal.

In the view we have taken on the first question raised before us, it is not necessary to deal with the second question, though we may add that as at present advised it seems to us that the High Court was in error in treating the application for withdrawal of the appeal as if it were an application for withdrawal of an election petition under section 109 and referring the matter to the election tribunal. Even if the High Court had power to refuse an application for withdrawal of an appeal, the proper course for the High Court would be to consider all that is required by section 110 itself. However in view of our decision on the first question we need not pursue the point further.

*M. G. Setalvad and Ranadeb Chaudhri*, Senior Advocates (*M. K. Banerjee, Advocate and S. N. Andley and Rameshwar Nath*, Advocates of *M/s. Rajinder Narain & Co.* with them); for Appellant.

*R. Gopalakrishnan*, Advocate, for Respondent No. 2.

G.R.

*Appeal allowed.*



[SUPREME COURT.]

B. P. Sinha, C.J., J. C. Shah and  
N. Rajagopala Ayyangar, JJ.  
27th March, 1963.

The Union of India v.  
The Birla Cotton Spinning &  
Weaving Mills, Ltd.  
C.A. No. 609 of 1961.

*Arbitration Act (X of 1940), section 34—Stay of suit by the respondent alleging that dispute had arisen between the parties and there being an Arbitration agreement which could be invoked by the appellant being ready and willing to do all things necessary for the proper conduct of the Arbitration.*

The Court held: "But the Union is not seeking to go to arbitration on a dispute between the parties about a breach committed by one side or the other or whether circumstances have arisen which have discharged one or both parties from further performance. It is a case in which in substance there is no dispute between the parties "under", "in connection with", or even "with regard to" the contract. The plea raised by the Union for stay of the suit was frivolous. It is somewhat surprising that the plea should have been raised and persisted in, and even after going to arbitration the other cases have been brought up to this Court involving large costs to the public exchequer.

N. S. Bindra, Senior Advocate (R. H. Dhebar, Advocate, with him), for Appellant.

G. B. Pai, Advocate, and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

S. K. Das, A. K. Sarkar and  
N. Rajagopala Ayyangar, JJ.  
27th March, 1963.

Laxmidas Dayabhai Kabrawala v.  
Nanabhai Chunilal Kabrawala.  
C.A. No. 759 of 1962.

*Practice—Legality and propriety of an order of a single Judge of a High Court directing a counter-claim filed by the respondents to be treated as a plaint in a cross-suit and remanding the case for trial on that basis—Sections 37 and 55 (1) of the Partnership Act (IX of 1932)—Order 8, rule 6, Civil Procedure Code (V of 1908)—Limitation Act (IX of 1908), Article 106.*

By Majority.—It would be seen that section 37 lays down the substantive law relating to the liability of a surviving partner who without a settlement of accounts with the legal representatives of the deceased partner utilises the assets of the partnership for continuing the business as his own. If in the present case the plaintiff has done so he would be liable to the obligation laid by the provision and if he has not, he would not be so liable. Therefore the section cannot stand in the way of the conversion prayed for by the defendant.

We consider that the question of goodwill has even less bearing on the exercise of the discretion by the Court than even the accounting contemplated by section 37. Goodwill is a part of the assets of a firm and section 55 (1) of the Partnership Act enacts that in settling the accounts of a firm after dissolution the goodwill shall, subject to contract between the partners, be included in the assets and it may be sold either separately or along with other property of the firm. The *prima facie* rule therefore is that the goodwill of the firm being a part of the assets has to be sold just like other assets before the accounts between the partners can be settled and the partnership wound up. Why there should be any particular reference to goodwill which is only one of the several assets of a firm in a plaint for taking accounts of a dissolved partnership is hard to see. How, similarly, the existence of goodwill as an asset of the firm which has to be sold and the proceeds divided between the partners in the account-taking is a bar to the conversion of a counter-claim into a plaint in a cross-suit is not easy to comprehend.

These were the only three matters which were taken into account by the learned trial Judge in refusing the defendants' prayer for treating the counter-claim as a plaint in a cross-suit.

There will be a direction that the defendants are at liberty to file a fresh pleading in the place and stead of their counter-claim contained in paragraphs 25 and 26 of the Written Statement, dated 17th October, 1951, provided however that there shall be no substantial variation in the allegations to be made or the reliefs to be claimed by them in such fresh pleading. This they might file within 4 weeks of the receipt of this order by the trial Court. In the event of the defendants exercising the option hereby given, the plaintiff shall file the Written Statement within 4 weeks thereafter. We ought to make it clear that by the directions we have given above we do not intend to preclude the parties from seeking any other or further amendment of the pleadings or to fetter, in any manner, the power of the Court to permit such amendment under Order 6, rule 17, Civil Procedure Code at any subsequent stage of the proceedings.

S. T. Desai, Senior Advocate (A. G. Ratnaparkhi, Advocate, with him), for Appellant.

M. H. Chhatrapati, Advocate, and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., for Respondents.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

B. P. Sinha, C.J., J. C. Shah and  
N. Rajagopala Ayyangar, JJ.  
29th March, 1963.

Thakkar Hemraji Keshavji v.  
Shah Haridas Jethabhai.  
C.A. No. 164 of 1961.

*Saurashtra Groundnut and Groundnut Products (Forward Contract Prohibition) Order, 1949—"Rules and Regulations of groundnuts ready delivery" of the Veraval Merchants' Association.*

From the absence of a clause expressly prohibiting transfer of the contract against delivery orders, railway receipts or bills of lading it cannot be inferred that the contract is transferable. The question whether an impugned contract is transferable must depend upon the language of the contract interpreted in the light of surrounding circumstances, and silence of the contract cannot be regarded as an indication of transferability—much less would it justify an inference that it is transferable.

We must then consider having regard to the surrounding circumstances if such a term can be implied. The contracts are made subject to the rules and regulations of the Veraval Merchants' Association. These rules are designated "Rules and Regulations of groundnuts ready delivery".

On a careful review of the rules we are of the view that under the rules and regulations of the Veraval Merchants' Association pursuant to which the contracts are made, the contracts were not transferable. The contracts were undoubtedly for delivery of groundnut at a future date, but they were contracts for specific quality for specific price, and for specific delivery under the rules of the Association under which they were made. The contracts were, for reasons already mentioned, also not transferable to third parties, and could not be regarded as forward contracts within the meaning of the order. It is unnecessary therefore to consider whether the respondent who claimed to have acted as Pucca Adatia and therefore as Commission Agent was entitled to claim reimbursement for any amount alleged to have been paid by him on behalf of the appellant for losses suffered in the transactions in dispute.

B. R. L. Iyengar, Atiour Rehman, J. L. Doshi, and K. L. Hathi, Advocates, for Appellant.

Purshottam Trikamdas, Senior Advocate (J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co. with him), for Respondent.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

P. B. Gajendragadkar, K. N. Wanchoo  
and K. C. Das Gupta, JJ.  
29th March, 1963.

Ahmad Adam Sait v.  
M. E. Makhri;  
C.A. No. 308 of 1961;

Civil Procedure Code (V of 1908), section 92 and Order 1 Rules 8 and 10—*Res judicata*.

In the case of *Raja Anandrao v. Shamrao and others*, (1962) 1 S.C.J. 584 : (1962) 1 M.L.J. (S.C.) 234 : (1962) 1 An. W.R. (S.C.) 234 : (1961) 3 S.C.R. 930 at p. 940, this Court has no doubt observed that a decree passed in a representative suit under section 92 binds not only the parties thereto, but all those who are interested in the Trust, and Mr. Setalvad has naturally relied upon this observation in support of his plea of *res judicata*; but it would be unreasonable to treat the said observation as laying down a broad and unqualified proposition like the one which Mr. Setalvad had submitted before us. The context in which the observation has been made must be borne in mind and that context clearly shows that the earlier suit had been filed in respect of a Hindu Temple and it was plain from the recitals in the plaint filed in that suit that the plaintiffs who had brought the said suit represented the interests of all worshippers and devotees of the said temple, including the worshippers who had brought the subsequent suit. In other words, in accepting the plea that the subsequent suit brought by the worshippers was barred by *res judicata*, this Court affirmed the finding that the interests of the said worshippers had been represented in the earlier suit, and so, it made no difference to the binding character of the decree passed in that suit that the said worshippers personally did not appear in the earlier litigation. This decision, therefore, proceeds on the basis that the party who was held precluded from filing a subsequent suit was constructively represented in the earlier litigation and the provisions of *Explanation VI* to section 11 therefore, applied. It is thus clear that the observations made in *Raja Anandrao's case* do not support Mr. Setalvad's contention in the present appeal.

Therefore, we are satisfied that the High Court was right in coming to the conclusion that the scheme must be revised on the true basis that the Mosque does not belong exclusively to the Cutchi Memons, but belongs to all the Sunni Musalmans of Bangalore.

By modifying the clause in this way, we wish to make it clear that if in future an occasion arises for changing or altering the terms of the scheme, it should not be necessary to file a separate suit.

In the result, we reject all the contentions raised by the appellants and confirm the findings recorded by the High Court in favour of the respondents. We are, however not inclined to affirm the order of remand passed by the High Court, because we have held that the scheme framed in 1927 should be left as it is with the modifications which we have indicated in our judgment. Therefore, the order of remand passed by the High Court is reversed and the respondents' claim for a modified scheme allowed. The appeal is dismissed with the above modifications. The appellants will pay the costs of the contesting respondents throughout.

M. C. Setalvad, Senior Advocate (M. L. Venkatanarasimhaiah, Advocate, and S. N. Andley, Rameswar Nath and P. L. Vohra, Advocates of M/s. Rajinder Narain & Co. with him), for Appellants.

A. V. Viswanatha Sastri, Senior Advocate (M. S. K. Sastri and M. S. Narasimhan, Advocates, with him), for Respondent No. 1.

G.R.

Ordered accordingly.

[SUPREME COURT.]

P. B. Gajendragadkar, K. N. Wanchoo  
and K. C. Das Gupta, JJ.  
29th March, 1963.

Madamanchi Ramappa v.  
Murthaluru Bojjappa.  
C.A. No. 376 of 1961.

*Civil Procedure Code (V of 1908), section 100—High Courts' Jurisdiction to interfere with the conclusions of the Courts below on questions of fact.*

The question about the limits of the powers conferred on the High Court in dealing with Second Appeals has been considered by High Courts in India and by the Privy Council on several occasions. One of the earliest pronouncements of the Privy Council on this point is to be found in the case of *Mst. Durga Chowdhrai*, L.R. 17 I.A. 122. In the case of *Deity Pattabhiramaswamy v. S. Hanymayya and others*, A.I.R. 1959 S.C. 1204, this Court had occasion to refer to the said decision of the Privy Council and it was constrained to observe that "notwithstanding such clear and authoritative pronouncements on the scope of the provisions of section 100, Civil Procedure Code, some learned Judges of the High Courts are disposing of Second Appeals as if they were First Appeals. This introduces, apart from the fact that the High Court assumes and exercises a jurisdiction which it does not possess, a gambling element in litigation and confusion in the mind of the litigant public". On this ground, this Court set aside the second appellate decision which had been brought before it by the appellants. [*V. Ramachandra Ayyar and another v. Ramalingam Chettiar and another*, A.I.R. 1963 S.C. 302, also relied upon.]

M. Rajagopal and K. R. Chaudhuri, Advocates, for Appellants.

A. V. Viswanatha Sastri, Senior Advocate (B. K. B. Naidu, Advocate, with him) for Respondent.

G.R.

*Appeal allowed.*

[SUPREME COURT.]

P. B. Gajendragadkar, K. N. Wanchoo  
and K. C. Das Gupta, JJ.  
1st April, 1963.

The University of Delhi v.  
Ram Nath.  
C.As. Nos. 650-651 of 1962.

*Industrial Disputes Act (XIV of 1947), section 33-C (2)—Whether running an educational institution would be an industry under the Act.*

We are satisfied that the University of Delhi and the Miranda College for Women run by it cannot be regarded as carrying on an industry under section 2 (j) of the Industrial Disputes Act and so, the applications made by the respondents against them under section 33-C (2) of the Act must be held to be incompetent. Case-law considered.

In the result, the appeals are allowed, the orders passed by the Industrial Tribunal are set aside and the petitions filed by the respondents under section 33-C (2) of the Act are dismissed. There would be no order as to costs.

M. C. Setalvad, Senior Advocate. (K. K. Raizada, B. K. Jain and A. G. Ratnaparkhi, Advocates, with him), for Appellants.

Janardhan Sharma, Advocate, for Respondents.

S. P. Varma, Advocate, for Intervener No. 1.

T. R. Bhasin, S. G. Malik, Miss Sushma Malik and Ram. Bhejalal Malik, Advocates, for Intervener No. 2.

G.R.

*Appeals allowed.*

[SUPREME COURT.]

S. K. Das, A. K. Sarkar, and N. Rajagopala Ayyangar, JJ.

1st April, 1963.

Will—Construction—Indian Succession Act (XXXIX of 1925), sections 69, 72, 73, 82 and 84—Meaning of expressions “enjoy the property upto her death”, “after the lifetime” and “after the death”.

It would be observed that in *Illustration (a)* to section 84 of the Succession Act the bequest is made to the first taker and his descendants. Where they are descendants of the first taker, the presumption is that the reference to the persons to take the gift over, is intended to denote the quality of the first taker's estate and not for the purpose of the subsequent takers having independent gifts. Where the subsequent legatees are intended to be themselves direct beneficiaries and they are directed to take along with the first taker the interest of the first taker is cut down to a joint interest in the property so as to enable the subsequently named to partake the legacy. That is *Illustration (b)* to the section. There the second named is a collateral and by the use of the conjunction ‘and’ a joint interest is presumed to be created in favour of all the legatees. Where the subsequent taker is a descendant of the first taker, as in *Illustration (a)*, but the testator does not provide for his taking it along with the first named it is a case falling under *Illustration (c)* where successive interests are created by the use of the words ‘after the first taker's death’. In such a case even if the second taker were the issue of the first the first taker's interest is for life since by the use of the words ‘after his or her lifetime’ successive interests are intended to be created. In our opinion, the case on hand would fall within *Illustration (c)* and the bequest to Severina is only of life interest, this being made clear by the use of the words ‘after her lifetime’.

It is therefore manifest that expressions ‘after the lifetime’ and ‘after the death’ were words understood by the draftsman of the will to indicate that the interest referred to was a terminable one—a life interest and we have these words ‘after her lifetime’ in clause 3 (c).

Quite a number of authorities were cited by learned Counsel on either side but in each one of these we find it stated that in the matter of the construction of a will authorities or precedents were of no help as each will has to be construed in its own terms and in the setting in which the clauses occur. We have therefore not thought it necessary to refer to these decisions.

S. N. Andley and A. G. Ratnaparkhi, Advocates, for Appellants.

A. V. Viswanatha Sastri, Senior Advocate (G. Gopalakrishnan, Advocate of M/s. Gagrat & Co. and R. Ganapathy Iyer, Advocate, with him) for Respondents Nos. 1 and 19.

M. V. Goswami and B. C. Misra, Advocates, for Respondents Nos 8 to 14.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, K. N. Wanchoo,

K. C. Das Gupta, J. C. Shah and

N. Rajagopala Ayyangar, JJ.

4th April, 1963.

Basti Sugar Mills Ltd. v.

Ram Ujagar.

C.A. No. 225 of 1963.

U.P. Industrial Disputes Act, sections 2 (z) and (l) (iv)—Definition of employer—Article 19 (1) (g) of the Constitution—Minimum wage under Standing Orders.

The position thus is (a) that the respondents are workmen within the meaning of section 2 (z), being persons employed in the industry to do manual work for reward, and (b) they were employed by a contractor with whom the appellant company had contracted in the course of conducting the industry for the execution by the said contractor of the work of removal of press-mud which is ordinarily a part of the industry. It follows therefore from section 2 (z) read with sub-clause (iv) of section 2 (l) of the Act that they are workmen of the appellant company and the appellant company is their employer. There is no substance therefore in the first point raised by the learned counsel for the appellant.

The second point, *viz.*, that this definition contravenes the appellant's fundamental rights under Article 19 (1) (g) is equally devoid of substance. Assuming that the result of this definition of employer in sub-clause (iv) of section 2 (l) is the imposition of some restrictions on the appellant's right to carry on trade or business, it cannot be doubted for a moment that the imposition of such restrictions is in the interest of the general public. For, the interests of the general public require that the device of the engagement of a contractor for doing work which is ordinarily part of the industry should not be allowed to be availed of by owners of industry for evading the provisions of the Industrial Disputes Act. That these provisions are in the interests of the general public cannot be and has not been disputed. That being the position, the impugned definition which gives the benefit of the provisions of the Act to the workmen engaged under a contract in doing work which is ordinarily part of the industry cannot but be held to be also in the interests of the general public.

We have therefore come to the conclusion that the words "employed by a factory" are wide enough to include workmen employed by the contractors of factory also.

G. S. Pathak, Senior Advocate (D. N. Mukherjee, Advocate, with him), for Appellant.

M. Rajagopalan and K. R. Chaudhuri, Advocates, for Respondents.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

K. N. Wanchoo and K. C. Das Gupta, JJ.

M/s. Kesoram Cotton Mills Ltd. v.

Gangadhar.

4th April, 1963.

C.As. Nos. 425-426 of 1962.

*Industrial Disputes Act (XIV of 1947), section 33 (2) (b)—Rules of natural justice—Wages during period of suspension.*

We are therefore of opinion that clause (7) refers to the period up to the date of the agreement including the period of grace given to the workmen in clause (1) in order to join their duties and not to the future. In this view of the matter the tribunal was not unjustified in granting wages for the suspension period after the date of this agreement to those whom it reinstated. The contention of the appellant in this behalf must fail with respect to those reinstated. We shall consider the case of nine workmen permitted to be dismissed when considering the appeal of the workmen.

The tribunal has held that this procedure followed by the inquiry officer was open to objection and was against the principles of natural justice and that the witnesses should have been examined in chief in the presence of the workmen against whom the inquiries were going on. The requirements of principles of natural justice were laid down by this Court in *The Union of India v. T. R. Verma*, (1958) S.C.J. 142 : (1958) 1 An. W.R. (S.C.) 67 : (1958) 1 M.L.J. (S.C.) 67 : (1958) M.L.J. (Cri.) 123 : (1958) S.C.R. 499.

The order of the tribunal therefore holding that the inquiries were vitiated by rules of natural justice is correct. We may add however that in spite of the above finding the tribunal permitted termination of the service of four of these five workmen and reinstated only one. We shall deal with this aspect of the matter further when considering the appeal of the workmen.

In the result, the award of the tribunal is affirmed in the light of and subject to the above modifications and consequently the appeal by the management is dismissed and by the workmen allowed only with respect to the grant of wages in the manner indicated above. In the circumstances parties will bear their own costs in both appeals.

M. C. Setalvad, Senior Advocate (B. P. Maheshwari, Advocate, with him), for Appellant (In C.A. No. 425 of 1962) and the Respondents (In C.A. No. 426 of 1962).

T. Kumar, Advocate, for Respondents (In C.A. No. 425 of 1962) and the Appellant (In C.A. No. 426 of 1962).

G.R.

*Appeal by management dismissed.  
Appeal by workmen allowed in part.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, A. K. SARKAR AND K. N. WANCHOO, JJ.

The Punjab National Bank, Ltd.

Appellant \*

v.

K. L. Kharbanda

Respondent.

*Industrial Disputes Act (XIV of 1947), section 33-C—Scope—Section 33-C (2)—Benefit includes monetary and non-monetary—Banking Companies—Sastry Award—Supervisor's scale—Fixation of pay.*

Section 33 -C of Industrial Disputes Act is a provision in the nature of execution and where the amount to be executed is worked out or where it may be worked out without any dispute section 33-C (1) will apply. But where the amount due to a workman is not stated in the award and there is a dispute as to its calculation, sub-section (2) will apply and the workman would be entitled to apply thereunder to have the amount computed provided he is entitled to a benefit, whether monetary or non-monetary, which is capable of being computed in terms of money.

The word 'benefit' used in sub-section (2) is not confined merely to non-monetary benefit which could be converted in terms of money but is concerned with all kinds of benefits whether monetary or non-monetary, to which a workman may be entitled.

The Sastry Award had conferred a benefit on the employee and those like him by providing for fixation of pay in the new scale and even though that benefit may be monetary and there was a dispute as to the amount of that benefit, it was open to the employee to apply to the Labour Court for computation of that benefit in terms of money and the labour Court would have jurisdiction to entertain the application and compute the amount due on the basis of the benefit conferred by the award.

The supervisor's scale being a scale in the Bank, the employee is right in his claim that his basic pay cannot be reduced below what it would be under a point to point adjustment on the corresponding scale which he was drawing before the Sen Award in the Bank as a workman.

Appeal by Special Leave from the Judgment and Order, dated the 2nd August, 1960, of the Central Government Labour Court at Delhi in L.C.A. No. 80 of 1960.

A. V. Viswanatha Sastri, Senior Advocate (*Naunit Lal*, Advocate, with him), for Appellant.

S. T. Desai, Senior Advocate (*Janardan Sharma*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

*Wanchoo, J.*—This is an appeal by Special Leave in an industrial matter. The respondent Kharbanda is a supervisor in the Punjab National Bank, Ltd., which is the appellant before us. The dispute relates to the fixation of his salary in accordance with the All-India Industrial Tribunal (Bank Disputes) Award (hereinafter referred to as the Sastry Award). The respondent made an application to the Central Labour Court, Delhi, under section 33-C (2) of the Industrial Disputes Act (XIV of 1947), (hereinafter called the Act), and his case was that he was entitled to certain benefits capable of being computed in terms of money under the Sastry Award, but the appellant had made a wrong calculation in fixing his basic salary. Therefore, the respondent prayed that the benefit to which he was entitled by fixation of his basic salary correctly should be computed in terms of money and determined by the Labour Court. His case further was that when his basic salary was rightly fixed under the Sastry Award he would be entitled to a sum of Rs. 6,428-28 nP. as arrears up to the date of his application.

The application was opposed on behalf of the appellant and two contentions were raised to meet the case put forward by the respondent. In the first place it was urged that the application was not maintainable under section 33-C (2) of the Act and the Labour Court had no jurisdiction to decide it. Secondly, it was urged that the manner in which the appellant had fixed the basic salary was correct and there was therefore no force in the contention of the respondent that he was entitled to certain benefits of which he had been deprived and which should be calculated by the Labour Court.

Before we deal with the two points which arise in the present appeal we may refer to the provisions of the Sastry Award out of which the present dispute arises. Originally another tribunal known as the Sen Tribunal was appointed in June, 1949, to go into the disputes between various banks all over the country and their employees. The Sen Tribunal made an award after an exhaustive inquiry but on appeal to this Court the said award was set aside in 1951. Thereafter Act (II of 1951) was passed as a temporary measure for freezing certain provisions of the said award in order to prevent the spread of the prevalent unrest amongst the bank employees in question. The said dispute was then referred by the Central Government to the Sastry Tribunal in January, 1952. This tribunal held an elaborate inquiry and made its award which was published on 20th April, 1953. Appeals were preferred by the banks and their employees against the said award before the Labour Appellate Tribunal, and on 28th April, 1954, the Appellate Tribunal substantially confirmed the recommendation and directions of the Sastry Tribunal with certain modifications. In the present appeal, we are not concerned with the further history of the dispute, for it is admitted that the provisions of the Sastry Award with respect to the matter in controversy before us have remained unmodified when finally the dispute was set at rest by the Industrial Disputes (Banking Companies) Decision Act (XLI of 1955).

The Sastry Tribunal decided after considering the matter from all aspects to provide only one scale for clerks in all banks, though banks themselves were divided into four classes and the places where the banks were situate were divided into three areas. In the present appeal we are concerned with Class A, area I, for which the grade provided was from Rs. 85 to Rs. 280 with varying increments (*see* para. 119 of the award) to which it is unnecessary to refer. After having provided one cadre of clerks, the Sastry Tribunal then considered the question of certain special posts where the incumbent required special skill for the efficient discharge of his duties and the problem before it was whether there should be a separate scale for such special posts or whether the incumbents of such posts should be in the same scale as clerks with certain advantages in the shape either of additional increments in the same scale or additional allowance over and above the scale pay or a combination of both. The Sastry Tribunal rejected the formulation of a separate scale for these special posts and decided to grant a special allowance over and above the pay of the clerical scale. One such class of special posts with which the Sastry Award was concerned was the class of supervisors to which the respondent belongs and it provided a special allowance of Rs. 50 in the case of A class banks in area I for supervisors by para. 164 thereof.

Then arose the question of fixing the pay of the employees of the banks into the new scale provided in the award and that matter was dealt with in para. 292. The Sastry Award divided the employees into two categories, namely, (i) those who entered the service of the banks before 31st January, 1950, and (ii) those who entered the service of the banks after 31st January, 1950. In the present case we are concerned with those who joined the service of the banks after 31st January, 1950. The relevant provision with respect to such employees is clause (7) of para. 292 which reads as follows:—

“(7) The workman shall be fitted into the new scale of pay on a point-to-point basis as though it had been in force since he joined the service of the bank, provided that his adjusted basic pay is not less than what it would be under a point-to-point adjustment on the corresponding ‘pre-Sen’ ‘scale’.”

It may be mentioned that the respondent was appointed as a supervisor by the appellant on 23rd April, 1951 on the basic salary of Rs. 120 per mensem. At that time the basic scale for supervisors was Rs. 120-8-200-E.B. 10-300 while there was a basic scale for graduate clerks, etc., of Rs. 75-5-120-8-200. The respondent was appointed on the initial basic salary of Rs. 120 per mensem. The dispute between the parties is that the respondent claims that his basic salary should be fixed under para. 292 (7) according to the supervisor's scale for the purposes of the proviso while the appellant claims that it can only be fixed at the highest on the scale for graduate clerks, and the appellant fixed the respondent's pay on that basis, and that led to the respondent's making the present application under section 33-C



(2) of the Act. The tribunal has found in favour of the respondent. The appellant therefore applied for Special Leave which was granted; and that is how the matter has come up before us.

The first question therefore that falls for decision is whether such an application can be made under section 33-C (2) of the Act. Section 33-C (2) reads as follows :—

“(2) Where any workman is entitled to receive from the employer any benefit which is capable of being computed in terms of money, the amount at which such benefit should be computed may, subject to any rules that may be made under this Act, be determined by such Labour Court as may be specified in this behalf by the appropriate Government, and the amount so determined may be recovered as provided for in sub-section (1) ”.

It is contended on behalf of the appellant that section 33-C (2) deals only with such cases where the workman is entitled to receive from the employer any benefit which is non-monetary but which could be computed in terms of money. It is said that it is only in such a case where the workman claims a non-monetary benefit from his employer that he can apply to the Labour Court for converting the value of this non-monetary benefit into money and computing the amount due in terms of money. On the other hand, it has been contended on behalf of the respondent that the benefit to which a workman may be entitled need not necessarily be non-monetary and that any benefit to which he is entitled under an award if it requires computation can be the subject-matter of an application under section 33-C (2). Reliance has been placed on behalf of the respondent in this connection on a course of decisions by the industrial tribunals and the High Court where the meaning of the word “benefit” in sub-section (2) has not been confined to non-monetary benefits only.

The crucial words which we have to interpret are “any benefit which is capable of being computed in terms of money”. The “benefit” is of wide import, and the dictionary meaning thereof is “advantage, profit.” This would naturally include monetary advantage or monetary profit. There is no reason therefore for excluding “monetary benefits” from the word “benefit” used in this sub-section, unless it is clear from the words used that monetary benefits were not intended to be included in the wide word “benefit” used therein. It is urged on behalf of the appellant that we should exclude monetary benefits from the meaning of this word in the context of this sub-section because the word is “qualified by the words “which is capable of being computed in terms of money.” This, it is urged, suggests that the meaning of the word “benefit” here excludes monetary benefits, for, according to the appellant, there would be no sense in computing monetary benefits in terms of money. But this contention overlooks the fact that the word used in the qualifying clause is “computed” and not “converted”. If the word had been “converted” and the clause had read “which is capable of being converted in terms of money” there would have been a clear indication that the benefit which was to be converted in terms of money was other than monetary benefit. The dictionary meaning of the word “convert” is “to change by substituting an equivalent” and if the word “convert” had been used in the qualifying words, the argument that the word “benefit” only means non-monetary benefit might be incontrovertible. But the word in the qualifying clause is “computed” and the dictionary meaning of the word “compute” is merely “to calculate”. Therefore, where the benefit to which a workman may be entitled has not already been calculated, for example, in an award which confers on him the benefit, it stands to reason that sub-section (2) would apply for computation of such benefit if there is dispute about it. Further, if we compare sub-section (1) with sub-section (2) of this section, it will appear that sub-section (1) applies to cases where any money is due to a workman from an employer under a settlement or an award or under the provisions of Chapter V-A, and that contemplates that the amount is already computed or calculated or at any rate there can be no dispute about the computation or calculation; while sub-section (2) applies to cases where though the monetary benefit has been conferred on a workman under an award, it has not been calculated or computed in the award itself, and there is dispute as to its calculation or computation. It cannot there-

fore he said looking to the words used in sub-section (2) that it only applies to cases of non-monetary benefit which has to be converted in terms of money. It appears to us that it can also apply to monetary benefits to which a workman may be entitled which have not been calculated or computed, say, for example, in an award and about their calculation or computation there is dispute between the workman and the employer. It may be added that section 33-C was put in the Act for the purposes of execution in 1956 after the Industrial Disputes (Appellate Tribunal) Act, (XLVIII of 1950) was repealed in that year. The Appellate Tribunal Act contained section 20 which provided for execution of awards and was in terms almost similar to section 33-C. When the Appellate Tribunal Act was repealed in 1956 a provision similar to that contained in section 20 was brought into the Act at the same time. It is clear therefore that section 33-C is a provision in the nature of execution and where the amount to be executed is worked out (for example in an award) or where it may be worked out without any dispute, section 33-C (1) will apply. But where the amount due to a workman is not stated in the award itself and there is a dispute as to its calculation, sub-section (2) will apply and the workman would be entitled to apply, thereunder to have the amount computed provided he is entitled to a benefit, whether monetary or non-monetary, which is capable of being computed in terms of money.

This matter had come up before the Labour Appellate Tribunal in 1955 in *Glaxo Laboratories (India) Ltd., Bombay v. Shri A. Y. Manjrekar, etc.*<sup>1</sup> The appellate tribunal took the view that section 20 of the Appellate Tribunal Act was concerned purely with execution and there was no reason to hold that sub-section (2) only applied to non-monetary benefits. The same view was taken by the Madras High Court in *South Arcot Electricity Distribution Co., Ltd. v. Elumalai*<sup>2</sup>, by a learned Single Judge and again by the same High Court in *M. S. N. S. Transports, Tiruchirappalli v. Rajaram (K)*<sup>3</sup> by a Division Bench. Looking therefore to the words of the sub-section and the previous decisions with respect to them we are of opinion that the word "benefit" used in sub-section (2) is not confined merely to non-monetary benefit which could be converted in terms of money but is concerned with all kinds of benefits, whether monetary or non-monetary, to which a workman may be entitled, say, for example, under an award and that the sub-section comes into play when the benefits have to be computed or calculated and there is a dispute as to the calculation or computation. After the benefits have been so computed, the workman can apply under sub-section (1) for recovery of the amount in the same manner as arrears of land revenue. As in this case, the Sastry Award had conferred a benefit on the respondent and those like him by providing for fixation of pay in the new scale, even though that benefit may be monetary and there was a dispute between the parties as to the amount of that benefit, it was open to the respondent to apply to the Labour Court for computation of that benefit in terms of money, and the Labour Court would have jurisdiction to entertain the application and compute the amount due on the basis of the benefit conferred by the award.

This brings us to the next question, namely, as to how the basic salary should be fixed. The main emphasis on behalf of the appellant in this connection is on the word "corresponding" appearing in clause (7) of para. 292. It is urged that the Sastry Tribunal fixed one scale for all clerks and as supervisors are clerks the respondent could only be considered as belonging to the corresponding scale for clerks in the appellant-bank, for the application of the proviso, and thereafter he would be entitled to the special allowance of Rs. 50 per mensem. On the other hand, the respondent contends that supervisors are workmen, as has been held in a dispute between this very bank and its supervisors, referred to an industrial tribunal which gave an award on 4th April, 1957, (see the observations of this Court in the *Punjab National Bank, Ltd. v. Their Workmen*<sup>4</sup>, and therefore all that was necessary to find the corresponding scale was to see in what scale of workmen the respondent was at

1. (1955) L.A.C. 505.

2. (1959) 1 L.L.J. 624; (1959) 2 M.L.J. 545 : A.I.R. 1959 Mad. 401 : (1959) M.L.J. (Cri.) 964 : I.L.R. (1959) Mad. 812.

3. (1960) 1 L.L.J. 336 : A.I.R. 1960 Mad.

332 : (1960) 1 M.L.J. 236 : I.L.R. (1960) Mad. 390.

4. C.A. No. 450 of 1959 decided on December 6, 1960 (Reported in (1961) 1 Lah. L.J. 10.)

the relevant time. In this connection, we may incidentally add that it is not disputed by the appellant that its supervisors, accountants and accounts-in-charge are generally workmen under the Act, though some may not be so. The difficulty so far as the appellant is concerned arose on account of the fact that the appellant had nine scales which applied to workmen of all kinds beginning with peons and chaukidars and ending with accountants and accounts-in-charge. Three of these scales were for what may be called subordinate staff under the Sastry Award while six were for what is clerical staff under the Sastry Award. These six included the grade of supervisors. The appellant however contends that only four grades, namely (i) Assistant cashiers, (ii) Head cashiers, (iii) Undergraduate clerks, typists and Godown keepers and (iv) Graduate clerks, all stenographers in sanctioned stenographer's posts, should be treated as clerks for purposes of correspondence with the scale for clerks fixed by the Sastry Award and the remaining two grades, namely, (i) Supervisors and (ii) Accountants and Accounts-in-charge, should not be treated as clerks for the purpose of correspondence. In view, however, of the decision of the Industrial Tribunal in the dispute between the appellant and some of its supervisors and accountants already referred to, it is obvious that these two grades for supervisors and accountants and accounts-in-charge were also grades for workmen prevalent in the appellant-bank. What the Sastry Award did was to make one grade for all clerical workmen and when clause (7) speaks of correspondence it relates in our opinion to the corresponding grades of workmen by whatever name they may have been known in particular banks. The fact that certain clerical workmen in this bank were called clerks while certain others were called supervisors, accountants and accounts-in-charge would not in our opinion make any difference to the question of correspondence, for para. 292 deals with workmen generally and not separately with clerical staff and subordinate staff. Further clause (7) itself lays down that the workman shall be fitted into the new scale of pay on a point-to-point basis and therefore when we have to find the corresponding scale for the purpose of the proviso in clause (7) we have to look at the corresponding scale which relates to a workman at a time before the Sen Award. Now if the supervisor's scale was the scale of a workman previous to the Sen Award then, it must be held to be a corresponding scale for the purpose of fixation so far as the respondent is concerned, irrespective of the name by which this class of workmen was designated in this particular bank. The proviso says that after adjustment the basic pay shall not be less than what it would be under a point-to-point adjustment on the corresponding pre-Sen scale. If therefore the supervisor's scale is a workmen's scale it must be the corresponding pre-Sen scale so far as the respondent is concerned; consequently his basic pay cannot be fixed in the new scale prescribed by the Sastry Award below what it would be on the corresponding pre-Sen scale. We have already pointed out that it has been already held between this very bank and its workmen that supervisors are workmen and therefore the supervisor's scale in this bank was a workmen's scale; therefore when the fixation of pay has to be made under clause (7) we have to find out the corresponding workmen's scale in the case of the respondent at a time before the Sen Award was made and that in our opinion can only be the supervisor's scale, for supervisors have been held to be workmen between the parties to the present dispute. The fact that the Sastry Award provided for a special pay for certain employees including supervisors has no relevance on the question of correspondence which has to be worked out under clause (7) in order to find out the basic pay for purposes of fixation. In view of what we have said, the supervisor's scale being a scale for workmen in this bank, the respondent is right in his claim that his basic pay cannot be reduced below what it would be under a point-to-point adjustment on the corresponding scale which he was drawing before the Sen Award, in this bank as a workman. In this view of the matter the view taken by the Labour Court is correct. Once the principle is fixed, there is no dispute as to the amount due to the respondent.

The appeal therefore fails and is hereby dismissed with costs.

V.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, K. SUBBA RAO AND J. R. MUDHOLKAR, JJ.

Mst. Kharbuja Kuer

.. Appellant \*

v.

Jangbahadur Rai and others

.. Respondents.

*Pardahnashin ladies—Transactions with—Burden of proof that they clearly understood the nature of the transaction—Civil Procedure Code (V of 1908), section 100—Finding of fact—No Second Appeal lies.*

In India pardahnashin ladies have been given a special protection in view of the social conditions of the times ; they are presumed to have an imperfect knowledge of the word, as, by the pardah system they are practically excluded from social intercourse and communion with the outside world.

The rule evolved for the protection of pardahnashin ladies shall not be confused with other doctrines, such as, fraud, duress and actual undue influence, which apply to all persons whether they be pardahnashin ladies or not.

The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a pardahnashin lady to establish that the said document was executed by her after clearly understanding the nature of the transaction. It should be established that it was not only her physical act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it, but also by other evidence, direct and substantial.

Where the District Munsif and on appeal the Subordinate Judge approached the case from a correct perspective (as to the burden of proof in respect of transaction with pardahnashin ladies) and came to a finding that the transaction was unsustainable there is a concurrent finding of fact which cannot be interfered with in Second Appeal. The High Court has no jurisdiction to entertain a Second Appeal on the ground of erroneous finding of fact.

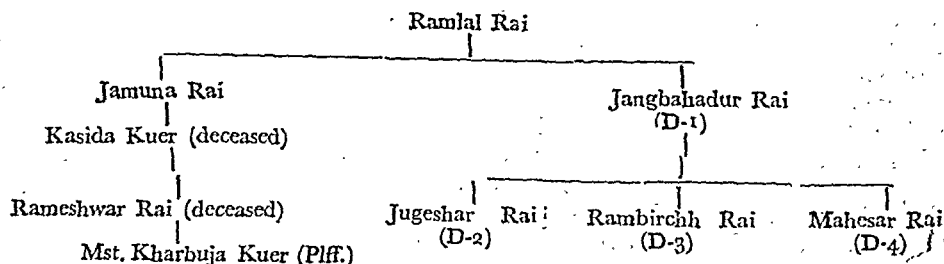
Appeal by Special Leave from the Judgment and Decree dated the 2nd December, 1957, of the Patna High Court, in S.A. No. 791 of 1953.

D. P. Singh, Advocate, for Appellant.

Sarjoo Prasad, Senior Advocate, (K. P. Gupta, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

*Subba Rao, J.*—This appeal by Special Leave is preferred against the judgment of a single Judge of the Patna High Court. The facts that gave rise to this appeal may be briefly stated. To appreciate the findings of the various Courts and the contentions of the parties, the following genealogy will be useful.



The case of the plaintiff, who is the widow of Rameshwar Rai, is that her husband and Jangbahadur, defendant 1, effected a partition of the family property in or about 1924, that after the partition he was in exclusive possession of the property that fell to his share, that he died in the year 1930, that thereafter she and her mother-in-law continued to be in possession of the said property, that her mother-in-law died in 1938, that the first defendant asked her and her mother-in-law to execute a power of attorney in his favour, that they, being pardahnashin ladies executed a document in his favour on 24th August, 1935, believing it to be a power of attorney, that subsequently they came to know that it was a maintenance deed containing false recitals to the effect that there was no separation and that the property was joint family

property. They also alleged in the plaint that the deed in question was never read out to them, that the scribe and the attesting witnesses were partisans of the first defendant. It was also alleged that the document was always in the custody of the first defendant, that the plaintiff and her mother-in-law, till the latter's death, were getting the income from the property as they were getting before the execution of the said document and that they came to know of the fraud only in 1355 fasli, when the first defendant began to interfere with the possession and occupation of the property by the plaintiff and disclosed to several people that she had only a right to maintenance and thereafter when she got the document read over to her and discovered the fraud. With those allegations, among others, the plaintiff filed a suit in the Court of the Munsif, Muzaffarpur, for the following reliefs :

"On a consideration of the aforesaid facts and also on adjudicating the plaintiff's title and the absence of title of the defendants, it may be adjudged by the Court that the deed of agreement for maintenance is altogether fraudulent and not binding upon the plaintiff".

The relief claimed is rather involved, but in substance it is a relief for a declaration of the plaintiff's title to the suit property and for a declaration that the maintenance deed, having been executed by fraud, was not binding on her. The defendant denied the allegations contained in the plaint and alleged that the deed of maintenance was read over and explained to the plaintiff and her mother-in-law and that one Babu Ramnath Singh, brother of the plaintiff, was present at the time of the execution and affixed his signature on behalf of the plaintiff. He denied that he had committed any fraud. On the pleadings the following issues, among others, were framed :

*Issue No. 3.*—"Is the allegation of separation between Rameshwar Rai and defendant No. 1 in the month of Asardh 1334 Fs. (1927) correct?"

*Issue No. 4.*—"Is the document dated 24th August, 1935 legal and valid? Was the same read over to the plaintiff and the plaintiff executed it with the full knowledge of the contents?"

*Issue No. 5.*—"Are the plaintiffs entitled to the reliefs claimed?"

It will be seen from the issues that the burden of proof to establish separation was placed on the plaintiff and that to prove that the document was read over to the plaintiff and executed by her with full knowledge of the contents was laid on the defendant.

On a consideration of the entire evidence, the learned Munsif found on Issues 3 and 4 that Rameshwar Rai died in state of separation from Jangbahadur, that the plaintiff and her mother-in-law were ignorant pardahnashin ladies, that the two ladies had full confidence in the 1st defendant, and that the document, Exhibit-C was not read over to the plaintiff and she did not execute it after understanding the contents thereof. On those findings the suit was decreed in terms of the plaint prayer. On appeal, the learned Subordinate Judge considered the entire evidence over again and accepted the said two findings given by the learned Munsif and confirmed the decree. But, on Second Appeal, Imam, J., set aside the concurrent findings of the two Courts mainly on the ground that the Courts had thrown the burden of proof wrongly on the defendant. In the words of the learned Judge,

"it was the duty of the plaintiff to prove that there was fraud committed and as that had not been established the question whether the document had been read over and explained to the plaintiff, in my opinion, in the circumstances, does not arise."

He considered the evidence from that standpoint and held that the plaintiff had not established her case; and on that finding, he dismissed the suit.

Mr. D.P. Singh, learned counsel for the appellant, raised before us two contentions, namely, (1) the learned Judge of the High Court was wrong on the question of burden of proof; and (2) the learned Munsif and the learned Subordinate Judge have not only thrown the burden of proof rightly on the defendant, but they have also given their findings on the entire evidence, and therefore the burden of proof became immaterial and the findings of fact given by the said Courts were binding on the High Court under section 100 of the Code of Civil Procedure.

Mr. Sarjoo Prasad, learned counsel for the respondents, on the other hand, contends that the finding on the question of separation was halting and was clearly

illegal, not having been based on evidence, either oral or documentary, and that though the initial burden to prove that the document was read over and explained to the widows was on the defendant, the evidence and the circumstances of the case clearly discharged that burden.

It is settled law that a High Court has no jurisdiction to entertain a Second Appeal on the ground of erroneous finding of fact. In the instant case the learned Munsif, and, on appeal, the learned Subordinate Judge found concurrently that the two widows put their thumb marks without understanding the true import of the document. Imam, J., in Second Appeal reversed the said findings on the ground that they were vitiated by an erroneous view of the law in the matter of burden of proof. The judgment, if we may say so with respect, consists of propositions which appear to be contradictory. The learned Judge, after reviewing the case law on the subject, concludes his discussion by holding that it was the duty of the plaintiff to prove that there was fraud committed and that, as that had not been established, the question whether the document was read over and explained to the plaintiff, in his opinion, in the circumstances, did not arise. This proposition, in our view, is clearly wrong and is contrary to the principles laid down by the Privy Council in a series of decisions. In India pardahnashin ladies have been given a special protection in view of the social conditions of the times; they are presumed to have an imperfect knowledge of the world, as, by the pardah system they are practically excluded from social intercourse and communion with the outside world. In *Farid-Un-Nisa v. Mukhtar Ahmad*<sup>1</sup>, Lord Sumner traces the origin of the custom and states the principle on which the presumption is based. The learned Lord observed:

"In this it has only given the special development, which Indian social usages make necessary, to the general rules of English law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind."

The learned Lord also points out:

"Of course fraud, duress and actual undue influence are separate matters".

It is, therefore, manifest that the rule evolved for the protection of pardahnashin ladies shall not be confused with other doctrines, such as, fraud, duress and actual undue influence, which apply to all persons whether they be pardahnashin ladies or not.

The next question is what is the scope and extent of the protection. In *Geresh Chunder Lahoree v. Mst. Bhuggobutty Debia*<sup>2</sup>, the Privy Council held that as regards documents taken from pardahnashin women the Court has to ascertain that the party executing them has been a free agent and duly informed of what she was about. The reason for the rule is that the ordinary presumption that a person understands the document to which he has affixed his name does not apply in the case of a pardahnashin woman. In *Kali Baksh v. Ram Gopal*<sup>3</sup>, the Privy Council defined the scope of the burden of a person who seeks to sustain a document to which a pardahnashin lady was a party in the following words:

"In the first place, the lady was a pardahnashin lady, and the law throws round her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor."

The view so broadly expressed, though affirmed in essence in subsequent decisions, was modified, to some extent, in regard to the nature of the mode of discharging the said burden. In *Farid-Un-Nisa v. Mukhtar Ahmad*<sup>1</sup>, it was stated:

"The mere declaration by the settlor, subsequently made, that she had not understood what she was doing, obviously is not in itself conclusive. It must be a question whether, having regard to the

1. (1925) L.R. 52 I.A. 342, 350 : 49 M.L.J. 758 (P.C.).

2. (1870) 13 M.L.A. 419.

3. L.R. (1913) 41 I.A. 23, 29: 26 M.L.J. 121 (P.C.).

proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them."

While affirming the principle that the burden is upon the person who seeks to sustain a document executed by a pardahnashin lady that she executed it with a true understanding mind, it has been held that the proof of the fact that it has been explained to her is not the only mode of discharging the said burden, but the fact whether she voluntarily executed the document or not could be ascertained from other evidence and circumstances in the case. The same view was again reiterated by the Judicial Committee, through Sir George Rankin, in *Jagadish Chandra v. Debnath*<sup>1</sup>. Further citation is unnecessary. The legal position has been very well settled. Shortly it may be stated thus : The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a pardahnashin lady to establish that the said document was executed by her after clearly understanding the nature of the transaction. It should be established that it was not only her physical act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it, but also by other evidence, direct and circumstantial.

If that be the law, a perusal of the judgments of the three Courts demonstrates that while the learned Munsif and the learned Subordinate Judge approached the case from a correct perspective, the High Court misled itself by a wrong approach. The relevant issue we have already extracted shows that the burden was thrown upon the defendant. The first two Courts approached the evidence from that standpoint and gave a concurrent finding that it had not been established that the plaintiff executed the document after understanding the nature of the transaction. Apart from the burden of proof, also on the facts found they came to the same conclusion. The High Court, having wrongly held that the approach of the two Courts was not correct and having wrongly thrown the burden upon the plaintiff considered the evidence afresh and set aside that finding. As the two Courts approached the evidence from a correct perspective and gave a concurrent finding of fact, the High Court had no jurisdiction to interfere with the said finding.

Learned counsel for the respondents contends that on one of the crucial findings which influenced the first two Courts in coming to the conclusion which they did, namely, the finding on the partition in the family, was not based on evidence and that, indeed, both the parties agreed that that question was irrelevant to the main question raised in the suit. He further said that the learned Munsif, having rightly held that the burden of proof to establish separation was on the plaintiff and having held that there was no acceptable oral evidence and that the documentary evidence adduced was not sufficient to sustain partition, should have found that the presumption under the Hindu law was not rebutted. It is true that before the learned Munsif the Advocates appearing for the parties contended that it was not necessary to give any finding on Issue No. 3 and that the suit could be disposed of without giving any finding thereon. But the learned Munsif rightly did not accept the said suggestion and held that the issue had been framed on the pleadings and that all the relevant evidence had been adduced and that it was only proper to give a finding thereon. The learned Subordinate Judge pointed out that the main point for consideration was not the matter of jointness or separation, but only the validity or genuineness of the deed itself, and that "the question of separation or jointness thus only becomes a link in the chain to Judge the validity or otherwise of the document, Exhibit-C." This statement of the learned Subordinate Judge is unobjectionable. The question of partition in the family was a circumstance which would have an important bearing on the question of probability of the widows executing a document admitting that there was no partition in the family and that they had no absolute interest in the said property.

Now coming to the evidence, we cannot accept the argument of learned counsel for the respondents that there was no evidence in the case to rebut the presumption of Hindu law that a family is joint. The learned Munsif said that there was no documentary evidence on behalf of the plaintiff to prove separation; by that statement he meant that the partition was not effected by a written document, for the next sentence made it clear when he said that it was due to the fact of alleged oral partition. Then he considered the documents filed by the defendants in great detail and came to the conclusion that the said documents were not inconsistent with partition. Then he discussed the oral evidence. He had considered the evidence of five witnesses examined on behalf of the plaintiff and of seven witnesses examined on behalf of the defendants. He also noticed pieces of circumstantial evidence. After considering the entire evidence, oral, documentary and circumstantial, he came to the following conclusion:

"Although the oral evidence on both the sides on the point of jointness and separation is not satisfactory but from the circumstances adduced from the facts of the case I am convinced that Rameshwar died in state of separation from Jangbahadur."

It cannot be said from the said finding, that he rejected the oral evidence. It may be that the oral evidence adduced on behalf of the plaintiff was not as satisfactory as it should be, but he preferred that evidence, which supported partition, in view of the circumstances found on the evidence. The finding, whether it is correct or not, is certainly a finding of fact and it cannot be said that it was not based on evidence.

Now coming to the appellate Court, the learned Subordinate Judge reviewed the entire evidence, oral, documentary and circumstantial, and arrived at the following findings:

In view of the facts and the circumstances narrated above, while the probabilities are that there was a disruption in the joint family of Rameshwar and Jangbahadur as alleged by the plaintiff, the defendants have failed to prove beyond all doubt that the family continued to be joint at the time of Rameshwar's death, or that they came in exclusive possession of the properties left behind by him. *It, we find that if the fact of separation between Rameshwar and Jangbahadur be accepted to be true, as has been shown above, then the fraud in the execution of this document is patent, and no discussion is required to declare it as a forged and fraudulent document.*"

It is true the finding could have been more explicit, but that does not detract from its finality. In the first part of the finding, the learned Subordinate Judge says: in effect that, having regard to the facts and circumstances he had discussed earlier, the burden shifted to the first defendant, who did not adduce acceptable evidence to dislodge the circumstances against jointness. But in the second part of the finding he makes it clear that he had found that there was partition in the family. The finding is again a finding of fact. That apart, the High Court did not in any way question the correctness of the finding of the learned Munsif and the learned Subordinate Judge, but only ignored it on the ground that it was not the duty of the lower appellate Court to deal with that question at all. We cannot appreciate the observations of the learned Judge of the High Court, for in our view, that finding, as the learned Munsif pointed out, arose on the pleadings and, as the lower appellate Court pointed out, had a direct impact on the main question to be decided in the case. We, therefore, hold that the said finding was binding upon the High Court.

Even if that finding was ignored, there was sufficient material to sustain the finding of the first two Courts. Both the Courts found that the first defendant, on whom the burden lay, not only did not establish that it was executed by the plaintiff with the knowledge of its contents, but that even apart from the burden of proof, that they also found that the plaintiff and her mother-in-law put their thumb marks on the document under the impression that it was a power of attorney. The finding is one of fact and was based upon the following relevant facts:—(1) The plaintiff and her mother-in-law were pardahnashin and illiterate women—one of them was old and the other was middle-aged. (2) They had full confidence in the first defendant. (3) Babu Ramnath Singh, who wrote the names on the document was not proved to be the brother of the plaintiff. (4) The document was in the



custody of the defendant. (5) The plaintiff and her mother-in-law were in enjoyment of the property as they were enjoying it even before the execution of the document. (6) The defendant had not examined either Babu Ramnath Singh or other important witnesses who could have proved the fact that the plaintiff and her mother-in-law had the knowledge of the nature of the document. (7) The defendant managed to get this document by fraud to facilitate mutation of the property in his name. And (8) the plaintiff gave acceptable evidence in support of her case. The finding of both the Courts is supported by evidence, and there was no permissible ground for interference with it in Second Appeal.

For the aforesaid reasons, we find that the learned Judge of the High Court had erroneously interfered with the concurrent findings of fact arrived at by the first two Courts. In the result, we allow the appeal, set aside the decree of the High Court and decree the suit with costs throughout.

K.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S.K. DAS, M. HIDAYATULLAH AND J.C. SHAH, JJ.

Soorajmull Nagarmull

.. *Appellant\**

v.

The State of West Bengal

.. *Respondent.*

*Defence of India Act (XXXV of 1939), section 19 and Rules relating to Arbitration for settlement of compensation (1945), Rule 15—Second Proviso—No compensation awarded—No appeal lies to High Court.*

The Arbitrator appointed under section 19 of the Defence of India Act, 1939, is not a Court or tribunal subject to the appellate jurisdiction of the High Court. By the Defence of India Act a right of appeal against the award of an Arbitrator is conferred but that right is restricted in the manner prescribed by the Rules. It is provided by the Second Proviso to rule 19 of the Rules framed under section 19 of the Act relating to arbitration for settlement of compensation that an appeal shall not lie against an award where the amount of compensation does not exceed Rs. 5,000. The right of appeal does not depend upon the claim made by the claimant either before the acquiring authority or the Arbitrator or before the High Court; it depends solely upon the amount of compensation awarded by the Arbitrator. It would not be open to the Court to extend the right to appeal and enable a claimant whose claims has been rejected completely to appeal to the High Court. If the Arbitrator rejects the claim and refuses to award anything the case would fall within the Second Proviso to Rule 19 as being one where the amount of compensation awarded does not exceed Rs. 5,000.

Appeal by Special Leave from the Judgment and Order dated the 27th June, 1955, of the Calcutta High Court, in Appeal from Original Decree No. 28 of 1948.

*A.V. Viswanatha Sastri*, Senior Advocate (*B.P. Maheshwari*, Advocate, with him), for Appellant.

*B. Sen*, Senior Advocate (*P.K. Chatterjee* and *P.K. Bose*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

*Shah, J.*—Messrs. Soorajmull Nagarmull—who will hereinafter be referred to as the appellants—were tenants of three warehouses and vacant land appurtenant thereto—popularly known as the Shamnagar Jute Godowns—belonging to Sri Hanuman Seva Trust. The warehouses were used for storage of jute belonging to the appellants. By an order dated 17th August, 1943, and issued under rule 75-A of the Defence of India Rules, 1939 the warehouses were requisitioned and possession thereof was taken on 21st September, 1943. As the amount of compensation payable to the owner of the warehouses could not be fixed by agreement an Arbitrator was appointed under section 19 (1) (b) of the Defence of India Act, 1939. Before the Arbitrator, Sri Hanuman Seva Trust claimed compensation as owners of the warehouses. The appellant claimed compensation for loss of earnings, "damage to business" and cost of removal of 18,000 maunds of jute and some iron implements, which the appellants claimed had to be removed in consequence

of the order of requisition. The appellants estimated the compensation at Rs. one lakh. The Arbitrator by his order dated 13th December, 1947, observed that the appellants had failed to prove any actual loss of business in consequence of the requisition, and rejected the claim of the appellants.

Against the order passed by the Arbitrator an appeal was preferred to the High Court of Judicature at Calcutta. The appellants valued the claim at Rs. 1,50,000. At the hearing of the appeal, the State of West Bengal contended that the appeal was not maintainable in view of the provisions of section 19 (1) (f) and (g) and section 19 (3) (c) of the Defence of India Act and 2nd Proviso to Rule 19 framed under the Defence of India Act. The High Court upheld the contention raised by the State of West Bengal and dismissed the appeal. With Special Leave the appellants have appealed to this Court.

Under clause (1) of section 19 of the Defence of India Act, (XXXV of 1939), it is provided, in so far as it is material :

"Where under section 19-A or by or under any rule made under this Act any action is taken of the nature described in sub-section (2) of section 299 of the Government of India Act, 1935, there shall be paid compensation, the amount of which shall be determined in the manner and in accordance with the principles hereinafter set out, that is to say :—

\* \* \* \* \*

(f) An appeal shall lie to the High Court against an award of the Arbitrator except in cases where the amount thereof does not exceed an amount prescribed in this behalf by rule made by the Central Government.

(g) Save as provided in this section and in any rules made thereunder, nothing in any law for the time being in force shall apply to arbitrations under this section."

Sub-section (3), in so far as it is material, provides :—

"(3) In particular and without any prejudice to the generality of foregoing power, such rules may prescribe :—

\* \* \* \* \*

(c) the maximum amount of an award against which no appeal shall lie."

By notification dated 22nd March, 1945, Rules were framed under section 19 relating to arbitration for settlement of compensation. Rule 19 of the Rules provided :

"19. Any appeal against the award of the Arbitrator shall be presented within six weeks from the date of receipt by the Collector or the party by whom the appeal is preferred of the copy of the award sent under Rule 17 :

Provided that

\* \* \* \* \*

Provided further that no appeal shall lie against an award made under these Rules where the amount of compensation awarded does not exceed Rs. 5,000 in lump or Rs. 250 per mensem."

The Arbitrator appointed under section 19 of the Defence of India Act is not a Court or a tribunal subject to the Appellate jurisdiction of the High Court. By the Defence of India Act a right to appeal against the award of the Arbitrator is conferred, but that right is restricted in the manner prescribed by the Rules. It is provided by the Second Proviso to rule 19 that an appeal shall not lie against an award where the amount of compensation does not exceed Rs. 5,000.

The claim of the appellants was rejected by the Arbitrator and they were not awarded any compensation. Mr. Vishwanatha Sastri appearing on behalf of the appellants, contends that by clause (f) of section 19 (1) the Legislature provided a right of appeal against all awards and has imposed a restriction only in those cases where some amount is awarded but the amount so awarded is less than Rs. 5,000. Counsel submits that the restriction limiting the right of appeal must be strictly construed. He says that where for any reason no compensation at all is awarded the bar contained in clause (f) of section 19 (1) and the Second Proviso to Rule 19 would not apply. In our judgment, there is no force in that contention. An appeal is a creature of statute. The Arbitrator not being a Court subordinate to the High Court, an appeal would lie only if it is expressly so provided. The Legislature has

provided that where the amount of compensation awarded does not exceed Rs. 5,000 no appeal shall lie against the award. The rule does not contemplate that the bar to the maintainability of the appeal will be effective only if some amount is awarded but the compensation so awarded is less than Rs. 5,000. If the Arbitrator rejects the claim and refuses to award anything the case would, in our judgment, fall within the Second Proviso to Rule 19 as being one where the amount of compensation awarded does not exceed Rs. 5,000.

The Second Proviso to Rule 19 enacts a rule of which a parallel is difficult to find. The right to appeal does not depend upon the claim made by the claimant either before the acquiring authority or the Arbitrator or before the High Court : it depends solely upon the amount of compensation awarded by the Arbitrator. But, however, unusual the rule may appear to be, it would not be open to the Court to extend the right to appeal and to enable a claimant whose claim has been rejected completely to appeal to the High Court. The right to appeal is exercisable only if the amount awarded exceeds Rs. 5,000.

In that view of the case, the High Court was right in not entertaining the appeal. The appeal fails and is dismissed.

K. S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, N. RAJAGOPALA AYYANGAR AND T. L. VENKATARAMA AYYAR, JJ.

The State of Andhra Pradesh

... *Appellant \**

v.

Duvvuru Balarami Reddy and others

.. *Respondents.*

*Inam—Shrotriendars—If entitled to sub-soil rights and grant leases of mineral lying under the soil.*

The sub-soil rights are in the Government unless there is anything in the grant to the contrary. In the instant case the original grant to the shrotriendardar was not available and what was stated in the Inam Fair Register of 1861 was that the grant was for the personal advantage of the holder. There was nothing to show that the grant included the grant of sub-soil rights. The fact that the grant included poramboke would not by itself establish that sub-soil rights were also included in the grant. So far as sub-soil rights are concerned, they can only pass to the grantee if they are conferred as such by the grant or if it can be inferred from the grant that sub-soil rights were also included therein. If such sub-soil rights were not granted to the shrotriendardars it was not open to them to grant any lease of mineral lying under the soil to any one.

Appeals by Certificate and Special Leave from the Judgment and Order, dated the 5th August, 1955, of the former Andhra High Court in Writ Appeal No. 13 of 1955.

D. Narasaraaju, Advocate-General for the State of Andhra Pradesh (*D. Parsanna Kumari T. V. R. Tatachari* and P. D. Menon, Advocates, with him), for Appellant (in C.A. No. 252 of 1958) and Respondent No. 1 (In C.A. No. 253 of 1958).

P. Ram Reddy, Advocate, for Appellants (In C.A. No. 253 of 1958), and Respondents Nos. 1 to 3 (In C.A. No. 252 of 1958).

A. V. Viswanatha Sastry, Senior Advocate, (*K. R. Chaudhuri*, Advocate, with him), for Respondent No. 2 (In C.A. No. 253 of 1958).

The Judgment of the Court was delivered by

*Wanchoo, J.*—These are two connected appeals arising out of the same judgment of the Andhra Pradesh High Court. The main appeal No. 252 is by the State of Andhra Pradesh while the other appeal No. 253 is by Duvvuru Balarami Reddy and others. We shall dispose of them by this common judgment and will hereinafter refer to the State of Andhra Pradesh as the appellant and Duvvuru Balarami Reddy and others as the respondents. The brief facts necessary for present purposes are these. The respondents had filed a writ petition for the issue of a writ in the nature of

*mandamus* or any other appropriate writ directing the appellant to give permission to the respondents to carry on mica mining operations in survey No. 49/1 in the village of Ananthamadugu in Rapur Taluk of Nellore district subject to the respondents executing an agreement in the manner provided under the Mineral Concession Rules, 1949 (hereinafter referred to as the Rules) and conforming to the conditions mentioned therein. The case of the respondents was that they had obtained leases for mica mining purposes from various co-owners in the shrotriern village of Ananthamadugu on 24th March, 1953. Thereafter on 27th May, 1953, this village was notified under the Madras Estates (Abolition and Conversion into Ryotwari) Act, No. XXVI of 1948, (hereinafter referred to as the Act) and the interest of the shrotriern owners was taken over by the appellant. The leases granted to the respondents were for a period of one year and one of the terms provided that the lessors were bound to extend and renew the period of lease for such period as may be desired by the lessees subject to the Rules. After the estate was taken over, the question arose whether the leases were enforceable against the Government under section 20 (1) of the Act. In November, 1953, the Manager of Estates, appointed on behalf of the Government, held that the leases were enforceable against the Government. This order was confirmed by the Collector of Nellore. Thereupon there was a revision petition by one of the co-owners of the shrotriern who was not a party to the leases before the Board of Revenue. The respondents also applied to the Government for permission to work the mines. The Government however did not grant such permission. The respondents contended that the Government had no right to withhold permission to work the mines. Therefore, the writ petition was filed asking for the issue of a writ in the nature of *mandamus* or any other appropriate writ directing the appellant to give permission to the respondents to carry on mica mining in accordance with the leases.

The petition was opposed on behalf of the appellant and the main contention on its behalf was that the village in question being a shrotriern inam village there was no presumption that the inam grant included the grant of sub-soil rights also to the shrotrierns. Therefore, the respondents could not claim any rights higher than those of their lessors. In effect, the appellant had contended that the lessors had no rights to the minerals and therefore the leases even if not void within the meaning of section 20 of the Act would not confer any rights on the respondents to claim as a matter of right the grant of permission to work the mines from the appellant and that it was entirely within the discretion of the State whether to grant a mining lease or not in accordance with the Rules. It was also stated that the revision filed before the Board of Revenue had been stayed as the points raised before the Board were covered by the questions involved in the writ petition.

On these pleadings the main question that arose for decision was whether the shrotrierns had any rights in the minerals at all and were entitled to grant leases thereof. If the shrotrierns had no right in the minerals the grant of lease by them would be of no value and would not entitle the respondents to claim a mining lease under the Rules from the appellant as a matter of right.

The learned Single Judge who heard the writ petition came to the conclusion that there was nothing to show that the inam grant in the present case covered the right to minerals. In consequence, it was held that the respondents did not get any rights under the said leases to the minerals. The learned Judge then considered the other points raised in the petition with which we are however not concerned and eventually dismissed it.

The respondents went in appeal to a Division Bench of the High Court, and the appeal Court seems to have held on a review of the various Standing Orders of the Board of Revenue of the composite State of Madras that the State was only entitled to impose a royalty on minerals taken out by the shrotriern inamidar. It was pointed out that this seemed to be in accordance with commonsense as the

"grantee is entitled to the surface rights and the grantor to the sub-soil rights and as the latter rights can only be exercised by entering upon the surface, it is only natural and just that the latter should share what is produced by working the mine, since one cannot enter upon the land as he has no right to do so and the other cannot work the mine, as he has no right to the land."

This would seem to suggest that the appeal Court held that the sub-soil rights belonged to the State and not to the inamdars; but because of the difficulty that arose on account of the surface rights being in the inamdar and sub-soil rights being in the State, it apparently held that the inamdar and the Government should share what is produced by working the mine. Finally, however, the appeal Court dismissed the appeal on the ground that the period of one year for which the leases had been granted had expired and the period of renewal which the respondents could get under the Rules also had expired before the decision of the appeal Court. It relied in this connection on the decision of this Court in *K. N. Guruswamy v. The State of Mysore*<sup>1</sup>; but as the respondents had failed on account of the expiry of time they were allowed their costs.

This was followed by an application by the State for a certificate which was granted, and that is how the State's appeal has come up before us. As for the appeal by Special Leave by the respondents, they contend that the decision being in their favour on the merits, the High Court should have ordered the State to grant them a lease even though the period fixed in the original leases and the period of renewal permissible under the Rules had expired.

The main question therefore that falls for decision in these appeals is whether shrotriendars can be said to have rights in the minerals. This matter has been the subject of consideration by the Madras High Court on a number of occasions and eventually the controversy was set at rest by the decision of the Judicial Committee in *Secretary of State for India in Council v. Srinivasa Chariar and others*<sup>2</sup>. That case came on appeal to the Judicial Committee from the decision of the Madras High Court in *The Secretary of State for India in Council v. Srinivasa Chariar and ten others*<sup>3</sup>. The controversy before the Madras High Court was with respect to a shrotriem inam which was granted by the Nawab of Carnatic in 1750 and had been enfranchised by the British Government in 1862. The inamdar started quarrying stones in the land granted to him and the Government claimed that it had a right to levy royalty or seigniorage fee on stones quarried by the inamdar. The inamdar contended on the other hand that an enfranchised inam was exactly in the same position as a zamindari estate under the Permanent Settlement and that he was entitled to the entire sub-soil rights and the Government was not entitled to levy royalty or seigniorage fee on stones quarried by him. The High Court held that under the terms of the grant the grantor conveyed all that the grantor had in the soil including sub-soil rights, and therefore it was not open to the Government to levy any royalty or seigniorage fee on stones quarried by the inamdar. In effect, the decision of the High Court negated the claim of the Government to sub-soil rights, for the Government could only levy royalty or seigniorage fee if it had sub-soil rights and the inamdar had no such rights.

This decision was taken in appeal to the Judicial Committee as already indicated above, and the controversy between the parties was that the inamdar claimed a decree establishing his full rights to the said village to the rocks and hills within its boundaries. The State on the other hand while admitting that there had been an inam grant of the village to the inamdar contended that there was no conveyance of the rights to minerals in the village. The Judicial Committee held that the grant of a village in inam might be no more than an assignment of revenue, and even where there was included a grant of land, what interest in the land passed must depend on the language of the instrument and the circumstances of each case. The Judicial Committee also considered the Standing Orders of the Board of Revenue of 1890 and 1907 which have been referred to by the appeal Court in the judgment under appeal. This decision thus establishes that the mere fact that a person is the holder of an inam grant would not by itself be enough to establish that the inam grant included the grant of sub-soil rights in addition to the surface rights and that the grant of sub-soil rights would depend upon the language used in the grant. If there are no words in the grant from which the grant of sub-soil rights can be properly inferred

1. (1954) S.C.J. 644 : (1955) 1 S.C.R. 305.  
2. (1920) L.R. 48 I.A. 56 : I.L.R. 44 Mad.

421 : 40 M.L.J. 262.

3. (1917) 31 M.L.J. 483 : I.L.R. 46 Mad. 268.

the inam grant would only convey the surface rights to the grantee, and the inam grant could not by itself be equated to a complete transfer for value of all that was in the grantor. In particular, the Judicial Committee stressed the use of the words "the produce of the season each year" used in the grant to show that only the surface rights were granted in that case.

It is not disputed that ever since the decision of the Judicial Committee in *Srinivasa Chariar's case*<sup>1</sup>, that has been the law with respect to sub-soil rights of inamdars as distinct from zamindars under the Permanent Settlement. The Board's Standing Orders of 1890 and 1907 to which the appeal Court has referred in its judgment were also considered by the Judicial Committee and it is now too late in the day to use them to find out the rights of the inamdars and the Government in the minerals under the soil. As the decision of the Judicial Committee shows, the Standing Orders of the Board of Revenue themselves show how the views of the Government changed from time to time on this question. The older view seems to have been that the sub-soil rights were in the inamdars but from 1907 at any rate the Government has taken the view that sub-soil rights are in the Government unless there is anything in the grant to the contrary. It is this later view which was upheld by the Judicial Committee in *Srinivasa Chariar's case*<sup>1</sup> and this view has ever since prevailed as to the rights of the Government in the minerals under the soil in the case of inams. We are unable to see how this decision as to the rights of the Government to the minerals under the soil can be distinguished on the ground that the decision dealt only with the question of royalty. It is obvious that the Government could charge royalty only if it had the right to the minerals under the soil and not the inamdars. What therefore we have to see is whether on the terms of the grant in this case the shrotriendars can be said to have been granted the sub-soil rights also.

So far as this matter is concerned, there does not seem to have been a serious controversy in the High Court and it does not appear that the respondents contended that under the terms of the grant to the shrotriendars the latter were entitled to sub-soil rights. We have already referred to that part of the judgment of the appeal Court which suggests that even the appeal Court was of the view that the sub-soil rights were in the Government in this case and the surface rights were in the shrotriendras. The original grant is not available and all that we have is the *Inam Fair Register* of 1861 and all that is stated in that register is that the grant is for the personal advantage of the holder. There is nothing therefore in the *Inam Fair Register* to show that the grant included the grant of sub-soil rights.

It is however urged on behalf of the respondents that the grant included poramboke, and from the fact that poramboke was also included it should be inferred that mere surface rights were not the subject-matter of the grant. Reliance in this connection has been placed on the decision of the Judicial Committee in *Secretary of State v. Krishna Rao*<sup>2</sup>. The dispute in that case related to levy of water cess under the Madras Irrigation Cess Act, (No. VII of 1865). The Judicial Committee pointed out that the inam grant in that case included not only dry, wet and garden land but also poramboke, i.e., unculturable land. This was held to indicate that full proprietary rights were granted and therefore the Government could not charge any water cess. It is urged for the respondents that this case shows that where poramboke is also granted, the grantee gets all the rights including the sub-soil rights in full proprietorship. It should however be remembered that the dispute in that case was whether the inamdar was entitled to free irrigation from water sources lying in the shrotriend village by virtue of the grant or whether the grantor could levy a cess under the Madras Irrigation Cess Act. There was no dispute as to the sub-soil rights in that case, the dispute being confined to surface rights relating to water. The Government contended in that case that the grant to the inamdar was only of the *melvaram* or the right of the revenue from the lands, while the respondent's contention was that the grant carried not only the *melvaram* but also the proprietary interest in the land itself and therefore the Government had no right to levy the irrigation cess. It was in

<sup>1</sup>. (1920) L.R. 48 I.A. 56; I.L.R. 44 Mad. 421; 40 M.L.J. 262.

<sup>2</sup>. (1945) L.R. 72 I.A. 211; I.L.R. (1946) Mad. 225; (1945) 2 M.L.J. 352.

that connection that the Judicial Committee held that the grant of poramboke, *i.e.*, unculturable land, was one of the factors that indicated that it was not a mere grant of *melvaram* but full proprietary right. It is remarkable however that though the Judicial Committee came to the conclusion in that case that full proprietary right had been granted, it referred to the earlier decision in *Srinivasa Chariar's case*<sup>1</sup> during the course of the judgment. This later decision therefore in our opinion cannot be read in such a way as to lay down that wherever poramboke is included in the inam grant, a presumption must be drawn that the inam grant included sub-soil rights also; all that may be possible to infer by the inclusion of poramboke on the basis of this decision is that all the surface rights were granted and not merely the *melvaram* as was contended in that case. The fact therefore that in the *Inam Fair Register* in this case the grant includes poramboke would not by itself establish that sub-soil rights were also included in the grant. So far as sub-soil rights are concerned, they can only pass to the grantee if they are conferred as such by the grant or if it can be inferred from the grant that sub-soil rights were also included therein. We have already remarked that the original grant in this case is not available and we have only the *Inam Fair Register* to go by. There can be no doubt therefore on the facts of this case that the learned Single Judge was right in holding that the grant of sub-soil rights to shrotriendars is not established. The appeal Court also does not appear to differ from this view of the learned Single Judge.

Once the conclusion is reached that sub-soil rights were not granted to the shrotriendars it seems to us that the inference is plain that it was not open to the shrotriendars to grant any lease of minerals lying under the soil to any one. Therefore, the leases granted by the shrotriendars to the respondents in this case would be of no legal effect in conveying any right to them in the minerals under the soil. In the circumstances the respondents cannot put forward the leases in their favour to claim a mining lease under the Rules. With respect, we have not been able to understand how the difficulty which may arise in practice, on account of the sub-soil rights being in the Government and the surface rights being in the shrotriendars, in the working of the mines would make the shrotriendars sharers in the sub-soil rights and therefore entitled to grant a lease of the sub-soil rights. Whatever may have been the practice in the past and howsoever the Government may have been getting over the practical difficulty in the past would not confer any right to the minerals upon the shrotriendardar so as to enable him to grant a mining lease to any one. It follows therefore that the mining leases granted in this case were granted by persons who had no right to the minerals and therefore confer no rights on the respondents to claim as of right from the Government that they should be granted a mining lease under the Rules.

In view of the above decision Appeal No. 252 must be allowed and Appeal No. 253 must fail.

We therefore allow Appeal No. 252 and setting aside the order of the appeal Court dismiss the writ petition with costs to the State throughout. Appeal No. 253 is hereby dismissed but in the circumstances parties will bear their own costs.

*Appeal No. 252 of 1958 allowed  
and Appeal No. 253 of 1958 dismissed.*

1. (1920) L.R. 48 I.A. 56 : I.L.R. 44 Mad. 421 : 40 Mad. 262.

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B.P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K.N. WANCHOO, N. RAJAGOPALA AYYANGAR AND T. L. VENKATARAMA AIYAR, JJ.

The Chief Commissioner, Ajmer (now the State of Rajasthan)  
and another

.. Appellants\*

v.

Brijniwas Das

.. Respondent.

The Union of India

.. Intervener.

*Cinematograph Act (XXXVII of 1952), section 12 (4)—Construction—Notification under and conditions in pursuance thereof in licences under the Act requiring that cultural films should have been produced in India—Validity.*

It is true that section 12 (4) of the Cinematograph Act classifies films into two categories but they are not mutually exclusive. The words "indigenous films" are general and unqualified in their contents and must include in their ordinary and accepted sense cultural as well as other films. If the two categories of films are to be construed as mutually exclusive, then the words "indigenous films" must be read as meaning "indigenous films other than cultural films." That would be to cut down the plain and ordinary sense of the words, and to import into the enactment words which are not there. Such a construction must, if that is possible, be avoided. The policy underlying the enactment is to encourage exhibition of two classes of films (1) cultural and (2) indigenous, and so far as indigenous films are concerned they may be cultural films or they may not be. In this view the words "produced in India" in the impugned notification under section 12 (4) and Condition No. 22 in the licence are not to be read as a qualification annexed to the first category of films, but as referable to the second category, and would be perfectly *intra vires* under section 12 (4).

Accordingly the notification issued by the Chief Commissioner of Ajmer on 23rd November, 1954 in exercise of the powers conferred by section 12 (4) of the Cinematograph Act in so far as it requires that cultural films should have been produced in India is within section 12 (4) and Condition No. 22 of the licence which has been framed in accordance therewith is valid.

Appeal from the Judgment and Order dated the 14th May, 1958, of the Rajasthan High Court (Jaipur Bench) at Jaipur in Writ Application No. 237 of 1956.

H. N. Sanyal, Additional Solicitor-General of India (S. K. Kapur and P. D. Menon, Advocates, with him), for Appellants and the Intervener.

The Judgment of the Court was delivered by

Venkatarama Aiyar, J.—This is an appeal against the Judgment of the High Court of Rajasthan, on a Certificate granted by that Court under Article 133 (1) of the Constitution. The respondent carries on the business of exhibiting films in premises called the Royal Talkies at Beawar under licences granted by the appropriate authorities under the Cinematograph Act, 1952 (XXXVII of 1952) hereinafter referred to as "the Act". Acting in exercise of the powers conferred by section 12 (4) of the Act, the Chief Commissioner of Ajmer issued on 23rd November, 1954, a notification which, omitting what is not material, is as follows :—

"(1) The licensee shall so regulate the exhibition of cinematograph films that at every performance open to the public, approved films are exhibited, the approved films to be exhibited in relation to other films at every such performance being in the same proportion as one is to five or the nearest lower or higher approximation thereto.

(2) Only such films produced in India as are certified by the Central Government with the previous approval of the Film Advisory Board, Bombay, to be scientific films, films intended for education purposes, films dealing with news, current events or documentary films shall be deemed to be approved films for the purposes of these directions."

This notification came into force on 1st December, 1954. On 24th November, 1955 the District Magistrate of Ajmer being the licensing authority under the Act sent to the respondent a statement of conditions of licence revised in accordance with the above notification. We are concerned in this appeal with two of them, Conditions Nos. 15 and 22. They are, so far as they are material, as follows :—

"15. The licensee shall, when and so often as the Chief Commissioner may require, exhibit free of charge or on such terms as regards remuneration as the Chief Commissioner may determine, films, and lantern slides provided by the Chief Commissioner :



Provided that the licensee shall not be required to exhibit at one entertainment films or lantern slides the exhibition of which will take more than fifteen minutes in all or to exhibit films or slides unless they are delivered to him at least twenty-four hours before the entertainment at which they are to be shown is due to begin."

"22. (a) The licensee shall so regulate the exhibition of cinematograph films that at every performance open to the public, approved films are exhibited, the approved films to be exhibited in relation to other films at every such performance being in the same proportion as one is to five or the nearest lower or higher approximation thereto.

(b) Only such films produced in India as are certified by the Central Government with the previous approval of the Film Advisory Board, Bombay, to be scientific films, films intended for education purposes, films dealing with news, current events or documentary films shall be deemed to be approved films for the purposes of these directions."

On 25th July, 1956 the Films Division, Ministry of Information and Broadcasting, Government of India, made a demand on the respondent for a sum of Rs. 274-1-0 on account of supplies of approved films made to him during the period 3rd March, 1956 to 5th August, 1956 and further informed him that if the above demand was not complied with, further supplies of approved films would be stopped. The respondent disputed his liability to pay the amount on the ground that the supply was made not in pursuance of any contract entered into by him but voluntarily by the Government. A correspondence then followed and eventually the respondent was told that if the amount was not paid as demanded, further supplies of approved films would be stopped and the licence cancelled. Thereupon he filed the Writ Petition under Article 226 of the Constitution, out of which this present appeal arises, in the Court of the Judicial Commissioner, Ajmer, challenging the *vires* of section 12(4) of the Act, the Notification, dated 23rd November, 1954 issued thereunder and Conditions Nos. 15 and 22 inserted in the licence in accordance therewith. The petition was heard by a Bench of the High Court of Rajasthan to which it stood transferred under the provisions of the States Reorganisation Act, 1956, and by their Judgment, dated 14th May, 1958 the learned Judges sustained the validity of section 12 (4) but struck down the impugned Conditions Nos. 15 and 22 as not authorised by section 12 (4) of the Act. It is against this judgment that the present appeal, on certificate, has been preferred by the Government.

Before us the learned Additional Solicitor-General who appeared for the appellant did not contest the correctness of the decision of the High Court in so far as it held that Condition No. 15 was not valid, but he contended that the learned Judges were not right in holding that Condition No. 22 was not authorised by section 12 (4) of the Act. The sole point for determination in this appeal is therefore whether the Notification, dated 23rd November, 1954 is within the terms of section 12 (4). If it is, then Condition No. 22 which gives effect to it is valid. If not, both the notification and the condition must be struck down as *ultra vires*.

Section 12 (4) of the Act runs as follows :—

"The Central Government may, from time to time, issue directions to licensees generally or to any licensee in particular for the purpose of regulating the exhibition of any film or class of films, so that scientific films, films intended for educational purposes, films dealing with news and current events, documentary films or indigenous films, secure an adequate opportunity of being exhibited, and where any such directions have been issued those directions shall be deemed to be additional conditions and restrictions subject to which the licence has been granted."

It will be seen that the enactment comprises two categories of films, one consisting of scientific films, films intended for educational purposes, films dealing with news and current events and documentary films or what for conciseness may be called "cultural films", and the other, of "indigenous films". The learned Judges of the High Court were of the opinion that these two categories were alternative as indicated by the disjunctive "or" and consequently the provision that cultural films should have been produced in India was to introduce a restriction in category No. 1 which is not authorised by the statute, and that in consequence the words "produced in India" in Condition No. 22 were unauthorised and *ultra vires*.

This view does not commend itself to us. It is true that the enactment classifies films into two categories but we do not read them as mutually exclusive. The words "indigenous films" are general and unqualified in their contents, and must include

in their ordinary and accepted sense cultural as well as other films. If the two categories of films are to be construed as mutually exclusive, then we must read the words "indigenous films" as meaning "indigenous films other than cultural films". That would be to cut down the plain and ordinary sense of the words, and to import into the enactment words which are not there. Such a construction must, if that is possible, be avoided. We must proceed on the basis that the Legislature meant precisely what it said.

This conclusion is further reinforced when regard is had to the policy underlying the enactment, which is to encourage exhibition of two classes of films (1) cultural and (2) indigenous, and so far as indigenous films are concerned they may be cultural films or they may not be. In this view the words "produced in India" in the impugned notification, and Condition No. 22 are not to be read as a qualification annexed to the first category of films, but as referable to the second category, and would be perfectly *intra vires* under section 12 (4). We must accordingly hold that the Notification, dated 23rd November, 1954 in so far as it requires that cultural films should have been produced in India is within section 12 (4) and Condition No. 22 which has been framed in accordance therewith is valid. The order of the Court below will be modified to this extent. As the respondent does not appear, there will be no order as to costs in this Court.

K.S.

Order modified.

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Lala Kapurchand Godha and others

.. Appellants \*

v.

Mir Nawab Himayatalikhan Azamjah

.. Respondent.

*Contract Act (IX of 1872), sections 63 and 41—Scope—Acceptance of smaller amount from a third person in full satisfaction of debt—Effect—Suit for balance against original promisor—Not maintainable.*

When the promisees have accepted performance of the promise from a third person, they cannot afterwards enforce it against the promisor. Where the promisees have accepted a lesser amount in full satisfaction of their claim, they cannot subsequently sue the original promisor for the balance.

The promisors having accepted the money on the condition on which it was offered (namely that they must record a full satisfaction of the claim, it is not open to them to say, either in fact or in law, that they accepted the money but not the condition.

Appeal from the Judgment and Decree, dated the 15th April, 1958, of the Bombay High Court, in Appeal No. 25 of 1957.

B. R. L. Iyengar, Advocate, for Appellants.

M. C. Setalvad, Attorney-General for India (S. R. Vakil and K. H. Bhabha, Advocates and J. B. Dadachanji, O. C. Mathur and Ravindra Narain, Advocates of M/s. Dadachanji & Co., with him), for Respondent.

The Judgment of the Court was delivered by

S. K. Das, J.—This is an appeal on a Certificate granted by the High Court of Bombay under section 110 of the Code of Civil Procedure, and arises out of a suit which the appellants had brought for recovery of Rs. 9,99,940 with interest and costs from Mir Nawab Himayatalikhan Azamjah, who was then known as the Prince of Berar, being the eldest son of the Nizam of Hyderabad. The circumstances in which the appeal has arisen are these.

On or about 31st January, 1937 Baboo Mull & Co. sold and delivered to the Prince of Berar in Bombay various articles of jewellery the aggregate value of which was Rs. 13,20,750. Lala Kapurchand Godha, who was the first plaintiff in the action and Lala Heeralal Godha, the original second plaintiff, carried on business in jewellery in partnership with their father and one Lala Baboo Mull (since deceased) in the name and style of Baboo Mull & Co. It is not disputed that the appellants

now before us own the entire interest in the subject-matter of the suit and instead of using the name of Baboo Mull & Co. we shall name the appellants as the persons who sold the jewellery to the Prince of Berar on 31st January, 1937. A writing, dated 31st January, 1937 was executed by the Prince of Berar, respondent before us, by which he declared and acknowledged having purchased the jewellery specified in a schedule from the appellants at the aggregate price of Rs. 13,20,750. In that writing (Exhibit-A) the respondent stated :

"I promise on behalf of myself and my heirs, executors, administrators and successors to pay to you or to your order at my option and leisure at your abovementioned address the said sum of rupees thirteen lacs twenty thousand seven hundred and fifty only together with simple interest thereon at 10% (ten per cent.) per annum."

It is not disputed that the jewellery was in fact delivered by the appellants to the respondent, and after 31st January, 1937 the respondent passed various acknowledgments in respect of the debt due at the time of the passing of the respective acknowledgments. These documents consisted of an acknowledgment of liability and a promise to pay on behalf of the respondent and the last of such acknowledgments was passed on 15th / 16th February, 1948. By that time the debt of Rs. 13,20,750 with ten per cent. interest thereon had increased to about Rs. 27,79,000. By that last document the respondent admitted his liability for the amount of Rs. 27,79,078-2-0 and promised to pay the amount, again at his option and leisure. On 30th April, 1948 the appellants presented their bill and some time in January, 1949 one of the appellants had an interview with the respondent and was told that the Nizam had passed the bill. In 1949 when Hyderabad was under Military Occupation after the Police Action, a Committee was set up on 8th February, 1949 by the Military Governor known as the Princes Debts Settlement Committee. The report of this Committee shows that it was set up in accordance with a resolution made by the Military Governor in order to scrutinise all debts of the Prince of Berar and his younger brother. On 19th February, 1949 the appellants presented a petition to the Military Governor with regard to their claim and asked for payment of the amount due to them or in the alternative for the return of the jewellery. The claim of the appellants was considered by the Committee in para. 11 of their report. The Committee recommended that the appellants should be paid a sum of Rs. 20 lacs in full satisfaction of their claim. The Committee further stated that they did not recommend the return of the jewellery. It may be here stated that the Committee consisted of two persons, namely, Zahiruddin Ahmed, who was the Controller of Accounts to the Nizam and A. N. Shah, a member of the Indian Civil Service. It may also be stated that the report of the Committee shows that it made a reduction of about ten per cent. in the case of all suppliers of goods to the two Princes because the Committee thought that in most of the cases the suppliers inflated the prices for the supply of goods to the two Princes. The Committee also thought that the reasonable rate of interest would be six per cent. in the case of creditors who had to wait for a number of years for payment of their dues. On 27th September, 1949 a sum of Rs. 11,25,000 was paid to the appellants. At that time there was a dispute going on as to whether the appellants were entitled to the entire amount of Rs. 20 lacs or to only 9/16th share thereof. That dispute having been finally settled in favour of the appellants, the appellants received a second payment of Rs. 8,75,000 on 14th February, 1950. This amount along with the earlier amount paid to the appellants came to the total of Rs. 20 lacs, which the Committee had recommended should be paid to the appellants in full satisfaction of their claim. On 14th February, 1950 a receipt was passed by the appellants for the sum of Rs. 8,75,000 (Exhibit-C) and this receipt ran in the following terms :

"Received from the Controller-General of Accounts and Audit, Hyderabad Government, the sum of Rs. 8,75,000 (Rupees eight lacs and seventy-five thousand) only in full and final payment of the balance of rupees twenty lacs allowed by the Government in respect of my claim under the pronote dated 15th February, 1948 passed by the Prince of Berar in my favour, reserving however my right to recover the balance amount due to me under the said pronote from the Prince of Berar."

The relevant authorities refused, however, to make payment on the receipt Exhibit-C in which the appellants reserved their right to recover the balance amount due from the Prince of Berar. Thereupon, the appellants discharged all the previous

pronotes and on each one of them recorded a satisfaction of full payment. We may refer to the last of them, namely, the one dated 15th/16th February, 1948. This was for a sum of Rs. 27,79,078-2-0 and on this document Kapurchand Godha, one of the appellants, recorded "received payment in full".

Then, on 14th August, 1950 the appellants served through their Solicitors a notice on the respondent asking him to make payment of the balance of Rs. 9,99,940 with interest at ten per cent. The respondent not having paid the amount a suit was instituted on 5th February, 1951 in the High Court of Bombay for recovery of the amount.

The suit was tried by Coyajee, J. The principal issue for trial was Issue No. 6, namely, whether the appellants had accepted payment of Rs. 20 lacs in full satisfaction of their claim against the respondent and surrendered all the writings duly discharged and there was absolute release of the debt as stated in paras. 7, 8 and 11 of the written statement. On a consideration of the oral and documentary evidence given in the case and relying particularly on Exhibit-C, Coyajee, J., came to the conclusion that the appellants did not take the sum of Rs. 20 lacs in full satisfaction of their claim. The learned Judge said :

Ordinarily, a plaintiff would have been in a most difficult and unenviable position to enforce this claim after having endorsed those documents namely Ex. No. 1 as payment in full satisfaction. But evidently, 'payment in full satisfaction' there meant full satisfaction as regards the liability of the Hyderabad State and that would naturally be the meaning if taken in conjunction with Ex.-C where he reserved liberty to proceed personally against the Prince of Berar. I have therefore come to the conclusion on the main issue in the suit namely, that there was no accord and satisfaction when the plaintiff received the second cheque from the Accountant-General of Hyderabad State."

Then there was an appeal by the respondent which was heard by the appellate Court (Chagla, C.J. and Mody, J.) By its judgment dated 15th April, 1958 the appellate Court came to a contrary conclusion and held that on the evidence, oral and documentary, given in the case it was clearly established that the appellants accepted the sum of Rs. 20 lacs in full satisfaction of their claim and duly discharged the promissory notes by endorsing full satisfaction thereon ; therefore, section 63 of the Indian Contract Act, 1872 applies and the suit of the appellants was liable to be dismissed. It accordingly allowed the appeal and dismissed the suit with costs.

In the appeal before us Mr. B.R.L. Iyengar appearing on behalf of the appellants has very strongly contended that the view of Coyajee, J. is the correct view on the evidence given in the case. He has emphasised two points in connection therewith : (1) the crucial question is—what does the evidence show as to the intention of the creditor in accepting Rs. 20 lacs ? and (2) what is the effect of Exhibit-C a receipt executed contemporaneously with the payment of the second instalment of Rs. 8,75,000 ? Mr. Iyengar has argued that the appellate Court did not attach sufficient importance to these two points and the conclusion which it reached is vitiated for that reason. As the judgment of the appellate Court is a judgment in reversal and the questions raised are essentially questions of fact on which there are conflicting findings, we allowed counsel for the parties to place before us the relevant evidence along with the pleadings of the parties. Two of the witnesses whose evidence appears to be decisive of the questions raised were Putta Madhava Rao who was examined on behalf of the appellants and Kapurchand Godha, one of the appellants. Putta Madhava Rao was at the relevant time, Assistant Accountant-General, Hyderabad and he was present before the Committee on more than one occasion when the claim of the appellants was considered. Before Coyajee, J. a question was raised whether the statements of this witness as to what transpired before the Committee were admissible in evidence, when none of the two members of the Committee were called for examination. Madhava Rao was undoubtedly competent to prove what he himself heard or saw if such hearing or seeing was a fact in issue, and we consider it unnecessary to determine the further question as to whether he was competent to prove the statements alleged to have been made by one or other of the two members of the Committee. Therefore, we confine ourselves to the statements of Madhava Rao as to what happened before him. Madhava Rao said that before the Committee the appellants insisted on payment of their full claim, but the Com-

mittee decided that the appellants must take Rs. 20 lacs in full satisfaction of their claim ; on this Kapurchand Godha protested and said that he would have to reserve his right for the balance. The Committee thereupon made it clear that they could not recommend payment of anything more, because a specific amount for distribution had been allotted to them. The reference to "a specific amount" was to a sum of rupees two crores earmarked for the liquidation of the debts of the two Princes out of a fund known as *Sarf-e-Khas*. What happened after the Committee had made its recommendation is very important. The first instalment of Rs. 11,25,000 was paid on 27th September, 1949. At that time a dispute was going on about the share of the appellants to the money. The receipt which was passed for the payment of Rs. 11,25,000 is marked Exhibit-B. That receipt does not show whether the appellants had agreed to accept Rs. 20 lacs in full satisfaction of their claim. As to the second instalment of Rs. 8,75,000 which was paid on 14th February, 1950, Madhava Rao gave the following evidence. He said that when Exhibit-C was brought to him by Kapurchand Godha, the witness told the latter that he could not make payment against that receipt as the receipt recited reservation of the right of the appellants for the balance. The witness took the document, Exhibit C, to Zaheruddin Ahmed who was the Accountant-General then. Zaheruddin Ahmed suggested that the claimant should endorse full satisfaction and payment on all the promissory notes and then only the payment would be made. The witness then said :

"Thereupon I obtained the endorsements (on the promissory notes) from Kapurchand. Kapurchand whilst endorsing these documents protested that he had been forced to endorse these and he was not at all satisfied. This happened on the 14th of February, 1950."

We may here state that no plea was raised by the appellants to the effect that the endorsements on the promissory notes had been obtained by coercion, and no issue was struck between the parties as to the endorsements on the promissory notes having been obtained by coercion. That being the position, what is the effect of Madhava Rao's evidence? The clear effect is that the authorities who were paying the money in discharge of the debt of the respondent made it clear that they would pay the money only if a full satisfaction of the claim was given by the appellants. The appellants after some initial protests agreed and duly discharged all the promissory notes by endorsing thereon full payment and satisfaction. The question of coercion was introduced as and by way of after-thought. Two facts seem to be clearly established by the evidence of Madhava Rao. One is that the authorities refused to pay the second instalment unless full satisfaction of the claim was endorsed in accordance with the recommendation of the Committee ; the second is that the appellants did record full payment in satisfaction of the promissory notes before they received the money. In our opinion, these two facts clearly established the case of the respondent that the appellants had given a full discharge when they received the second instalment. Indeed, the evidence of Madhava Rao is supported by the evidence of Kapurchand Godha. Kapurchand Godha said that when he presented the receipt, Exhibit-C to Madhava Rao the latter said that he would not accept the receipt in that form. Madhava Rao then took Kapurchand to the Accountant-General. Kapurchand was asked to produce the promissory notes and was told that unless the promissory notes were endorsed with full satisfaction, no payment would be made. Kapurchand then said :

"I was told that unless I signed the receipt for full payment, no cheque would be issued to me. Thereupon I endorsed the receipt for full payment. By that I mean I was asked to endorse full payment on the vouchers and I did so. I protested and said that as I was asked to endorse full payment, I was doing so despite the fact that I was not receiving full payment. Thereafter I signed the receipt as well as the vouchers and handed over the documents to the Accountant-General."

This evidence is in accord with the evidence of Madhava Rao and again establishes that the appellants when they received the second and the last instalment of Rs. 8,75,000 gave a full discharge of their claim and the plea of coercion was later introduced as and by way of an after-thought.

There was some difference of evidence as to whether Exhibit-C bore the signature of Kapurchand when it was first presented to Madhava Rao or whether the signature was later put on it. With that difference we are not now concerned. Nor are we concerned with certain minor discrepancies between the evidence of the two witnesses referred to above. The substantial result of the evidence of the two witnesses to whom we have referred is that whatever reluctance Kapurchand might have had in accepting Rs. 20 lacs in full satisfaction of the claim of the appellants, he ultimately agreed to do so. Not only did he agree, but he actually endorsed full satisfaction and payment on all the promissory notes and thereafter he received payment of the second instalment of Rs. 8,75,000 which along with the first instalment of Rs. 11,25,000 made up the sum of Rs. 20 lacs. On these facts which are established by the evidence given on behalf of the appellants themselves, the only conclusion is that there was full satisfaction of the claim of the appellants.

The legal position is clear enough. Section 63 of the Indian Contract Act reads:

"Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit."

*Illustration (c)* to the section says :

"A owes B 5,000 rupees. C pays to B, 1,000 rupees, and B accepts them in satisfaction of his claim on A. This payment is a discharge of the whole claim."

It seems to us that this case is completely covered by section 63 and *Illustration (c)* thereof. The appellants having accepted payment in full satisfaction of their claim are not now entitled to sue the respondent for the balance. A reference may also be made in this connection to section 41 of the Contract Act under which when a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor. There is some English authority to the effect that discharge of a contract by a third person is effectual only if authorised or ratified by the debtor. In India, however, the words of section 41 of the Contract Act leave no room for doubt, and when the appellants have accepted performance of the promise from a third person, they cannot afterwards enforce it against the promisor, namely, the respondent.

When a statute clearly covers a case, it is hardly necessary to refer to decisions. In deference, however, to the arguments advanced on behalf of the appellants, we refer to the two decisions on which learned Counsel for the appellants has relied. One is the decision in *Day v. McLea*<sup>1</sup>. In that case the plaintiffs made a claim against the defendants for a sum of money as damages for breach of contract; the defendants sent a cheque for a less amount stating that it was in full payment of all demands. The plaintiffs kept the cheque stating they did so on account and brought an action for the balance of their claim. It was held that keeping the cheque was not as a matter of law conclusive that there was an accord and satisfaction of the claim; but that it was a question of fact on what terms the cheque was kept. We do not think that that decision is of any help to the appellants. As Lord Justice Bowen said in *Day v. McLea*<sup>1</sup>:

"If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim; and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon that view. In either case it is a question of fact." (p. 613).

We have already referred to the facts which are clearly established by the evidence in this case. Those facts clearly established that the appellants took the second instalment in full satisfaction of their claim. The second decision relied on

on behalf of the appellants *Neuchatel Asphalte Co., Ltd. v. Barnett*<sup>1</sup>, also proceeded on a similar ground. In that case the claim of the plaintiff company amounted to £259, but the defendant raised some minor queries which might reduce it by £14 or £15. The defendant then sent a cheque for £125 and stated in a covering letter that this sum was "on account" pending the receipt of the plaintiff's reply to outstanding queries in connection with the work done. Some time later the defendant enclosed a further cheque for £75 and on the back of the cheque was endorsed "in full and final settlement of the account". The cheque was accepted by the plaintiff company, which later sued for the balance of the amount of the claim. It was held that having regard to the correspondence and the surrounding circumstances, there was no intention on the part of the plaintiff company to accept the cheque for £75 in full satisfaction of the plaintiff's claim, because the word "in full and final settlement of the account" typed on the back of the cheque were inconsistent with the main object and intention of the transaction, particularly since (a) the covering letter sent by the defendants plainly imported that the cheque was sent only on account and not in full and final settlement, and (b) it could not reasonably be supposed that, in the circumstances, the plaintiff company had agreed to a reduction of the amount claimed. The facts of the case before us are entirely different. The appellants were clearly and unambiguously told that unless they gave a full satisfaction of their claim, they would not be paid the amount. The appellants were left in no doubt as to the condition on which payment would be made to them. The appellants clearly accepted the condition and recorded full satisfaction on all the promissory notes. It is now impossible to accept the position that the appellants reserved their right to sue the respondent for the balance of the amount. In *Hirachand Punamchand v. Temple*<sup>2</sup>, the father of a debtor wrote to the creditor offering an amount less than that of the debt in full settlement of the debt and enclosing a draft for that amount. The creditor cashed and retained the proceeds of the draft and afterwards brought an action against the debtor for the balance of the debt. It was held that the creditor must be taken to have accepted the amount received by him on the terms upon which it was offered and therefore he could not maintain the action. The case was considered under the English law and it was observed that assuming that there was no accord and satisfaction in the strict sense of the law in England, it could still be held that the creditor had ceased really to be holder of the negotiable instrument on which he sued. With the niceties of English law in the matter of accord and satisfaction we are not concerned. The position in the present case is that the appellants must have known that they could receive the second instalment and retain the first instalment by accepting the condition on which the sum of Rs. 20 lacs was offered to them, namely, that they must record a full satisfaction of their claim. They accepted the money on the condition on which it was offered and it is not now open to them to say, either in fact or in law, that they accepted the money but not the condition.

For these reasons we are satisfied that the appellate Court was right in the view which it took. Therefore, the appeal fails and is dismissed with costs.

K.S.

Appeal dismissed.

## THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT:—B. P. SINHA, *Chief Justice*, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR, J. R. MUDHOLKAR AND T. L. VENKATARAMA AYYAR, JJ.

M/s. Orissa Cement, Ltd. and others

.. Petitioners\*

v.

The Union of India and others

.. Respondents.

*Employees' Provident Funds Act (XIX of 1952), section 7(1)—Notifications under by the Central Government dated 15th January, 1958 and 2nd December, 1960—Validity of—Whether the Notifications offend against Article 19 (1) (g) of the Constitution of India, 1950.*

The intention of the Legislature as expressed in section 6 (1) of the Employees' Provident Funds Act, 1952 is to make the employer liable only for a moiety of the provident fund and while the Employees' Provident Fund Scheme, 1952 is well designed to carry out this intention, in its application to workmen directly employed, by reason of the combined operation of paras. 30. and 32 of the Scheme, it breaks down, in its extension to contract labour by reason of the inapplicability of para. 32. It operates unfairly and harshly on persons, who employ contract labour, and it further results in discrimination between those who employ contract labour and those who employ direct labour. This cannot be said to be reasonable and must be struck down as not falling within the protection afforded by Article 19 (6) of the Constitution of India (1950). Thus the Notifications issued by the Central Government on 15th January, 1958 and 2nd December, 1960 are unconstitutional and void.

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

A. V. Viswanatha Sastri, Senior Advocate (K. C. Jain and B. P. Maheshwari, Advocates, with him), for Petitioners.

Bishan Narain, Senior Advocate (Sukumar Ghose and P. D. Menon, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Venkatarama Aiyar, J.—The first petitioner is a company carrying on business in the manufacture of cement in the State of Orissa and petitioners Nos. 2 and 3 are two of its Directors. They have filed the present petition under Article 32, challenging the validity of two notifications, dated 15th January, 1958 and 2nd December, 1960 issued by the Central Government under section 7 (1) of the Employees' Provident Funds Act, 1952 hereinafter referred to as "the Act". It will be convenient to first set out the relevant statutory provisions bearing on the question. The Act was passed for the purpose of providing for the institution of Provident Funds for the employees in factories and other establishments. Section 5 of the Act, which deals with this matter is as follows:—

"5. *Employees' Provident Fund Schemes.*—(1) The Central Government may, by notification in the Official Gazette, frame a Scheme to be called the Employees' Provident Fund Scheme for the establishment of provident funds under this Act for employees or for any class of employees and specify the establishments or class of establishments to which the said Scheme shall apply and there shall be provisions of this Act and the Scheme.

(2) A Scheme framed under sub-section (1) may provide that any of its provisions shall take effect either prospectively or retrospectively on such date as may be specified in this behalf in the Scheme."

Section 6 (1) which provides for the employer making contribution to the Fund runs as follows:—

"6. (1) The contribution which shall be paid by the employer to the Fund shall be six a quarter per cent. of the basic wages, dearness allowance and retaining allowance (if any) for the time being payable to each of the employees, and the employees' contribution shall be equal to the contribution payable by the employer in respect of him and may, if any employee so desires and if the Scheme makes provision therefor, be an amount not exceeding eight and one-third per cent. of his basic wages, dearness allowance and retaining allowance (if any):

Provided that where the amount of any contribution payable under this Act involves a fraction of a rupee, the Scheme may provide for the rounding off of such fraction to the nearest rupee, half of a rupee or quarter of a rupee."



Under section 7 the Central Government may, by notification in the Official Gazette, add to, amend or vary any Scheme framed under this Act. Section 14 prescribes penalties for any contravention of the provisions of the Act or default in compliance with them.

In exercise of the powers conferred by section 5 of the Act, the Central Government published on 2nd September, 1952, what is called the 'Employees' Provident Funds Scheme, 1952. Para. 2 (f) (iii) of the Scheme defines "Excluded Employees" as meaning the employees employed by or through a contractor. Under para. 3 the provident fund standing to the credit of an employee vests in the authorities constituted thereunder. Para. 26 provides that every employee employed in a factory or establishment other than an excluded employee shall be required to become a member of the fund if he has completed one year's continuous service, in the factory or establishment, and there is a proviso that if the employee has actually worked in the factory or establishment for not less than 240 days, he shall be deemed to have completed one year's continuous service. Paras. 30 to 32 deal with contributions to be made by the employer and they are as follows :—

"30. The employer shall, in the first instance pay both the contribution payable by himself (in this Scheme referred to as the employer's contribution) and also, on behalf of the member employed by him, the contribution payable by the member (in this Scheme referred to as the member's contribution) ".

"31. Notwithstanding any contract to the contrary the employer shall not be entitled to deduct the employer's contribution from the wage of a member or otherwise to recover it from him. "

"32. (1) The amount of a member's contribution paid by the employer shall, notwithstanding the provisions in this Scheme or any law for the time being in force or any contract to the contrary be recoverable by means of deduction from the wages of the member and not otherwise:

Provided that no such deduction may be made from any wage other than that which is paid in respect of the period or part of the period in respect of which the contribution is payable :

Provided further that the employer shall be entitled to recover the employee's share from a wage other than that which is paid in respect of the period for which the contribution has been paid or is payable where the employee has in writing given a false declaration at the time of joining service with the said employer that he was not already a member of the Fund :

Provided further that where no such deduction has been made on account of an accidental mistake or a clerical error, such deduction may, with the consent in writing of the Inspector, be made from the subsequent wages.

(2) Deduction made from the wages of a member paid on daily, weekly or fortnightly basis should be totalled up to indicate the monthly deductions.

(3) Any sum deducted by an employer from the wage of an employee under this Scheme shall be deemed to have been entrusted to him for the purpose of paying the contribution in respect of which it was deducted. "

The combined effect of section 6 and paras. 30 to 32 of the Scheme is that the contribution to the Provident Fund is to be  $12\frac{1}{2}$  per cent. of the basic wages, and dearness allowance, that it is to be borne equally by the employer and the employee, and that the employer is to pay the whole of it, half on his account, and the other half on account of the employee, and he is to recoup himself by deducting it from the wages of the employee. Such deduction would be possible only when the employer is the person who has to pay wages to the employee and that is why employees employed by or through a contractor were included in the definition of "excluded persons" to whom under para. 26 the Scheme had no application. These employees would be paid by the contractor and the question of deduction of wages by the principal employer, *i.e.*, the person who is in charge of the factory or establishment, will not arise.

It is said that with a view to avoid their contribution under the Act, the employers resorted increasingly to the device of employing workmen through contractors, and the Government accordingly deemed it expedient to amend the provisions of the Scheme so as to secure the benefits thereof to employees who were employed through contractors. To carry out this purpose, a notification was issued on 15th January,

1958 No. S.R.O. 331 substituting for para. 2 (f) (iii) of the Scheme as it stood in 1952 the following :—

“(iii) an employee employed by a contractor in any operation not directly connected with any manufacturing process carried on in the factory or other establishment, or

*Explanation.*—In respect of an employee employed by a contractor who is not an excluded employee under this paragraph, the principal employer shall be responsible for complying with the provisions of the Act and the Scheme ;”

The result of this amendment was that all employees employed by contractors who were directly connected with any manufacturing process carried on in the factory or the establishment became entitled to the benefits under the Act. On 11th May, 1959, para. 26 was suitably amended so as to conform to the notification, dated 15th January, 1958. Even this notification was felt to be inadequate for achieving the objects of the legislation and therefore in exercise of the powers conferred by section 7 (1) of the Act the Government issued a fresh notification No. G.S.R. 1467 on 2nd December, 1960, whereby it repealed para. 2 (f) (iii) as it then stood and added a new para. 73-A as follows :—

“73-A. Where an employee is employed by, or through, a contractor in, or in connection with, the work of an establishment, the principal employer shall be responsible for complying with the provisions of the Act and this Scheme in relation to such employee.”

This amendment had the effect of abolishing the distinction made by the amendment of 1958 between workmen employed by contractors, who were directly connected with the manufacturing process in the factory or establishment, and those who were not so connected, all of whom became entitled to the benefits of the Scheme.

The authorities constituted under the Act issued notices to the first petitioner drawing its attention to the changes introduced by the notifications and asking it to comply with their provisions, to which the management replied pointing out the practical difficulties in the way of implementing them as regards workmen brought in by contractors. A long correspondence followed culminating in a threat by the respondents to take penal proceedings under section 14 of the Act. Thereupon the petitioners have filed the present petition, raising the question of the constitutionality of the two notifications, dated 15th January, 1958 and 2nd December, 1960. They contend that they throw a heavy burden on their business and cannot, in consequence, be upheld as reasonable restriction within Article 19 (6) and must be struck down as infringing Article 19 (1) (g) of the Constitution. The respondents on the other hand maintain that they are beneficent legislation enacted in the interests of the public and are within the protection of Article 19 (6).

Now there can be no question that the impugned notifications are conceived in the interests of the public. The Scheme framed under the Act in 1952 conferred benefits of provident fund on workmen directly employed in factories or establishments but large sections of them working there under similar conditions but employed by contractors were excluded from its purview. This was obviously a discrimination for which there was no justification and it was this that was sought to be removed by the notifications in question. It is not contended by the petitioners that the object behind these notifications is not such as would fall within Article 19 (6). What is urged is that the means and modus adopted for achieving it are unreasonable and that therefore the scheme must be held to violate Article 19 (1) (g). It is argued that when the Government decided to confer the benefits of provident fund on workmen who were employed through contractors, instead of framing provisions appropriate to their character as employees of contractors, it simply extended to them the provisions which had been framed in 1952 with reference to workmen directly employed without regard to the difference in the situations in which the two classes of workmen were placed. This, it is contended, has led to results as unjust as unforeseen, and the Scheme must therefore be held not to be within the saving of Article 19 (6).

In order to decide how far this objection is well founded we must examine the distinction between contract labour and direct labour to the extent that it bears on the provisions of the Scheme. When the principal employer engages contract labour there is no privity of contract between him and the workmen who actually do the work. It is the contractor who engages them, and pays wages to them. The principal employer has as such no direct relationship with them. Now the argument of the petitioners is that the obligation of the employer to contribute every month to the provident fund an amount equal to six and a quarter per cent. of the wages and dearness allowance of the employee is incapable of performance as the principal employer is not in a position to know what wages had been agreed between the contractor and his employees and that further as the factory or establishment maintains no muster rolls as regards workmen employed through contractors, it is not possible for the principal employer to know whether a workman is a casual labourer, or whether he is entitled to the benefits of the Scheme under para. 26, by reason of his having put in continuous work for the requisite period.

The difficulties suggested by the petitioners are not without substance but they are not, in our view, of sufficient weight to overthrow the Scheme. It is true that they could have been eliminated if the Scheme had enacted a provision imposing on the contractors an obligation to give a statement in writing to the principal employer containing the necessary particulars about the workmen and their wages. But even apart from such a provision there should be no difficulty in the principal employer requiring the contractor at the time of the agreement to give those particulars, so as to protect himself. Nor is there any point in the contention that the workmen may be casual labourers and the principal employer would not be in a position to ascertain whether a particular workman is entitled to the benefits of the Scheme under para. 26 because under that para. the workman can claim the benefits of the Scheme only if he works continuously for a period of not less than 240 days in that very factory or establishment, and that is a matter which is capable of being ascertained by the principal employer.

A more serious objection to the extension of the Scheme of 1952 to workmen employed through contractors is that the right given to the principal employer under para. 32 is incapable of exercise as against them. Under para. 30 the whole of the provident fund, being  $12\frac{1}{2}$  per cent. of the wages and dearness allowance has to be paid in the first instance by the employer and under para. 32 he is to deduct half of it, being the employee's share of the contribution from his wages. As already pointed out, this contemplates that the hand which has to pay the provident fund under para. 30 is also the hand that has to pay wages to the workmen under para. 32. But that is not the position in the case of contract labour. It is the contractor who pays the wages of workmen employed through him, but the obligation to pay the provident fund is cast on the principal employer. Now the complaint of the petitioners is that the Scheme works "with an evil eye and an unequal hand" with reference to an employer who engages contract labour, in that while an obligation to pay the entire provident fund, including the share of his employee, is laid on him, he is not given the correlative right of recouping himself to the extent of that share, by deducting it out of his wages.

The answer of the respondents to this is that the principal employer might by an arrangement with the contractor deduct from out of the amounts payable to him the sums contributed by him to the provident fund on account of the employees and that further he might sue to recover those sums from the contractor in a suit based on section 69 of the Contract Act. But then, it is to be observed, that para. 32 provides that the employer has to deduct the amount paid towards the provident fund on account of the employee from his wages "and not otherwise". Moreover the Scheme does not impose any obligation on the contractor to pay to the principal employer the amounts paid by him on account of the employee. The intention of the Legislature as expressed in section 6 (1) of the Act is to make the employer liable only for a moiety of the provident fund and while the Scheme of 1952 is well designed

to carry out this intention, in its application to workmen directly employed, by reason of the combined operation of paras. 30 and 32, it breaks down, in its extension to contract labour by reason of the inapplicability of para. 32. It operates unfairly and harshly on persons who employ contract labour, and it further results in discrimination between those who employ contract labour and those who employ direct labour. The Scheme therefore cannot be said to be reasonable and must be struck down as not falling within the protection afforded by Article 19 (6).

In the result we hold that the notifications, dated 15th January, 1958, and 2nd December, 1960 are unconstitutional and void. The petitioners are entitled to their costs.

K.L.B.

*Petition allowed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR, K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

Ram Autar and others

.. *Appellants\**

v.

The State of Uttar Pradesh

.. *Respondent.*

*Criminal Procedure Code (V of 1898), section 133—Scope of powers under—Business carried on in private house—If can be prohibited on the ground of the noise or carts coming there causing obstruction on the road.*

Merely because the trade of auctioning vegetables carried on in their private house by the appellants produce the consequence that people passing by the road are put to inconvenience because of the carts which necessarily come near this house and are parked in the public road, action cannot be taken under section 133 of the Criminal Procedure Code to prohibit the conduct of business by the appellants. Unlawful obstruction, if any, is certainly not caused by the people who carry on the trade of auctioning. If the obstruction caused by keeping the carts on the road can be considered to be unlawful obstruction within the meaning of section 133 (1) (i) action can be taken against the persons causing such obstruction. The appellants cannot be considered to be the persons causing obstruction. If a trade like auctioning which has to be carried on as necessary for the well being of the community, some amount of noise has to be borne in at least that part of the town where such trade is ordinarily carried on. In making the provisions of section 133 of the Code of Criminal Procedure, the Legislature cannot have intended the stoppage of such trades in such part of the town, merely because of the "discomfort" caused by the noise in carrying on the trade.

Appeal by Special Leave from the Judgment and Order, dated the 18th August, 1959, of the Allahabad High Court in Criminal Revision No. 947 of 1958.

C. L. Prem, Advocate, for Appellants.

G. C. Mathur and G. P. Lal, Advocates, for Respondent.

The Judgment of the Court was delivered by

*Das Gupta, J.*—This appeal by Special Leave is against the order of the High Court at Allahabad dismissing the application for revision of an order under section 133 of the Code of Criminal Procedure.

The three appellants carry on the trade of auctioning vegetables. These vegetables, it appears, are brought in carts which are parked on the public road outside the building where the auctioning takes place. There was some dispute between these appellants and the Municipal Board which it is suggested by the appellants was really behind the move to get this order under section 133 passed against them. It is unnecessary, however, for us to consider that matter. What appears to be clear is that the trade is carried on in a private house, in the Sub-zimandi quarter, and it does happen that some amount of inconvenience is caused to people who pass by the public road because of the carts which necessarily come near this house. The real question is, whether because this trade of auctioning vegetables which the appellants carry on in their private house produce the consequence that people passing by the road are put to inconvenience, action can be taken under section 133 of the Code of Criminal Procedure. The High Court seems to be of the opinion :—

\* Criminal Appeal No. 79 of 1960.

"When it is clear that the business of auctioning vegetables cannot be carried on without causing obstruction to the passers by, the conduct of the business can be prohibited, even though it is carried on in a private place."

It seems to us that this proposition has been put too widely. Section 133 of the Code of Criminal Procedure empowers action by the District Magistrate, Sub-Divisional Magistrate, or Magistrate First Class to remove public nuisances in certain circumstances. Two out of the several clauses of section 133 (1) in which these circumstances are set out, with which we are concerned, are the first and second clauses. The first clause provides for action by Magistrate where he considers, on receiving a police-report or other information and on taking such evidence as he thinks fit, that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public or from any public place. The second clause deals with the position where the conduct of any trade or occupation or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated.

It is difficult to see how the first clause can have any application. Unlawful obstruction, if any, is certainly not caused by the people who carry on the trade of auctioning. If the obstruction caused by keeping the carts on the road can be considered to be unlawful obstruction within the meaning of this clause—about which we express no opinion—action can be taken against the persons causing such obstruction. The obvious difficulty in the way of that might be that the persons who bring the carts are not the same from day to day. But whether or not any action is possible under section 133 against the persons bringing the carts, we are unable to agree that merely because the appellants carry on auctioning in connection with which the carts are brought, they can be considered to have caused the obstruction. In our opinion, the appellants cannot be considered to be the persons causing obstruction.

Turning now to the next clause, the question arises how the conduct of this auctioning trade is injurious to the health or physical comfort of the community. Undoubtedly, some amount of noise and perhaps a great deal of noise is caused when the auction is going on. That however is a necessary concomitant of buying and selling large quantities and it will be unreasonable to think that merely because some amount of noise is caused which people preferring perfect peace may not like, this is injurious to the physical comfort, or health of the "community". It appears to us that the conduct of trades of this nature and indeed of other trades in localities of a city where such trades are usually carried on, is bound to produce some discomfort, though at the same time resulting perhaps in the good of the community in other respects. If a trade like auctioning which has to be carried on as necessary for the well-being of the community, some amount of noise has to be borne in at least that part of the town where such trade is ordinarily carried on. In making the provisions of section 133 of the Code of Criminal Procedure, the Legislature cannot have intended the stoppage of such trades in such part of the town, merely because of the "discomfort" caused by the noise in carrying on the trade. In our opinion therefore, the slight discomfort that may be caused to some people passing by the road or living in the neighbourhood cannot ordinarily be considered to be such as to justify action under section 133 of the Code of Criminal Procedure. We do not think that the orders are justified under section 133. Accordingly, we allow the appeal and set aside the order made by the Magistrate.

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—B. P. SINHA, *Chief Justice*, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR, J. R. MUDHOLKAR AND T. L. VENKATARAMA AYYAR, JJ.

Kumar Bimal Chandra Sinha (deceased) and after him his legal representatives and others

.. Appellants \*

v.

The State of Orissa and others

.. Respondents.

*Orissa Estates Abolition Act (I of 1952), section 3—Notification under vesting an 'Estate' in State Government—Interests of occupancy raiyats in holdings purchased by the proprietors and buildings thereon used as katcheri and grains godowns—If vest in Government as part of the "Estate".*

Where the proprietors of an "Estate" had purchased properties comprising *raiya*ti lands with certain buildings thereon (used as *katcheri* and godowns) from the *raiya*ti, the position in law is that though these lands with the buildings are situate geographically within the ambit of the proprietors' "Estate", they are not part of the "Estate". The proprietors hold those properties with the buildings not as proprietors, but as *raiya*ti. The rent payable by the proprietors as *raiya*ti in respect of such lands would no doubt form part of the assets which have to be included in the gross assets in determining compensation under section 26 of the Abolition Act. But that does not mean that the interests of *raiya*ti also have become vested in the State as a result of the notification under section 3 read with section 5 of the Act. The State has no authority to take possession of those lands and buildings as vesting in it by virtue of the notification.

Appeal from the Judgment and Order, dated the 27th March, 1958, of the Orissa High Court in O.J.C. No. 191 of 1956.

Hemendra Chandra Sen, Senior Advocate (S. Ghose, Advocate, with him), for Appellants.

N. S. Bindra, Senior Advocate (V. N. Sethi and P. D. Menon, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Sinha, C.J.—This appeal on a certificate granted by the High Court of Orissa raises the question of the interpretation of certain provisions of the Orissa Estates Abolition Act, 1951 (Orissa Act I of 1952)—which hereinafter will be referred to as the Act. The appellants who were petitioners in the High Court were the proprietors of an estate known as Paikpara Estate, in the district of Puri, bearing Touzi Nos. 268, 269 and 270. The respondents are the State of Orissa and its officials.

The facts on which the High Court based its judgment under appeal are as follows. Within the said Paikpara Estate, there were several tenures and sub-proprietary interests. The Paikpara Estate vested in the State of Orissa by virtue of a notification issued under section 3 of the Act, on 23rd August, 1953. It is common ground that the interests of tenure-holders and sub-proprietors within the said estate have not yet been taken over under the provisions of the Act. Under the tenure-holders aforesaid, there were some occupancy holdings which had been purchased by the proprietors, the appellants in this Court, long ago. Thus the proprietors by virtue of their purchase became occupancy *raiya*ti, under the tenure-holders or sub-proprietors, in respect of the holdings purchased by them. It is also common ground that in the last Settlement *Khatians* their interests as occupancy *raiya*ti in respect of the holdings purchased by them have been recorded. On the lands of the occupancy holdings, there were several buildings which were used as *Katcheri* houses by the proprietors, for the administration of their estate. In January 1954, according to the petitioners in the High Court, the State officials took illegal possession of those buildings situate on the *raiya*ti land, as aforesaid. The appellants thereupon made an application to the Collector of Puri for vacant possession of the lands and the buildings, described in the petition, on the allegation that those lands together with the buildings, purchased from tenants with rights of occupancy, were,

after purchase by the proprietors, used as *Katcheri* house by them. They also alleged that those properties had not vested in the State of Orissa as a result of the said notification, under the Act. Part of the said house had been let out to the Postal Department. The Anchal Adhikari of that area wrote to the Postmaster, and Superintendent of Post Offices, not to pay rent to the proprietors. The Postal Department, therefore, vacated that portion of the building in their occupation, which has gone into the occupation of the State Government. Another portion of the property, which was used as *dhangola* was let out for storing paddy, to a third party. That *dhangola* was also taken illegal possession of by the Naib Tehsildar of the place. Other portions of the property also are in illegal possession of the State Government, through its Anchal Adhikari. It was thus claimed on behalf of the proprietors that the State Government had no right to take possession of the property, as it did not form part of the estate which had been acquired under the Act, and had, on notification, vested in the State Government. The learned Collector of Puri did not concede the demand of the proprietors, and held that the occupancy holding is situated within the tenure held under the proprietors and lay within the geographical limits of the estate which had vested in the Government. Being aggrieved by the aforesaid order of the Collector, dated 20th November, 1956, the proprietors moved the High Court under Article 226 of the Constitution for relief against what was alleged to be illegal interference with their interest not as proprietors but as occupancy tenants. The High Court dismissed the proprietors' claim chiefly on the ground that the question raised by the petition before the High Court was practically concluded by the observations of the Supreme Court in the case of *K. C. Gajapati Narayan Deo v. The State of Orissa*<sup>1</sup>.

It is manifest that the controversy raised in this case has to be answered with reference to the provisions of the Act. "Estate" has been defined in clause (g) of section 2 of the Act as follows :

" 'Estate' includes a part of an estate and means any land held by or vested in an intermediary and included under one entry in any revenue roll or any of the general registers of revenue-paying lands and revenue-free lands prepared and maintained under the law relating to land revenue for the time being in force or under any rule, order, custom or usage having the force of law, and includes revenue-free lands not entered in any register or revenue-roll, all classes of tenures or under-tenures and any jagir, inam or muafi or other similar grant ;"

*Explanation I.*—Land Revenue means all sums and payments in money or in kind, by whatever name designated or locally known, received or claimable by or on behalf of the State from an intermediary on account of or in relation to any land held by or vested in such intermediary;

*Explanation II.*—Revenue-free land includes land which is, or but for any special covenant, agreement, engagement or contract would have been, liable to settlement and assessment of land revenue or with respect to which the State has power to make laws for settlement and assessment of land revenue;

*Explanation III.*—In relation to merged territories 'estate' as defined in this clause shall also include any mahal or village or collection of more than one such mahal or village held by or vested in an intermediary which has been or is liable to be assessed as one unit to land revenue whether such land revenue be payable or has been released or compounded for or redeemed in whole or in part."

The definition makes reference to an 'Intermediary', which has been defined in clause (h) as follows :

" 'Intermediary' with reference to any estate means a proprietor, sub-proprietor, landlord, landholder, malguzar, thikadar, gaontia, tenure-holder, under-tenure-holder and includes an inamdar, a jagirdar, zamindar, Ilaquadar, Khorposhdar, Parganadar, Sarbarakar and Maufidar including the Ruler of an Indian State merged with the State of Orissa and all other holders or owners of interest in land between the raiyat and the State;

*Explanation I.*—Any two or more intermediaries holding a joint interest in an estate which is borne either on the revenue-roll or on the rent-roll of another intermediary shall be deemed to be one intermediary for the purposes of this Act ;

*Explanation II.*—The heirs and successors-in-interest of an intermediary and where an intermediary is a minor or of unsound mind or an idiot, his guardian, committee or other legal curator shall be deemed to be an intermediary for the purposes of this Act. All acts done by an intermediary under this Act shall be deemed to have been done by his heirs and successors-in-interest and shall be binding on them."

Reading the two definitions together, the position in law is that 'estate' includes the interest, by whatever name called, of all persons, who hold some right in land between the State at the apex and the *raiya*t at the base. That is to say, the Act is intended to abolish all intermediaries and rent-receivers and to establish direct relationship between the State, in which all such interests vest, after abolition under the Act, and the tillers of the soil. The interest of a *raiya*t is designated by the word 'holding' and is defined by the Orissa Tenancy Act (Bihar and Orissa Act II of 1913) as follows :

" 'Holding' means a parcel or parcels of land held by a *raiya*t and forming the subject of a separate tenancy."

Under the Orissa Tenancy Act, the unit of interest of a proprietor is an 'estate'. Under a proprietor may be a number of sub-proprietors. 'Sub-proprietor' is also defined in the Tenancy Act, but we are not concerned in this case with that class of holders of land. The interest of a tenure-holder or an under-tenure-holder is characterised as a 'tenure'. Thus, the process of infeudation and sub-infeudation, which has been similar in all places where the Permanent Settlement took place that is to say, in Bengal, Bihar and Orissa and Madras and Andhra Pradesh, has led to the coming into existence of proprietors, with their estates, sub-proprietors under them, tenure-holders and under-tenure-holders and ultimately the tiller of the soil, the *raiya*t, whose unit of interest is a 'holding'. The Act was intended to abolish all proprietors, sub-proprietors, tenure-holders and under-tenure-holders, with a variety of names, but did not touch the interest of the *raiya*t. The same person, by transfer or by operation of law, might at the same time occupy different status in relation to land. He may be in respect of a particular area, which is geographically included in the estate, the proprietor. That land may be held by a *raiya*t not directly under a proprietor but under a tenure-holder, who holds directly under the proprietor. The proprietor may have acquired the interest of a *raiya*t. Thus the proprietor, in his capacity as the owner of the estate holds the entire estate, and he may have by purchase acquired the interest of a *raiya*t, paying rent for the *raiya*t's interest to his immediate landlord, the tenure-holder. The tenure-holder, in his turn, may have been liable to pay rent to the proprietor. That is what appears to have happened in this case. The appellants held the Paikpara estate as proprietors. They also appear to have purchased the properties in question comprising *raiya*t's lands with certain buildings thereon from the *raiya*t. Hence, the position in law is that though these lands with the buildings are situate geographically within the ambit of the appellant's estate, they are not part of the estate. In other words, the appellants hold those properties with the buildings not as proprietors as such, but as *raiya*t's. It appears that the Courts below have not kept clearly in view this distinction. The Collector, in the first instance, and the High Court in the proceedings under Article 226 of the Constitution, appear to have fallen into the error of confusing the petitioners' position as ex-proprietors, with their present position as *raiya*t's in respect of the land on which the buildings stand. The High Court has drawn the conclusion from the decision of this Court in *K. G. Gajapati Narayan Deo v. The State of Orissa*<sup>1</sup>, and has observed that whether the buildings in question vested in the Government, on the vesting of the estate under section 3 of the Act, would depend not upon whether it formed part of the estate acquired by the Government but on the purpose for which the buildings were used by the proprietors. As the buildings in question had been primarily used as office or *Katcheri* for the collection of rent or for the use of servants or for storing grains by way of rent in kind, the buildings will vest in the Government on the vesting of the estate itself. In our opinion, this conclusion drawn by the High Court from the decision of this Court is not well-founded in law. The High Court drew its conclusions from the following observations of this Court in the aforesaid case at pages 25-26 :

"Assuming that in India there is no absolute rule of law that whatever is affixed to or built on the soil becomes a part of it and is subject to the same rights of property as the soil itself, there is nothing in law which prevents the State Legislature from providing as a part of the estates abolition scheme that



buildings, lying within the ambit of an estate and used primarily for management or administration of the estate, would vest in the Government as appurtenances to the estate itself. This is merely ancillary to the acquisition of an estate and forms an integral part of the abolition scheme. Such acquisition would come within Article 31 (2) of the Constitution and if the conditions laid down in clause (4) of that article are complied with, it would certainly attract the protection afforded by that clause. Compensation has been provided for these buildings in section 26 (2) (iii) of the Act and the annual rent of these buildings determined in the prescribed manner constitutes one of the elements for computation of the gross asset of an estate."

The observations quoted above of this Court have reference to the following definition of 'Homestead' in clause (i) of section 2 of the Act :

"Homestead' mean a dwelling house used by the intermediary for the purposes of his own residence or for the purpose of letting out on rent together with any courtyard, compound, garden, orchard and out-buildings attached thereto and includes any tank, library and place of worship appertaining to such dwelling house but does not include any building comprised in such estate and used primarily as office or kutchery for the administration of the estate on and from the 1st day of January, 1946."

It will appear from this definition that the Legislature placed a proprietor's 'homestead' in two categories, namely (1) a dwelling house used by the intermediary for his own purposes and ; (2) any building comprised in such estate and used primarily as office or *katcheri* for the administration of the estate on and from the 1st day of January, 1946. In respect of the first category the Act provides in section 6 that that portion of the homestead shall be deemed to be settled by the State with the intermediary, who will continue to hold it as a tenant under the State Government, subject to the payment of fair and equitable ground-rent, except where under the existing law no rent is payable in respect of homestead lands. It will be noticed further that the second category in the definition of 'homestead' which has not been permitted to the outgoing intermediary has reference to "any building comprised in such estate". It has no reference to any building standing on *raiya*ti holding or a portion thereof. This becomes further clear with reference to the provisions of section 5, which lays down the consequences of vesting of an estate in the State. Under clause (a) of section 5, the entire estate, including all kinds of lands described in meticulous details, and other *non-raiya*ti lands vest absolutely in the State Government. This Court, while dealing with the constitutionality of the Act, was not concerned with *raiya*ti lands. Its observations had reference only to such buildings as stood upon the proprietor's private lands like *neej*, *seer*, *zirat*, etc., which were in his possession as proprietor or as tenure-holder. It is thus clear that the very basis of the judgment of the High Court is entirely lacking. That the High Court was not unaware of this distinction becomes clear from the following passage in its judgment :

"Doubtless, Ryoti lands are excluded from the scope of this clause. But buildings and structures standing on Ryoti lands and in the possession of the proprietor are not expressly saved."

The first sentence quoted above is correct, but not the second. There is no question of expressly saving structures on *raiya*ti lands, when it is absolutely clear that *raiya*ti lands are not the subject-matter of legislation by the Act. The same remarks apply to the reference in section 26 (b) (iii). Section 26 begins with the words "for the purpose of this chapter", namely, Chapter V, headed "Assessment of Compensation". Reading section 26 as a whole it is absolutely clear that for the purpose of assessment of the compensation payable to the outgoing proprietor or tenure-holder, of the estate to be acquired, gross assets have to be determined, by aggregating the rents payable by tenure-holders or under-tenure-holders and *raiya*ts. It is, thus, clear that the rent payable by the appellants as *raiya*ts in respect of the disputed lands would form part of the assets which have to be included in the gross assets, in determining compensation. But that does not mean that the interests of *raiya*ts also have become vested in the State as a result of the notification under section 3, read with section 5.

For the reasons aforesaid, it must be held that the appellants' *raiya*ti interests in the lands and in the buildings standing on those lands have not been affected by the abolition of his interest as proprietors, and that the State authorities had illegally taken possession of those. The appeal is accordingly allowed with costs here and below.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR AND K. C. DAS GUPTA, JJ.

The Provincial Transport Services

.. Appellant \*

v.

The State Industrial Court, Nagpur and others

.. Respondents.

*Central Provinces and Berar Industrial Disputes Settlement Act—1947—Section 31 and Schedule II, clause (3), "Dismissal of any employee except in accordance with law"—"Law" if includes industrial law as evolved by Courts.*

When using the words "in accordance with law" in clause (3) of Schedule II of the Central Provinces and Berar Industrial Disputes Settlement Act 1947 those who were responsible for enacting the statute did not intend to exclude the law as settled by the Industrial Courts and the Supreme Court as regards where a dismissal would be set aside and reinstatement of the dismissed workman ordered. If the word "law" in Schedule II includes not only enacted or statutory law but also common law, it is difficult to see why it would not include industrial law as it has been evolved by industrial decisions. [View expressed in *Provincial Transport Services v. Assistant Labour Commissioner*, 60 Bom.L.R. 72 and *Maroti v. Member, State Industrial Court*, 60 Bom.L.R. 1422, held to be not correct.]

Even though a proper enquiry had not been held by the management before dismissing a workman the Labour Commissioner had jurisdiction to hold an enquiry himself and the Industrial Court was wrong in interfering with his order dismissing the worker's application. [In the instant case the view taken by the Assistant Labour Commissioner that no enquiry had been held was perverse and the High Court ought to have set aside that finding and given relief on the basis that an enquiry had been properly held. The Industrial Court erred in thinking that it was bound by this decision of the Labour Commissioner and this error on his part was an error so apparent on the face of the record that it was proper and reasonable for the High Court to correct that error.]

Appeal by Special Leave from the Judgment and Order, dated the 17th October 1959, of the Bombay High Court at Nagpur in Special Civil Application No. 59 of 1959.

M. C. Setalvad, Attorney-General for India (E. J. Moharir, Advocate and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Appellant.

B. A. Masodkar, Bishambar Lal and Ganpat Rai, Advocates, for Respondent No. 3.

The Judgment of the Court was delivered by

*Das Gupta, J.*—This Appeal by Special Leave is against an order of the High Court of Bombay at Nagpur rejecting an application made by this appellant under Articles 226 and 227 of the Constitution for quashing an order made by the State Industrial Court, Nagpur, in the matter of dismissal by the appellant of its employee Kundlik Tulsiram Bhosle. Kundlik Tulsiram Bhosle, who is the third respondent before us, was engaged as a temporary motor driver in the service of the appellant. He was appointed on 22nd December, 1954 and it was expressly mentioned in the letter of appointment that until such time as he was confirmed by an order in writing his services were liable to be terminated at any time without notice or compensation and without assigning any reason. It was also stated that his case would be considered for confirmation one year after the date of appointment, provided a suitable permanent post fell vacant and his work was found satisfactory. By an order, dated 19th December, 1955 he was dismissed from service from 20th December, 1955. It appears that before this step was taken by the management, Kundlik had been served with a charge-sheet that on 14th November, when he was in charge of a bus as a driver he allowed conductor Vyenkati to carry five passengers without tickets and also allowed an unauthorised driver Sheikh Akbar to drive the bus. The charge-sheet was served on Kundlik on 9th November, and on 19th November, he submitted an explanation. According to the management an enquiry was thereafter

held by the Depot Manager and the charges were found established. Accordingly he was dismissed. Kundlik, the employee, made an application under section 16 of the C.P. and Berar Industrial Disputes Settlement Act, 1947, before the Labour Commissioner, Madhya Pradesh, Nagpur, alleging that his dismissal had not been preceded by an enquiry, that he had been illegally dismissed and praying for reinstatement.

The appellant pleaded in its written statement that an enquiry had been properly held and that the order of dismissal was legally made. The Assistant Labour Commissioner, who has the powers of the Labour Commissioner, under section 16, dealt with the application. He was of opinion that there were

“ Sufficient grounds to doubt whether an enquiry was really made by the non-applicant management and if at all one was held, whether the applicant as an accused person, had the chance to put questions to the witnesses who deposed against him.”

On the basis of the evidence adduced before him the Assistant Labour Commissioner came to the conclusion that the employee could not be held guilty of the charge of allowing an unauthorised person to drive the vehicle as Sheikh Akbar was a fully licensed driver of the Company but that his guilt on the other charge that he carried five passengers without tickets was fully established. Accordingly he dismissed the application.

Against this order the employee moved the State Industrial Court, Nagpur. That Court felt that it would not be justified in interfering with the findings of the Labour Commissioner that no enquiry had been held by the management and that the Assistant Labour Commissioner had no jurisdiction to hold an enquiry. In this view the Court set aside the order of the Labour Commissioner and made an order directing reinstatement of the employee with back wages.

It was against this order that the employer moved the High Court of Bombay on the ground that the Assistant Labour Commissioner and the State Industrial Court had erred in thinking that no enquiry had been held by the management and that the said Industrial Court was also wrong in thinking that the Assistant Labour Commissioner had no jurisdiction to hold an enquiry himself.

The High Court was of opinion that it could not exercise its powers under Articles 226 and 227 of the Constitution to interfere with the finding of the Assistant Labour Commissioner and the Revisional Court that no enquiry had been held. Proceeding on that basis the High Court also agreed with the Industrial Court that the Assistant Labour Commissioner had no jurisdiction to hold the enquiry himself. The High Court concluded that there was no error in the decision of the Industrial Court and so refused the application.

Three points have been urged on behalf of the appellant. The first is that it was not necessary in law to hold an enquiry before dismissing the employee in view of the terms of his employment and so in exercising jurisdiction under section 16 of the Central Provinces and Berar Industrial Disputes Settlement Act, the Industrial Court was not justified in interfering with the order of dismissal. Secondly, it was urged that in any case if it be held that an enquiry by the management was necessary in law it should be proper to hold that the Assistant Labour Commissioner had jurisdiction to hold enquiry himself. Thirdly, it was urged that the view taken by the Assistant Labour Commissioner that no enquiry had been held was perverse and the High Court ought to have set aside that finding and given relief on the basis that an enquiry had been properly held.

For a proper understanding of the first contention raised it is necessary to remember briefly the scheme of the jurisdiction conferred by section 16. Section 16 (1) authorises the State Government to make a reference to the Labour Commissioner in disputes touching, *inter alia*, the dismissal of an employee. Section 16 (2) provides that if the Labour Commissioner finds “ after such enquiry as may be prescribed ” that the dismissal was “ in contravention of any of the provisions of this Act or in contravention of the Standing Orders made or sanctioned under the Act ”, he may give certain reliefs to the employee. According to the employee the order of dis-

dismissal was in contravention of the provisions of section 31 of the Act. That section provides *inter alia* that if any employer intends to effect a change in respect of any industrial matter mentioned in Schedule 2 he shall give 14 days' notice of such intention in the prescribed form to the representative of the employees. Among the industrial matters mentioned in Schedule 2 is included "dismissal of any employee except in accordance with law or as provided for in the Standing Orders settled under section 30 of this Act". Admittedly, the appellant concern had no Standing Orders on the matter of dismissal. The question is whether the dismissal of the employee without an enquiry was "in accordance with law". If it is not, the Labour Commissioner would have jurisdiction. If the dismissal without such an enquiry be in accordance with law the Labour Commissioner would have no jurisdiction to interfere with the order of dismissal made by the management. The learned Attorney-General argues that a dismissal made in accordance with the ordinary law of contract as between master and servant must be held to be "in accordance with law" within the meaning of this Schedule, and the fact that any industrial law as evolved by the Courts in industrial adjudication under the Industrial Disputes Act should not colour our consideration of the matter. As at present advised, we are unable to see why the word "law" in this phrase "in accordance with law" as used in Schedule 2 should be given a restricted connotation so as to leave out industrial law as evolved by the Courts.

In dealing with industrial disputes under the Industrial Disputes Act and other similar legislation, Industrial Tribunals, Labour Courts, Appellate Tribunals and finally this Court have by a series of decisions laid down the law that even though under contract law, pure and simple, an employee may be liable to dismissal, without anything more, industrial adjudication would set aside the order of dismissal and direct reinstatement of the workmen where dismissal was made without proper and fair enquiry by the management or where even if such enquiry had been held the decision of the Enquiring Officer was perverse or the action of the management was *mala fide* or amounted to unfair labour practice or victimisation, subject to this that even where no enquiry had been held or the enquiry had not been properly held the employer would have an opportunity of establishing its case for the dismissal of the workman by adducing evidence before an Industrial Tribunal. It seems to us reasonable to think that all this body of law was well known to those who were responsible for enacting the Central Provinces and Berar Industrial Disputes Settlement Act, 1947 and that when they used the word "in accordance with law" in clause 3 of Schedule 2 of the Act they did not intend to exclude the law as settled by the Industrial Courts and this Court as regards where a dismissal would be set aside, and reinstatement of the dismissed workmen ordered. If the word "law" in Schedule 2 includes not only enacted or statutory law but also common law, it is difficult to see why it would not include industrial law as it has been evolved by industrial decisions. We are therefore *prima facie* inclined to think that the first contention raised by the learned Attorney-General that it was not necessary in law to hold an enquiry before dismissing this employee in view of the terms of his employment, cannot be accepted. At the same time we are inclined to think that there is considerable force in the second contention that even though a proper enquiry was not held by the management the Labour Commissioner had jurisdiction to hold an enquiry himself. This would *prima facie* be sufficient ground for holding that the Industrial Court was wrong in interfering with the order made by the Assistant Labour Commissioner and the High Court ought to have issued an appropriate writ to quash the order made by the Industrial Court. We are aware of the view taken by the Bombay High Court in *Provincial Transport Services v. Assistant Labour Commissioner*<sup>1</sup>, and *Maroti v. Member, State Industrial Court*<sup>2</sup> that the "law" in the phrase "in accordance with law" in Schedule 2 does not include Industrial Law. For the reasons mentioned above, we are inclined to think, with respect, that this view is not correct. We think it unnecessary however to discuss this matter more closely or record our definite and final con-

<sup>1</sup> 60 Bom.L.R. 72.

<sup>2</sup> 60 Bom.L.R. 1422.

clusion on these questions as for the reasons to be presently stated we are of opinion that in any case the third ground raised on behalf of the appellant should succeed.

As has already been stated the employee's case was that no enquiry had been held by the management. This was denied by the management and it was alleged that an enquiry had been held. The management produced before the Assistant Labour Commissioner papers showing the evidence that was claimed to have been recorded during such enquiry. According to this record, three persons were examined during the enquiry—the employee Kundalik himself, one conductor Sureswar and the conductor Vyankati. At the bottom of this paper there is Kundalik's signature and also Vyankati's signature. The employee's case was that his signature had been obtained on a blank paper and the document was then written up. In the absence of any evidence, it is impossible however for any reasonable Judge of facts to persuade himself that the management would descend to this step of forgery for the purpose of getting rid of an employee in the position of Kundalik. The Assistant Labour Commissioner himself has not said that he believes the explanation of the employee that his signature had been obtained on a blank paper. He was however impressed by the fact that signatures of Kundalik and Vyankati only were obtained and the Enquiring Officer's signature does not appear on the paper. While it would certainly have been better if the Enquiring Officer had also put his signature on the paper containing the statements, that omission cannot possibly be a ground for thinking that he did not hold the enquiry. The conclusion of the Assistant Labour Commissioner that "there are sufficient grounds to doubt whether an enquiry was really made" must therefore be held to be perverse. It has often been pointed out by eminent Judges that when it appears to an Appellate Court that no person properly instructed in law and acting judicially could have reached the particular decision the Court may proceed on the assumption that misconception of law has been responsible for the wrong decision. The decision of the Assistant Labour Commissioner that no enquiry had been held by the management amounts therefore, in our opinion, to a clear error in law. The Industrial Court erred in thinking that it was bound by this decision of the Labour Commissioner and this error on its part was, in our opinion, an error so apparent on the face of the record that it was proper and reasonable for the High Court to correct that error.

On behalf of the respondent it was sought to be argued that even if an enquiry had been held it has not been shown that the employee had an opportunity of cross-examining witnesses or adducing evidence of his own. It is not open however for the learned Counsel to raise this question in view of the fact that the employee did not ever make any such case himself. His case, as already stated, was that no enquiry had been held at all. No alternative case that the enquiry held was improper because he had not been allowed to cross-examine witnesses or to adduce evidence was made by him. It does not appear that in the present proceedings the employee stated clearly that he wanted to lead evidence and was not allowed to do so or that he wanted to cross-examine witnesses and was denied an opportunity to do so. It is not open to him therefore to raise this question for the first time before us.

We have accordingly come to the conclusion that the High Court ought to have held that there was a proper enquiry held against this employee and the management dismissed him on finding on that enquiry that the two charges against him had been fully proved, and that there was no reason to think that the management acted *mala fide*. The appellant was therefore entitled to an order for setting aside the order of the Industrial Court.

Accordingly, we allow the appeal, set aside the order of the High Court and order that the appellant's application under Articles 226 and 227 of the Constitution be allowed and the order of the State Industrial Court be set aside and the order of the Assistant Labour Commissioner dismissing the employee's application be restored. There will be no order as to costs.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. SUBBA RAO AND J. R. MUDHOLKAR, JJ.

Mahabir Gope

.. Appellant \*

v.

The State of Bihar

.. Respondent.

*Penal Code (XLV of 1860), section 303—Applicability—Person undergoing sentence of imprisonment for life convicted of offences under sections 302/34 and 302/149—If liable to be sentenced to death under section 303.*

Where a person is convicted under section 302/34, it must be held that he has committed the murder as much as the person by whose act the victim was killed. The position would not be any different even if the accused had been convicted under section 302/149. In such a case again the true legal position is, that in law, he must be deemed to have committed the murder as much as the actual murderer has.

Therefore section 303 cannot be confined only to cases where a person undergoing sentence of imprisonment for life actually and in fact himself commits an act which results in the death of the victim. The said section would apply even in cases where a person undergoing sentence of imprisonment for life is convicted either under section 302 read with section 34 or under section 302 read with section 149.

Appeal by Special Leave from the Judgment and Order, dated the 22nd December, 1961, of the Patna High Court in Criminal Appeal No. 118 of 1961 and Death Reference No. 2 of 1961.

*M. S. K. Sastri*, Advocate (at State expense), for Appellant.

*D. P. Singh* and *D. Gupta*, Advocates, for Respondent.

The Judgment of the Court was delivered by

*Gajendragadkar, J.*—The appellant Mahabir Gope along with eleven other persons was charged before the First Additional Sessions Judge, Bhagalpur, with having committed offences under sections 147 and 302 read with section 34 of the Indian Penal Code. The prosecution case was that on or about the 12th day of June, 1959, the appellant and the other accused persons formed themselves into an unlawful assembly at Bhagalpur Special Central Jail and in prosecution of the common object of the said assembly, Rambilash Singh, the Chief Head Warder, Mohammed Ilyas and Panchanand Panjiara, the Night Watchmen, were assaulted. That is how an offence under section 147 was committed by the members of the said unlawful assembly.

The prosecution case further was that on or about the said date and at the same place, in prosecution of the common object of the said assembly, the members of the assembly had committed an offence of rioting with deadly weapons while the Chief Head Warder and the two Night Watchmen were assaulted, and thereby all the members of the assembly rendered themselves liable to be punished under section 148 of the Indian Penal Code.

The third charge framed against the members of the unlawful assembly was that in furtherance of the common object of the said assembly, Rambilash Singh was intentionally assaulted by some of the members of the assembly with a view to cause his death and that made all the members of the assembly liable under section 302/34, Indian Penal Code.

Against the appellant, an additional charge was framed under section 303, Indian Penal Code. Under this charge, the prosecution case was that since the appellant had committed an offence punishable under section 302/34, whilst he was undergoing sentence of imprisonment for life, he rendered himself liable to be punished only with death under section 303.

\*Criminal Appeal No. 76 of 1962.

The learned trial Judge has convicted the appellant of the offences charged and acting under section 303, has sentenced him to death. For the purpose of this appeal, it is unnecessary to refer to the findings made by the learned trial Judge in regard to the prosecution case against the other members of the unlawful assembly.

The appellant challenged the correctness of the order of conviction and sentence thus passed against him by preferring an appeal in the High Court at Patna. The sentence of death imposed on him was also referred to the High Court for confirmation. The High Court has confirmed the sentence of death and dismissed the appeal preferred by the appellant. It is against this order that the appellant has come to this Court by Special Leave ; and the only point on which Special Leave has been granted is in regard to the scope and effect of the provisions of section 303 of the Indian Penal Code. That is how the narrow point which arises for our decision is whether the case of the appellant who has been convicted under section 302/34 in the present case falls under section 303.

Mr. M. S. K. Sastri, for the appellant contends that section 303 can apply only to a case where an accused person who is already undergoing a sentence of imprisonment for life commits murder and is convicted of it. He emphasises the fact that section 303 can be applied only where at the subsequent trial, the prisoner is found to have committed another murder. The expression "commits murder" used in section 303 implies that the prisoner must have himself committed the murder and thus become liable to be convicted under section 302 without recourse to section 34 ; and since in the present case, the appellant has been convicted not because it is found that he himself committed the murder of Rambilash Singh, but he has been found constructively guilty of murder and is convicted under section 302/34 on the ground that the said murder had been committed in furtherance of the common intention of all the accused persons. It is true that the Courts below have convicted the appellant under section 302/34 and it is in the light of the said conviction that the point raised by Mr. Sastri has to be considered.

For the purpose of section 303, when can it be said that a person has committed a murder ? Is it necessary that a person must be proved to have himself committed the murder before section 303 can be invoked against him, or would it be enough if it is shown that the person is constructively guilty of murder under section 302/34 ? The appellant's argument seeks to derive support from the fact that both sections 299 and 300 refer to a specific act. Section 299, for instance, provides that whoever causes death by doing an act with the intention or knowledge therein specified, commits the offence of culpable homicide. In other words, it is the act done with the requisite intention or knowledge that constitutes the offence of culpable homicide. Similarly, section 300 provides that if the act by which the death is caused is done with the intention of causing death or with the intention or knowledge as specified in the three clauses of section 300, culpable homicide is murder. That again shows that it is the specified act which amounts to murder, and so, unless the act which amounts to murder, has been committed by a person himself, it cannot be said that he has committed murder under section 303. That, in substance, is the argument urged before us by the appellant.

In appreciating the validity of this argument, it is necessary to bear in mind the effect of the provisions of section 34. Section 34 provides that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. It is thus clear that as a result of the application of the principle enunciated in section 34, when the appellant was convicted under section 302/34, in law it really meant that the appellant was liable for the act which caused the death of Rambilash Singh in the same manner as if it had been done by him alone. That is the effect of the constructive liability which follows from the application of the principle laid down in section 34. Section 34 embodies the ordinary commonsense principle that if two or more persons intentionally commit an offence jointly, in substance, it is just the same as if each one of them had committed that offence. Common intention which

is the basis of the principle laid down by section 34 implies action-in-concert and that in its turn, postulates the existence of a pre-arranged plan. Therefore, if two or more persons acting in concert in pursuance of a pre-arranged plan proceed to commit an offence, section 34 steps in and provides that for the act committed by one the other is liable in the same manner as if it had been done by him alone. That being the effect of the rule prescribed by section 34, it is difficult to accept the argument that where a person has been convicted under section 302/34, it cannot be said that he has committed the offence of murder. The act which caused the death of the victim may have been committed by another person, but since the said act had been done by the other person in furtherance of the common intention shared by that person and the appellant, in law, the act must be deemed to have been committed by the appellant alone. Therefore, where a person is convicted under section 302/34, it must be held that he has committed the murder as much as the person by whose act the victim was killed.

The position would not be any different even if the appellant had been convicted under section 302/149. Section 149 provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence. It is true that the basis of constructive liability imposed by section 149 is mere membership of the unlawful assembly, whereas the basis of the constructive liability contemplated by section 34 is participation in the same action with the common intention of committing a crime. That, however, does not make any difference in the legal position that if a murder is committed by one member of an unlawful assembly in prosecution of the common object of that assembly, all members of the unlawful assembly who at the time of the commission of that offence were members of such assembly would be guilty of the offence of murder. In such a case, again, where a person is convicted under section 302/149, the true legal position is that, in law, he must be deemed to have committed the murder as much as the actual murderer has. Therefore, in our opinion, section 303 cannot be confined only to cases where a person undergoing sentence of imprisonment for life actually and in fact himself commits an act which results in the death of the victim. The said section would apply even in cases where a person undergoing sentence of imprisonment for life is convicted either under section 302 read with section 34 or under section 302 read with section 149. That being our view, we must hold that the Courts below were right in sentencing the appellant to death under section 303.

The result is, the appeal fails and is dismissed.

K.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR, K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

Rajinder Kumar and another

— *Appellants* \*

*v.*  
The State of Punjab

— *Respondent.*

*Criminal trial—Evidence—Circumstantial evidence sufficient to prove the offence—Absence of proof of motive—Effect.*

The motive behind a crime is a relevant fact of which evidence can be given. The absence of motive is also a circumstance which is relevant for assessing the evidence. But where the circumstantial evidence proves the guilt of the accused those circumstances are not weakened by the fact that the motive has not been established. It often happens that only the culprit himself knows what moved him to a certain course of action.



[In the instant case the supreme Court on appeal by Special Leave held that the accused had been rightly convicted under section 302, Indian Penal Code and sentenced to death.]

Appeal by Special Leave from the Judgment and Order, dated the 7th September, 1961, of the Punjab High Court, Chandigarh, in Criminal Appeal No. 595 of 1961 and Murder Reference No. 56 of 1961.

*A.S. R. Chari*, Senior Advocate (*Om Parkash Passey*, Advocate, Punjab High Court and *K. R. Chaudhri*, Advocates, with him), for Appellants.

*Gopal Singh* and *P. D. Menon*, Advocates, for Respondent.

The Judgment of the Court was delivered by

*Das Gupta, J.*—Three and a half year old Tonny, son of Ravindernath Goyal was last seen alive on 5th January, 1961. A month later on 5th February, 1961, his dead body was discovered, buried in the compound of the house of the Goyal's next door neighbour Jagdish Chander and Rajinder Kumar. These two, Jagdish Chander and Rajinder Kumar are father and son. Tonny's body was found in a gunny bag with a blood-stained piece of cloth stuffed in the mouth; a blood-stained towel was also found in the bag. When the cloth stuffing the mouth was removed the tongue was found pushed to the left side backward locking the throat. The Civil Surgeon, Bhatinda, who held the *post mortem* examination has given his opinion that the death of the child was due to asphyxia resulting from suffocation caused by packing the mouth with the cloth.

Rajinder Kumar has been convicted under section 302 of the Indian Penal Code for the murder of Tonny and sentenced to death. The father Jagdish Chander has been convicted under section 201 of the Indian Penal Code for having concealed the dead body of Tonny.

The prosecution case is that on 5th January, 1961, between 3-30 P.M. and 4 P.M. when Tonny was at the house of Jagdish and Rajinder and the other inmates of the house were away Rajinder killed Tonny by stuffing his mouth with a cloth and kept the dead body in the Garage in their house; and that that very night he and his father buried the dead body in the compound after putting it in a gunny bag. For the entire month after the child was found missing and before his body was discovered frantic efforts had been made by the distracted parents and grand-father of Tonny to trace him but in vain. Indeed, according to the prosecution, the two accused made a show of taking part in the search for the boy.

The details of the prosecution story are best told by enumerating the circumstances on which the prosecution relied to prove its case that Rajinder killed Tonny.

(1) A few days before 5th January, 1961, relations between Rajinder Kumar on the one hand and Tonny's father Ravinder Kumar on the other had become strained because Rajinder had talked to Tonny's mother in a way which her husband did not like and Ravinder asked Rajinder to stop his visits to their house. After this Tonny who used to be a frequent visitor to Rajinder, whom he called "uncle," also stopped his visits for some days; but then three or four days before 5th January, he resumed his visits to Rajinder as Rajinder had been giving him sugar drops. (2) Tonny was last seen alive at about 3-30 P.M. in Rajinder's house playing with Rajinder. (3) At that time Rajinder's wife, his father, his sister and his servant Bhagat Ram were away from the house, Bhagat Ram having been actually sent out by Rajinder at about 2-30 P.M. (4) At about 4 P.M. Tonny's mother Sudha called out to Tonny after preparing the tea but not getting any response asked Rajinder Kumar, whom she saw coming from the direction of the Garage as to where Tonny was. (5) Rajinder Kumar said that Tonny had gone with his wife to the house of Jagdish Goyal. Rajinder's wife came back to the house just at that time and in reply to Sudha said that Tonny had not gone with her but had been playing about with her husband. Sudha then enquired again from Rajinder about Tonny and he said Tonny might have gone to the shop of Baba to fetch a toast. (6) At the same time Bhagat Ram returned with his cycle and wanted to keep it into the Garage but finding that Rajinder had locked the Garage he asked him to open the lock but Rajinder asked

him to put the cycle in the house saying that he had put some important articles in the Garage and so would not open the lock. (7) That night Bhagat Ram slept in the kitchen and Rajinder Kumar who had gone out of the house after 4 o'clock pretending to take part in the search for Tonny returned home at 12 midnight and put on the light in the kitchen where Bhagat Ram had laid himself down and asked him why he had not gone to sleep. (8) At about 2 o'clock when Bhagat Ram came out to answer a call of nature he saw Rajinder and his father in front of the Garage talking to each other but, they kept quiet when he drew near. (9) Rajinder remained outside the house for about another two hours during which Bhagat Ram was awake. (10) On 9th January, Rajinder met Raj Kumar a teacher in a primary school on the bridge in Mohalla Jori Bhatia and asked for his assistance in removing the dead body of the child after confessing to him that he had murdered him. (11) Rajinder was interrogated by the police on the 3rd and 4th February, and ultimately on the 5th February when he was taken by the police to his own house he made a statement that he had buried the dead body of the child at a distance of 6 to 7 ft. from the main gate towards the right, wrapped in a gunny bag close to the Gul Mohar tree. (12) Then Rajinder Kumar pointed out a place, dug there about 4 ft. deep and Tonny's body was found there in a gunny bag with his own garments on and with a banian thrust in his mouth. (13) There was also a towel which has been identified by Bhagat Ram as belonging to the accused Rajinder Kumar, inside the bag. (14) Human blood was detected on the banian, towel and the bag as also on the garments on the body of the child.

Both the accused pleaded not guilty and urged that they had been implicated falsely on unjustified suspicion.

The Trial Court as also the High Court found all the 14 circumstances mentioned above fully established by evidence. Mr. Chari, who appeared before us, on behalf of both the appellants, does not contest that if these circumstances have been proved they fully justify the conclusion reached by the Courts below. He, however, tried to persuade us that the High Court was wrong in finding some of the circumstances, at least, to have been proved.

It appears to us that if no other circumstances than the second, fifth and twelfth circumstances mentioned above have been proved they are by themselves sufficient, without anything more, to justify the conclusion that Rajinder Kumar murdered Tonny. If Tonny was last seen with him at 3-30 P.M. on the 5th and the dead body is discovered in his own house buried under the earth and this fact is known to him and it is further found that about 4 P.M. on the 5th he made contradictory statements as to where Tonny had gone, these three circumstances are incapable of explanation on any other reasonable hypothesis than that he killed the boy between 3-30 and 4 P.M. on that day and some time later buried the body. Mr. Chari suggested that it might be that Tonny was killed somewhere else by some unknown person and then that killer found some opportunity of bringing the dead body into the appellant's house and buried it there. This appears to us as an absurd suggestion, hardly worth serious consideration. If somebody else killed Tonny elsewhere, what could be the reason for his taking the trouble of carrying the body to the appellant's house and burying it there at the risk of being surprised by somebody before he had finished the job? Apart from that the fact remains, as proved beyond shadow of doubt, that the place where the body had been buried was known to Rajinder and it was Rajinder himself who dug the ground at the right place for the recovery of the body. Mr. Chari drew our attention to the statement of prosecution witness No. 5 Mrs. Gurdeep Kaur Girin that the police came to the house of the accused two days before the recovery of the child's deadbody and that some pits were dug by the police on that day and that Rajinder was with them. All the police officers have denied that any digging was done before the 5th. It seems to us clear that Mrs. Gurdeep Kaur while giving evidence in June, 1961 has made a mistake about the date on which she saw the digging being done. But even assuming that what she says was correct it would not show that Rajinder did not know the place where the body had been kept; it would merely show that even then he was keeping quiet about it.

Some comment has been made by the learned counsel on the failure of the police to discover by themselves during their numerous visits to the appellant's house that the ground was disturbed. We find nothing surprising in this. Few people not even the police officers who had some suspicion against the accused from the very commencement of the investigation would expect the accused to be so daring as to bury the dead body in the compound of his own house. The fact that any disturbed condition of the ground was not discovered by the police before the 5th February can be therefore no ground for thinking, as the learned counsel suggests, that the body had been brought there from somewhere else shortly before the 5th.

While we think the few circumstances mentioned above are by themselves sufficient to justify the conviction of Rajinder Kumar under section 302 of the Indian Penal Code, we think it proper to add that nothing has been shown to us that would justify us in interfering with the conclusion of the Courts below that the 6th, 7th, 8th and the 9th circumstances mentioned above have also been proved. Mr. Chari wanted us to believe that Bhagat Ram was taken into police custody on the 31st January and it is strange that his statement was not recorded by the police before the 5th February. The High Court has believed the evidence of the Inspector of Police, Ram Nath Paras, that Bhagat Ram was not available at Patiala for recording of his statement till the 7th February, 1961 and we cannot see anything that calls for our re-appraisal of the evidence on this question.

The criticism levelled by Mr. Chari against the evidence of prosecution witnesses Raj Kumar and Mahabir Dayal for proving the 10th circumstance mentioned above about Rajinder's extra-judicial confession is more plausible. These two witnesses are on their own showing persons of shady character and they would not be above giving false evidence to oblige the police, if the police wanted it. But, it is difficult to see why the police should think it necessary to secure the services of these persons for giving false evidence when the practically conclusive evidence afforded by the discovery of the dead body in the appellant's compound was already there. The story of the extra-judicial confession of Rajinder Kumar, as given by Raj Kumar and supported by Mahabir Dayal is therefore likely to be true. But it is really unnecessary for the purpose of the present case to examine the question further. For, any support from this 10th circumstance regarding the extra-judicial confession is not needed by the prosecution.

What moved Rajinder Kumar to commit this dastardly deed is not clear. The strained relations between Tonny's father Ravinder on the one hand and Rajinder on the other because the former had asked Rajinder to stop his visits as mentioned in the first circumstance specified above does not explain his action. Let us assume, however, that even this evidence of strained relations had not been given. That can be no reason for doubting the evidence, as regards the other circumstances that has been adduced or for hesitating to draw the inescapable conclusion from them. The motive behind a crime is a relevant fact of which evidence can be given. The absence of a motive is also a circumstance which is relevant for assessing the evidence. The circumstances which have been mentioned above as proving the guilt of the accused Rajinder are however not weakened at all by this fact that the motive has not been established. It often happens that only the culprit himself knows what moved him to a certain course of action. This case appears to be one like that.

We are satisfied that Rajinder Kumar has rightly been convicted under section 302 of the Indian Penal Code and sentenced to death.

The case against Jagdish Chander rests on Bhagat Ram's evidence. This witness, a youth of seventeen, joined the service of the accused about 5 or 6 months before January, 1961. He was a servant in the house on the 5th January. He has given evidence that when on that day at about 9 or 10 P.M. he asked for the key of the Garage to bring out his bedding which was there the appellant Jagdish said that he would do it himself and actually brought out the bedding. He has further said that when at about 2 o'clock he got up to make water he saw Rajinder and his

father, walking about in front of the Garage, that they were talking to each other but kept quiet when he went out ; and also that he could not sleep for about a couple of hours after that and that during all this time, both the father and son—Rajinder and Jagdish—remained outside the house. We have already stated above that there is no reason for us to interfere with the view taken by the Courts below that Bhagat Ram's evidence should be believed. Once that is believed the conduct of Jagdish as proved by it becomes incapable of explanation on any other reasonable hypothesis than that after coming to know that Rajinder had murdered Tonny he helped Rajinder in concealing the dead body by burying it underground. Mr. Chari suggested that Rajinder might have told his father that the boy had died accidentally on receiving an electric shock and the learned counsel drew our attention in this connection to the fact that an electric wire made into a ring was found on the thumb of the dead body. The medical examination shows however that this wire had nothing to do with the boy's death. Mr. Chari accepts that position, but argues that still Rajinder might have falsely told his father that the death was due to electrocution. There might have been some force in this argument were it not for the fact that a blood-stained *banian* was found stuffed in the mouth of the boy and a blood-stained towel was also found in the gunny bag. There is therefore no scope for the argument that Jagdish was misinformed by his son Rajinder about how Tonny had met his death. The circumstances that have been proved clearly establish the prosecution case that Jagdish after knowing on the 5th January, 1961, that an offence had been committed by the murder of Tonny caused some evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment. He has therefore been rightly convicted under section 204 of the Indian Penal Code and the sentence passed on him is proper.

The appeal is accordingly dismissed.

K. S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—K. C. DAS GUPTA AND J. R. MUDHOLKAR, JJ.

Nand Kumar and others

.. *Appellants\**

v.

The State of Rajasthan

.. *Respondent.*

*Criminal trial—Confessions—Retracted confession—Necessity of corroborating evidence to sustain conviction—Limits.*

Courts ordinarily consider it unsafe to convict any accused person on the basis of his retracted confession except where the truth of such confession is established by corroboration in material particulars by independent evidence. What is sufficient corroboration for this purpose has to be decided in each case on its own facts and circumstances. It may, however, be generally stated that where the prosecution by the production of reliable evidence which is independent of the confession and which is also not tainted evidence like the evidence of an accomplice or the evidence of a co-accused, establishes the truth of certain parts of the account given in the confession and these parts are so integrally connected with other parts of the accused's confession, that a prudent judge of facts would think it reasonable to believe, in view of the established truth of these parts, that what the accused has stated in the confession as regards his own participation in the crime is also true, that is sufficient corroboration. More than this is not needed ; less than this is ordinarily insufficient.

Appeal by Special Leave from the Judgment and Order, dated the 14th October, 1961, of the Rajasthan High Court in D.B. Criminal Appeals Nos. 263, 264, 278 and 280 to 282 of 1961 and D.B. Criminal (Death Sentence and Confirmation) Case No. 5 of 1961.

O. C. Chatterjee, Renu Chatterjee and S. N. Mukherjee, Advocates, for Appellants.

A. S. Adl Chari, Senior Advocate (Kan Singh and P. D. Menon, Advocates, with him), for Respondent.

\* Criminal Appeal No. 181 of 1961.

The Judgment of the Court was delivered by

*Das Gupta, J.*—On 4th June, 1960, eight boys, (1) Munna, son of Manohar Lal; (2) Ram Prakash son of Ram Baboo; (3) Laxmi, son of Vidhya Ram; (4) Pooran, son of Gulab Chand; (5) Kedar, son of Ram Kumar; (6) Mohan, son of Banke Lal; (7) Suresh, son of Chandra Shekhar and (8) Jagdish, son of Mitthan Lal, all of Dholpur City went to the temple of Mangal Bharti for a picnic. None of them returned home. On the morning of 6th June, all these boys were found dead near a well in Gundaria forest. Each of the bodies bore numerous injuries, which according to the evidence of the doctor, who held the *post mortem* examination, caused the deaths. Seven of the bodies were found naked; only the dead body of Munna had clothes on. The hands of each were tied from behind with ribbons of their trousers and their mouths were found gagged. Watches and rings, buttons and currency notes, which some of these boys had with them had disappeared.

The four appellants, *viz.*, Nand Kumar, Brij Kishore *alias* Kalua, Lakhan and Murari along with one Jagdish were all convicted for the murder of these eight boys under section 302 of the Indian Penal Code and were all sentenced to death. All of them were also convicted by the Additional Sessions Judge under section 377 of the Indian Penal Code and section 395, Indian Penal Code.

The conviction of these four appellants under section 302 was confirmed by the High Court of Rajasthan and the sentences of death passed on Nand Kumar, Kalua and Lakhan were also confirmed. The High Court reduced the sentence on Murari to one of imprisonment for life. The conviction of all the appellants under section 395 of the Indian Penal Code and the sentences passed thereunder were also confirmed. The present appeal is by Special Leave granted by this Court.

The prosecution case is that when the eight boys were at Mangal Bharti temple on 4th June, 1960, these four appellants and Jagdish joined them there. In the evening before they all left the temple, these appellants took Munna and his seven companions one by one into a narrow lane behind the temple and robbed them of their belongings and valuables by force. All the 13 then left the temple together and instead of returning to Dholpur City, the appellants took the boys to the Gundaria forest. It is said that before the appellants took the boys to Gundaria they had agreed among themselves to murder them. They all waited near a pillar till about 9-30 P.M. after which while Jagdish and Murari remained near the boys to keep watch over them—Jagdish being armed with a gun—first of all Munna was called away from the other boys and killed by the other three, *viz.*, Nand Kumar, Kalua and Lakhan. The other seven were also taken away one by one and killed by these three. For these killings they used a knife which belonged to Murari and which Murari had brought with him on that day. After all the eight boys had been killed the booty was distributed among these five. Nand Kumar took in his share an Agfa camera which had been taken from Munna and also Munna's wrist watch; Lakhan got a wrist watch and a ring which had belonged to Ram Prakash; Kalua's share was a wrist watch belonging to Laxmi Chand and also a ring which belonged to him. Murari got four buttons and some money in cash and Jagdish also got some buttons and cash.

The relatives of the boys had become anxious when the boys did not return on the night of 4th June. Information was received from Pura, also of Dholpur City, who had also gone to the Mangal Bharti on that day that he had seen the eight boys and also Nand Kumar, Lakhan, Kalua, Jagdish and Murari together at the Mangal Bharti. Inquiries were then made at the houses of these five but they were all found absent. On the following morning, *i.e.*, the 5th June, 1960, at 6 A.M., Shiv Narain, the brother of Munna lodged information with the Kotwali Police, Dholpur, about the disappearance of these boys. He added his suspicion that these boys might have fallen into the hands of dacoits belonging to the Panna dacoit's gang and kidnapped by them. On the same day at about 10 P.M. Bhanwar Singh, the Circle Inspector of Dholpur succeeded in contacting these appellants. Ultimately all the five made

statements which were recorded; giving information about their having kept the articles taken from some of the boys. At about 4 A.M. on 6th June, 1960, the Circle Inspector accompanied by the Deputy Superintendent of Police left for Gundaria forest in a police jeep along with the appellant Nand Kumar and some other persons. Nand Kumar led the police to the top of a small hill and pointed out the five cycles of Munna and his companions lying at one spot and the dead bodies of the eight boys lying at different places in the vicinity of the hill in the jungle. He also took out a knife, Exhibit 18, from a bush near one of the dead bodies. Then Nand Kumar went to his house with the police and there pointed out a camera and a wrist watch which had fallen to his share. He also brought out certain blood-stained clothes. After this the appellant Murari was taken by the police to his house and he brought out a gold ring with the name of R. P. Gupta inscribed in enamel, a wrist watch belonging to R. P. Gupta deceased and some blood-stained clothes. The police then took Murari to his house where Murari brought out some gold buttons and currency notes. Then Kalua took the police to his house and brought out a wrist watch and a ring inscribed with the name of S. K. Gupta and also some blood-stained clothes. According to the prosecution three of these appellants, viz., Nand Kumar, Murari and Kalua made confessions before the Sub-Divisional Magistrate—which were recorded by the Magistrate—Nand Kumar on the 14th June, Kalua on the 15th June, and Murari on the 17th June. A statement of Lakhan was also recorded by the Magistrate on the 15th June, 1960.

All the accused pleaded not guilty. They denied that they had made any statement at all before the Magistrate and also denied the recovery of any articles from their houses.

The conviction of each of the three appellants, Nand Kumar, Kalua and Murari on the charge of murder was based by the Trial Court and the High Court on the confession said to have been made by him taken with the circumstances which the Courts below considered sufficient corroboration to establish the truth of what was stated in the confession. On behalf of each of these appellants it has been contended before us that the confession was not voluntary and was not admissible in evidence, and secondly, that there was not sufficient corroboration to establish the truth of the confession. On behalf of Nand Kumar an additional plea was pressed that he made no confessional statement at all before the Magistrate and the document which is now produced as a record of his confessional statement was written up in his absence on papers on which Nand Kumar has been made to put his signature. The argument of the learned counsel, so far as we can understand it was that the jail register entry showing 1.25 as the time when Nand Kumar was brought back to the jail on the 14th June, 1960, was originally 10.25 but had been dishonestly altered to 1.25 by erasing the zero. Proceeding on the basis that 10.25 was the time noted the learned counsel argues that this shows that Nand Kumar was not before the Magistrate from 10.30 onwards when according to the record of the confession, Exhibit P-62, the Magistrate was recording his confession. In the first place we do not find any reasonable ground for thinking that the entry originally made was 10.25. As the entry stands, it is 1.25 and there is no evidence, circumstantial or otherwise to indicate that it was not so all along. Even supposing it was originally 10.25 and then altered to 1.25 the only reasonable conclusion would be, if the Magistrate's own evidence on the presence of the accused before him is taken into consideration, that somebody had made a mistake in making the entry and then corrected it to 1.25. We agree with the High Court that there is absolutely no reason to doubt the testimony of the Magistrate on this point and there can be no possible doubt whatsoever that the record Exhibit P-62 contains what was stated by the accused Nand Kumar before the Magistrate on 14th June, 1960.

As regards each of these confessions, the learned counsel has urged, as already indicated, that it was not voluntary. Three grounds were urged in support of the contention. They are : (1) that there was a delay of about a week or more in sending the accused to the Magistrate for recording the confessions ; (2) that Circle Inspector Paras Singh visited the judicial lock-up, where these confessing accused had been

kept on the 13th June, and (3) that the confessing accused had been kept in solitary cells.

As regards the first ground it does not appear that any enquiry was made from the Investigating Officer as to why he did not send up the accused for recording his confession earlier. But, if, as is suggested by the learned Counsel, the accused persons were ready to make their confessional statements before the Magistrate as early as the 6th June, it is not clear to us what the police stood to gain by delaying the recording of these confessions. On the contrary, it would seem natural for the police to hurry up with the recording of the confessions lest on second thoughts the accused might refuse to make the statement. In considering the visit of Paras Singh to the judicial lock-up on the 13th June, we have to remember that though Paras Singh was not examined as a witness by the prosecution the prosecution did offer to examine him when in the course of the argument a grievance was sought to be made by the defence of such non-examination. The Sessions Judge was prepared to examine him as a Court witness but the defence objected to it. It is not open, therefore, to the defence Counsel now to complain that Paras Singh was not examined.

It is not disputed that Paras Singh did visit the judicial lock-up on the 13th June. From the petition on which the order permitting him to visit the jail was made, it is reasonable to think, however, that this visit was made for steps in the investigation in some other case having no connection with the present accused. No doubt, as regards the voluntary nature of the confessions, therefore, arises from this visit of Paras Singh to the Judicial lock-up on the 13th June.

Nor can any conclusion be reasonably based on this point from the fact that the accused persons were kept in solitary cells. Such keeping in solitary cells is often considered prudent by the jail authorities for the safety of the confessing accused themselves. It is true that by being kept in the solitary cell an accused is kept away from the influence of other under-trial prisoners who might try to induce them to resile from the confession, but it is no ground for thinking that when a particular accused had been kept in a solitary cell the confession made by him was not voluntary.

We are satisfied that the confessions of all these three accused were voluntary and rightly admitted into evidence. Each of the accused however retracted the confession made by him. Courts ordinarily consider it unsafe to convict any accused person on the basis of his retracted confession except where the truth of such confession is established by corroboration in material particulars by independent evidence. What is sufficient corroboration for this purpose has to be decided in each case on its own facts and circumstances. It may, however, be generally stated that where the prosecution by the production of reliable evidence which is independent of the confession and which is also not tainted evidence like the evidence of an accomplice or the evidence of a co-accused, establishes the truth of certain parts of the account given in the confession and these parts are so integrally connected with other parts of the accused's confession, that a prudent judge of facts would think it reasonable to believe, in view of the established truth of these parts, that what the accused has stated in the confession as regards his own participation in the crime is also true, that is sufficient corroboration. More than this is not needed ; less than this is ordinarily insufficient.

Applying this test to the three retracted confessions before us, we are satisfied that the High Court was right in its conclusion that each of these confessions has been so well corroborated by independent evidence in material particulars that what the accused has said in the confession as regards his own participation in the crime has been proved to be true.

Turning first to Nand Kumar's confession, we find that after describing how with the other four accused persons he went to Mangal Bharti with a gun which belonged to one Fakhruddin and took part in the picnic with the 8 boys, Munna and his companions there, goes on to say about the conspiracy to rob these boys of their valuables and then actually robbing them of these valuables. He further stated in confession how they further conspired to take all the boys "under the pretext of

sight-seeing walk (*Sair ka Bahana*) and saying them to reach the city *en route* Gundaria and Barakhambha and to return their articles there and to murder them after taking them to some lonely place." took the boys to Gundaria and there how one by one all the 8 boys were killed by himself, Kalua and Lakhan, stabbing them with the knife which Murari had brought. He further stated that after the boys had been murdered the booty was distributed among themselves and he took in his share Munna's Agfa camera and a wrist watch belonging to Munna. Not only has the prosecution established by independent evidence that Nand Kumar with the other accused went to Mangal Bharti and met the 8 boys there and remained with them for some time taking part in the picnic, but it has further been proved by reliable and independent evidence that Munna's Agfa camera and the wrist watch belonging to him which he had taken with him that day to Mangal Bharti were recovered from Nand Kumar's house and that it was actually he who produced these himself from behind the floor carpet on the Tand of his house and that he also produced some clothes lying behind the floor carpet, viz., a white banian and a langot and a white shirt smeared with blood. There is satisfactory evidence that the blood on these articles was human blood.

It is necessary to mention also that the fact that he had knowledge of where the dead bodies were, was discovered by a statement made by him before the police, which has been rightly admitted into evidence under section 27 of the Evidence Act and on the morning of 6th June, 1960, it was he who took the police party to the place where the bodies were. The knife, Exhibit 18, was also pointed out by him from under a bush near one of the dead bodies after he had previously stated that he had left the knife at the place of occurrence.

These facts and circumstances provide overwhelming corroboration of Nand Kumar's confession that he was one of the three persons who inflicted the injuries on the 8 boys which caused their deaths. He has, therefore, been rightly convicted under section 302 of the Indian Penal Code.

Kalua also confessed having been one of the three who inflicted knife injuries on some of the boys and having held some of the other boys while his companions, Nand Kumar and Lakhan inflicted the injuries. Besides describing the visit to the Mangal Bharti and meeting the eight boys there he also spoke about robbing the boys of their belongings and thereafter about the conspiracy to kill the boys after taking them to Gundaria. He went on to say in the confession how the boys were taken to Gundaria and murdered there. He further stated about the distribution of the booty and said that he got in his share the wrist watch belonging to Laxmi and the ring on which the name of S. K. Gupta was written. Kalua's presence at the Mangal Bharti and meeting the eight boys there have been proved by independent evidence. It has also been established by reliable independent evidence that the wrist watch of Laxmi and also his ring, which originally belonged to his brother Sri Kishan Gupta and so bore the inscription S. K. Gupta, were recovered from Kalua's house and that it was Kalua himself who produced these from inside a box on a Tand in his house and further that Kalua himself produced a trouser and a shirt from behind another box lying behind the same Tand both of which articles had blood marks. It has been established satisfactorily that the blood was human blood. These facts and circumstances provide sufficient corroboration of Kalua's confession. He has, therefore, been rightly convicted under section 302 of the Indian Penal Code.

Murari also spoke in his confession of how he went to Mangal Bharti and met the eight boys; about the conspiracy to rob the boys of their belongings and how they were actually robbed and thereafter of the conspiracy of taking the boys to Gundaria and killing them there. He also spoke in his confession of how after the boys were taken to Gundaria forest the boys were called one by one and killed while he and Jagdish remained guard over the boys when they were waiting for their turn to be called. He has mentioned in his confession about his taking his own knife with him and has also stated that this knife was used in committing the murders. Speaking



about the distribution of the booty he said that he got in his share four buttons, one of which was completely of gold while the other three were gold topped. Independent evidence has established in addition to Murari's presence at Mangal Bharti and his meeting with the eight boys there, the recovery of four such buttons and Rs. 48 in currency notes and that it was Murari himself who produced these buttons and the notes from inside a box in his room after he had himself made a statement, which was rightly admitted under section 27 of the Evidence Act, about having kept these things in his house. The knife (Exhibit 18) which was found near one of the dead bodies was also identified by witness Ram Singh (P.W. 14) as the knife which he had seen Murari carrying before the occurrence. It is not an ordinary knife. It is a long knife of which the blade is 6 inches long and the handle 7 inches, with a special button arrangement on pressing which it opens and closes.

These facts and circumstances established by independent evidence provide sufficient corroboration of Murari's own confession that in furtherance of a common intention of himself and his companions to kill these eight boys he kept guard over the boys when one by one they were being called away and killed by his companions, Nand Kumar, Kalua and Lakhan. He has, therefore, been rightly convicted under section 302 of the Indian Penal Code.

The fourth appellant, Lakhan, did not confess having participated in any of the crimes. To prove the charge under section 302 of the Indian Penal Code against him the prosecution relied on a number of circumstances: (1) His presence with Nand Kumar and others at Mangal Bharti and meeting the eight boys there; (2) the recovery from his room of part of the booty taken from the boys, *viz.*, a gold ring bearing the inscription R. P. Gupta, and a wrist watch; (3) the recovery of a blood-stained banian and under-wear from his room and (4) the fact that these were produced by Lakhan himself after he had made a statement that he kept these things in his house. Along with this the prosecution wants the Court to take into consideration the statement made in the retracted confessions of Nand Kumar, Kalua and Murari that Lakhan took actual part in the killing of the eight boys. The circumstances mentioned above have clearly been established by legal evidence and they themselves are almost sufficient, without anything more, to justify a conclusion that Lakhan took part in the killing of the eight boys in furtherance of the common intention of himself and others to cause their deaths. It is proper and quite permissible to take into consideration, then, the statements made as regards the part taken by him in the retracted confessions of Nand Kumar, Kalua and Murari. These statements supply whatever assurance was needed to convince the Court that Lakhan took part in the killing of the eight boys in furtherance of the common intention of himself and others. His conviction under section 302, Indian Penal Code, was, therefore, fully justified.

Some argument was addressed to us on the question of motive. It has been urged that while according to the confessions Nand Kumar and others decided to kill these boys so that they might not speak about the crimes already committed by the accused, *viz.*, dacoity and sodomy, the learned Judges of the High Court seemed to think that Munna was killed by Nand Kumar as an act of revenge for the insult he had offered to Nand Kumar's sister and the other seven boys were killed so that they might not speak about this murder of Munna. The evidence in the present case is so clear to show that these four persons committed the murder of the eight boys that we think it unnecessary to speculate about the motive which induced them to murder the eight boys who had done no harm. Whether it was sadistic pleasure or the fear of discovery of robbery, or anything else the fact remains proved by overwhelming evidence that these four did actually commit the murder of the eight innocent boys.

It is hardly necessary to say anything about the conviction of these persons of an offence under section 395 of the Indian Penal Code. It is sufficient to mention only that the evidence discussed above in connection with the charge of murder provides sufficient basis for the convictions under section 395 of the Indian Penal Code.

The sentences of death passed on Nand Kumar, Kalua and Lakhan are the only possible sentences. The High Court has thought fit to treat Murari more leniently and sentenced him only to imprisonment for life. We cannot interfere with that sentence, even though it appears to us that this leniency was uncalled for.

The appeal is dismissed.

K.S.

*Appeal dismissed..*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR, K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

The State of West Bengal

.. *Appellant \**

*v.*

S. N. Basak

.. *Respondent.*

*Criminal Procedure Code (V of 1898), sections 439 and 561-A—Powers under—Limits—Investigation under Chapter XIV by Police into cognizable offence—If can be interfered with and quashed by the High Court.*

The powers of investigation into cognizable offences are contained in Chapter XIV of the Criminal Procedure Code. Section 154 which is in that chapter deals with information in cognizable offences and section 156 with investigation into such offences and under these sections the police has the statutory right to investigate into the circumstances of any alleged cognizable offence without authority from a Magistrate and this statutory power of the police to investigate cannot be interfered with by the exercise of power under section 439 or under the inherent power of the Court under section 561-A of the Criminal Procedure Code.

*King Emperor v. Khwaja Nazir Ahmed*, L.R. 71 I.A. 203 (212) : (1945) F.L.J. 48 : (1945) 1 M.L.J. 86 (P.C.), *relied on.*

Excepting that the person accused had appeared before the Court, had surrendered and had been admitted to bail, there was no case pending at the time to enable the accused person to invoke jurisdiction of High Court under sections 439 and 561-A of the Criminal Procedure Code.

Appeal from the Judgment and Order, dated the 6th September, 1960, of the Calcutta High Court in Criminal Revision No. 647 of 1960.

*B. Sen*, Senior Advocate, (*P. K. Chatterjee* and *P. K. Bose*, Advocates, with him), for Appellant.

*D. C. Roy* and *P. K. Mukherjee*, Advocates, for Respondent.

The Judgment of the Court was delivered by

*Kapur, J.*—This is an appeal against the judgment and order of the High Court of Calcutta quashing the investigation started against the respondent in regard to offences under section 420, Indian Penal Code, and section 120-B read with section 420 of the Indian Penal Code.

On 26th March, 1960, Sub-Inspector B. L. Ghose of Police Enforcement Branch filed a written report before the Officer-in-charge Chakdah P. S., alleging that the respondent in conspiracy with three others had cheated the Government of West Bengal of a sum of Rs. 20,000. The respondent at the time was an Assistant cum-Executive Engineer, Kanchrapara Development Area, Kalyani Division. On the basis of this report a First Information Report was drawn up and the police started investigation. On 4th April, 1960, the respondent surrendered in the Court of the Judicial Magistrate at Ranaghat and was released on bail for a sum of Rs. 1,000. The respondent then on 9th May, 1960, filed a petition under sections 439 and 561-A of the Criminal Procedure Code and prayed for a rule against the District Magistrate Nadia, to show cause why the case pending in the Court of the Senior Judicial Magistrate, Ranaghat, arising out of the Chakdah Police Station Case No. 33, dated 26th March, 1960, be not quashed. The High Court held :—

“In our view, the statutory power of investigation given to the police under Chapter XIV is not available in respect of an offence triable under the West Bengal Criminal Law Amendment (Special Courts) Act, 1949, and that being so, the investigation concerned is without jurisdiction. In so saying, we are conscious of the observations of their Lordships of the Privy Council in *Nazir Ahmad's case*”

\* Crl. Appeal No. 30 of 1961.

I. L.R. 71 I.A. 203, 212: (1945) F.L.J. 48: (1945) 1 M.L.J. 86 (P.C.).

12th April, 1962.

and therefore quashed the police investigation of the case holding it to be without jurisdiction. It is against this judgment and order that the State has come in appeal to this Court on a certificate granted by the High Court under Article 134 (1) (c).

At the time the respondent filed the petition in the High Court only a written report was made to the police by the Sub-Inspector of Police Enforcement Branch and on the basis of that report a First Information Report was recorded by the Officer-in-charge of the Police Station and investigation had started. There was no case pending at the time excepting that the respondent had appeared before the Court, had surrendered and had been admitted to bail. The powers of investigation into cognizable offences are contained in Chapter XIV of the Code of Criminal Procedure. Section 154 which is in that Chapter deals with information in cognizable offences and section 156 with investigation into such offences and under these sections the police has the statutory right to investigate into the circumstances of any alleged cognizable offence without authority from a Magistrate and this statutory power of the police to investigate cannot be interfered with by the exercise of power under section 439 or under the inherent power of the Court under section 561-A of the Criminal Procedure Code. As to the powers of the Judiciary in regard to statutory right of the police to investigate, the Privy Council in *King Emperor v. Khwaja Nazir Ahmad*<sup>1</sup> observed as follows :—

“The functions of the judiciary and the police are complementary, not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course subject to the right of the Court to intervene in an appropriate case when moved under section 491 of the Criminal Procedure Code to give directions in the nature of *habeas corpus*. In such a case as the present, however, the Court's functions begin when a charge is preferred before it, and not until then. It has sometimes been thought that section 561-A has given increased powers to the Court which it did not possess before that section was enacted. But this is not so. The section gives no new powers, it only provides that those which the Court already inherently possesses shall be preserved and is inserted, as their Lordships think, lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal Procedure Code and that no inherent power had survived the passing of that Act.”

With this interpretation, which has been put on the statutory duties and powers of the police and of the powers of the Court, we are in accord. The High Court was in error therefore in interfering with the powers of the police in investigating into the offence which was alleged in the information sent to the Officer-in-charge of the Police Station.

We therefore allow this appeal and set aside the order of the High Court. The investigation will now proceed in accordance with law.

K.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR, K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

Pratapray Manmohandas

... *Appellant*\*

v.

The Bombay Bullion Association, Ltd. and others

.. *Respondents.*

*Bombay Bullion Association Bye-laws—Bye-law 155 (4)—Scope—Failure of member to submit kapli on settlement day—Power of Clearing House Committee to declare him a defaulter—Committee if required to give time for filing kaplis or making payment when a member has made it clear that he is not going to pay.*

What Bye-law 155 (4) of the Bombay Bullion Association requires is that in the event of default of submission of a *kapli* (voucher) on the settlement day the Clearing House Committee shall call the defaulter and demand an explanation and thereafter if such *kapli* is not submitted, declare him a defaulter. But it does not mean that the time to be given has to be one or half an hour or any other specific period. It is not a requirement of the Bye-law that the Clearing House Committee should call the person defaulting either by telephone or by letter or giving him notice and considering the promptitude with which the payments have to be made and the dates fixed for the finishing of all the transactions it will be unreasonable to hold that such is the procedure contemplated by clause (4) of Bye-law 155. The

1. (1945) 1 M.L.J. 86 : (1945) F.L.J. 48 : L.R. 71 I.A. 203, 212 (P.C.).

period of time must in each case, depend upon the circumstances but where it is made absolutely clear that no payment is going to be made the giving of time is wholly without utility.

Appeal by Special Leave from the Judgment and Decree, dated the 12th July 1957, of the Bombay High Court in Appeal No. 71 of 1956.

C. K. Daphtary, Solicitor-General of India and S. G. Patwardhan, Senior Advocate (Naunit Lal, Advocate, with them), for Appellant.

A. V. Viswanatha Sastri, Senior Advocate, (N. P. Nathwani and K. L. Hathani, Advocates, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

*Kapur, J.*—This is an appeal against the judgment and decree of the High Court of Bombay confirming the decree passed in its original jurisdiction. The appellant who was the plaintiff in the suit, was trading under the name and style of Messrs. Pratapray Manmohandas as a bullion merchant and trader in Bombay. He was member of the Bombay Bullion Association, Ltd., which was defendant No. 1 in the suit and is respondent No. 1 in the appeal. Respondents 2 to 7 were defendants 2 to 7 and at all material times were members of the Clearing House Committee appointed under the Bye-laws of the 1st respondent. The appellant had also added as parties in the suit defendants 8 to 12 but they are no longer parties as their names were struck off in the trial Court.

The appellant entered into certain forward transactions with defendants 8 to 12 during the period from 30th May, 1949 to 30th June, 1949. On 13th June, 1949, the *hawala* rate of these transactions was fixed and on 14th June, 1949, the appellant "admitted a clearance sheet under Bye-law 131 of the Bye-laws of 1st respondent in which outstanding transactions for the *valan day*" (settlement) were entered. They included the transactions which had been entered into with defendants 8 to 12. All these transactions were *rajued* (tallied) on the following day. According to the bye-laws of the respondent association the balance sheet had to be submitted and money *kaplis* (vouchers) had to be given. In this balance sheet which was submitted the appellant did not include the amounts which were due to defendants Nos. 8 to 12 or the transactions he had entered into on the ground that he disputed the transactions entered into with those defendants as they were fictitious and illegal. On 21 June, 1949, which was the *valan day* (settlement day) the appellant claimed reference to arbitration in regard to those items under bye-law 38. On that day defendant 8 to 12 complained to the respondent Association that the appellant had not issued the necessary *kaplis* (vouchers). At 3 P.M. on the same day the appellant received notice from the Clearing House Committee, respondents 2 to 7, calling upon him to appear before them. The appellant appeared with his Solicitor and Counsel and in contention before the Clearing House Committee was that it had no jurisdiction to proceed with the matter because he was claiming arbitration and the dispute between him and defendants 8 to 12 had to be settled by the arbitrators. The Committee heard the explanation and passed a resolution under bye-law 155 (4) declaring the plaintiff a defaulter and it is this resolution which is the matter in controversy between the parties.

On 20th June, 1952, the appellant brought a suit for declaration that the resolution in dispute dated 21st June, 1949, was bad in law, inoperative, *ultra vi* and not binding on the appellant and also for damages against the respondent. He also prayed for reinstatement as a member of the respondent Association.

The plea taken by the respondents was that the transactions in dispute were not *phatak* (fictitious and inoperative); that at the meeting on 21st June, 1949, defendants 8 to 12 had complained that amounts of money had become payable to them from the appellant; that at the said meeting the appellant had made it clear that he would not give any *kaplis* (vouchers) and had therefore defaulted as they were therefore entitled to declare him defaulter under bye-law 155 (4) of the respondent Association.

The suit was tried by Tendolkar, J. Several issues were raised but the appellant led no evidence and respondents 1 to 8 examined Mr. Trikamdas Dwarkadas a Solicitor of Bombay, who was present at the meeting of the Clearing House Committee on 21st June, 1949. On 6th June, 1956, the suit was dismissed and an appeal was taken to the Appeal Court which was also dismissed and the appellant has come in appeal by Special Leave.

The trial Court had held that the plea taken by the appellant that after he and his Counsel were heard they were made to leave the meeting and the hearing proceeded in their absence was not established; that for bye-law 38 relating to arbitration becoming operative, it was necessary to have a genuine dispute between the parties and mere pretence of a dispute in order to evade or postpone the liability on the *valan day* is not sufficient; that where the defaulter appears before the Clearing House Committee and denies liability on some flimsy pretexts and thereby makes it abundantly plain that he does not wish to give a *kapli*, giving him an opportunity for giving a *kapli* was a mere formality the failure to observe which does not lead to the conclusion that the decision of the Clearing House Committee is void. Considering the evidence of Mr. Trikamdas Dwarkadas it was clear that the appellant had no intention of admitting the liability or discharging it. He also held :

“Moreover, it is not the plaintiff’s case that if time had been given he would have given the *kaplis* and therefore assuming that it is necessary under bye-law 155 (4)—a point which I did not wish to decide in this case—in the present case to give such time would have been perfectly futile and therefore failure to give such time does not invalidate the action which was taken by the Clearing House Committee.”

The Appeal Court concurred in dismissing the appeal. It held that on a proper interpretation of bye-law 155 (4) it was necessary for the Clearing House Committee to give an opportunity to the appellant to submit his *kaplis* because that was the meaning of the words “and can thereafter, if such a *kapli* is not submitted, the Clearing House Committee can declare him a defaulter.” In other words the Committee had to give the member a *locus penitentiae* and that after giving his explanation a member could still submit a *kapli* and escape the penalty of being a defaulter. From the conduct of the appellant and his Counsel however it appeared quite clearly that having challenged the jurisdiction of the Committee and having told them that they could not proceed in the absence of reference to arbitration the appellant had no intention of giving the *kaplis*.

Two questions have been raised in this appeal; (1) the question of interpretation and (2) that no opportunity was given after the decision was made against the appellant to give the *kaplis*. The submission of the respondents on the other hand was that appellant had deliberately made a false allegation that after he made a submission he was asked to leave. This was to buttress his plea that the matter was decided in his absence. The Courts below have found that whether an opportunity had been given to the appellant or not, he had no intention of giving his *kaplis*. Issue No. 5 was specific on this point. That issue was “whether the appellant and his legal advisers voluntarily left the meeting after indicating that the appellant was not going to give the *kaplis*” and that was the principal question which has been raised throughout the course of these proceedings. Even in the statement of the appellant’s case he has put in the forefront of the questions for decision the question whether the appellant left the meeting dated 21st June, 1949, voluntarily after indicating his unwillingness to submit the *kaplis*. The finding of both the Courts on this question was against the appellant. In our opinion that is fully justified by the evidence on the record. According to the evidence days were fixed by the Association for the settlement of all transactions which had been entered into for that period. According to the chart of Bombay Bullion Exchange settlement had to be made, i.e., the monies had to be paid by 3-30 P.M. on 21st June, 1949. The appellant made it clear, however, that he was not going to make the payment in accordance with the requirements of the *valan day*; on the other hand he stated that he will pay after the arbitration award was made.

The evidence produced by the respondents makes it abundantly clear that the contention of the appellant was that no action should be taken unless the arbitration which he had asked for had been disposed of and after saying that he went away. This is clear from the Attendance Book of Mr. Trikamdas Dwarkadas, Solicitor. The respondent Association was therefore justified in taking the action that it did. The minutes of the proceedings of the Clearing House Committee dated 21st June, 1949, also show that the appellant and his legal advisers stated that they wanted to go to arbitration and that no action should be taken against them until the arbitrators had given their award. It is stated therein that the appellant admitted that the transactions which his Solicitor said were fictitious were entered in his books and they had been *rajued* (tallied) and that he had shown the transaction in his "*ilias*" (clearance sheet). All this indicated that the contention raised by the appellant was false and had been raised in order to gain time. In these circumstances it cannot be said that the respondent Committee acted without giving due consideration to the facts of the case or in any precipitate manner.

Bye-law 155 (4) reads:

"If any member does not submit a *kapli* in the prescribed form in respect of the amount found claimable from him to his party (creditor), the Clearing House Committee shall call him and demand an explanation from him and can thereafter, if such a *kapli* is not submitted the Clearing House Committee can declare him a defaulter."

That clause requires that in the event of default of submission of a *kapli* the Clearing House Committee shall call the defaulter and demand an explanation and thereafter if such *kapli* is not submitted, declare him a defaulter. It was contended that the meaning of this is that first the Clearing House Committee is to demand an explanation and after such an explanation is given, time has to be given for the purpose of enabling the person not giving the *kapli* to submit his *kaplis*. In our opinion the interpretation of the learned Chief Justice of the High Court is in consonance with the language used, i.e., first the explanation is called and after explanation is given and some decision is arrived at in regard to the validity of the reasons for not giving the *kaplis* then the person complained against can file the *kaplis* but it does not mean that the time to be given has to be one or half an hour or any other specific period.

As we have said above the appellant had made it clear that he was not going to make the payment and had just left after making his submissions. It is not a requirement of the bye-law that the Clearing House Committee should call the person defaulting either by telephone or by letter or by giving him a notice and considering the promptitude with which the payments have to be made and the dates fixed for the finishing of all the transactions it will be unreasonable to hold that such is the procedure contemplated by clause (4) of bye-law 155. The period of time, must in each case, depend upon the circumstances, but where it is made absolutely clear that no payment is going to be made the giving of time is wholly without utility.

In our view the High Court has given a correct decision and we therefore dismiss this appeal with costs.

K. S.

*Appeal dismissed.*

# THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. C. DAS GUPTA AND J. R. MUDHOLKAR, JJ.

India Marine Service Private, Ltd.

.. Appellant \*

v.

Their Workmen

.. Respondents.

*Industrial Dispute—Order of dismissal in the interest of discipline on charge of insubordination—Mention in the order “that our past record which is very much against you” has also been considered—Tribunal if competent to go behind the finding and order of dismissal—Strike and lock-out—Wages for lock-out period—Right to—Principles.*

Where on a charge of insubordination and rule and insolent behaviour to his superior an employee after enquiry into the charge by the Managing Director is dismissed from service the Tribunal is not competent to go behind the finding of the Managing Director and consider for itself the evidence adduced before him. The fact that after arriving at the conclusion that the employee's services must be terminated in the interest of discipline, he added “we have also taken into consideration your past record which is very much against you” only gives additional weight to the decision already arrived at and does not make the decision to dismiss the employee any thing other than one based only on the charge of insubordination.

In a case where a strike is unjustified and the lock-out is justified the workman would not be entitled to any wages at all. Similarly where the strike is justified and the lock-out is unjustified the workmen would be entitled to the entire wages for the period of strike and lock-out. Where however, a strike is unjustified and is followed by a lock-out which at its inception was justified but becomes unjustified a case for apportionment of blame arises.

Where the attitude of the company was a reasonable one and it even proposed to the union of workmen and through it to its workmen that work should go on, that the dispute should be taken before the conciliation officer for conciliation and that in the meanwhile they were prepared to grant some interim relief to the workmen, but instead of accepting this reasonable offer the union spurned it contemptuously and for coercing the company encouraged its members to strike work even if it was intended to be a token strike, the strike was unjustified and the lock-out ordered on that day was justified. Though such lock-out was justified at its commencement in continuance for 53 days [was wholly unreasonable and therefore, unjustified. In the circumstances the blame was apportioned roughly half and half between the company and the workers and the workmen were directed to get half their wages for the lock-out period.

Appeal by Special Leave from the Award, dated the 31st January, 1961, of the Third Industrial Tribunal, West Bengal, in Case No. VIII-28 of 1960.

*T. Kumar*, Advocate, for Appellant.

*B. P. Maheshwari*, Advocate, for Respondents.

The Judgment of the Court was delivered by

*Mudholkar, J.*—In this appeal by Special Leave against an award made by the Third Industrial Tribunal, West Bengal, two questions arise for consideration. The first is whether the dismissal of Robin Bose, Purchaser, was justified and the other is whether the appellant's employees were entitled to any wages for the period between 13th November, 1958 and 4th January, 1959, during which there was a lock-out.

In a sense the two questions are separate and we will first mention the facts relevant to the question regarding the dismissal of Robin Bose. Bose was a clerk, designated as a Purchaser by the appellant company. On 13th September, 1958 at about 10-00 A.M., R. N. Chatterjee, under whose supervision Bose was working, took from the latter's table the purchase estimate book maintained by him for the purpose of checking an item of purchase made by him on 18th August, 1958. Shortly afterwards Bose went up to Chatterjee and asked for the book to be returned. Chatterjee told him that the book should be left there for some time and would be returned to him after he (Chatterjee) had finished with it. Bose, however, got annoyed. He flared up and started abusing Chatterjee in an objectionable language in the presence of the entire office staff. Though reminded by Chatterjee of the need

for maintaining discipline in the office he did not pay any heed to Chatterjee. Then he told him in a loud and threatening voice : " Don't teach me office discipline. I have worked in bigger offices, you shall have to bear consequence, if you don't return the book right now. " Chatterjee reminded him that he was " purchase-in-charge " and had every right to see the registers maintained by the purchase department. This only infuriated Bose further and he said " I shall see you—I know how to teach you a good lesson, " and left Chatterjee's table. Shortly thereafter the Managing Director came and Chatterjee reported the matter to him about Bose. Bose was then called by the Managing Director to his Chamber and asked for an explanation for shouting and behaving in a rude manner with his superior. It would appear that Bose was not repentant and after leaving the Managing Director's room again started being nasty to Chatterjee and said in a loud voice " If you don't arrange to return the book at once I will teach you a good lesson on the road. " Thereafter the Managing Director came out of the room and with difficulty succeeded in making him quiet.

In consequence of this incident a charge-sheet was issued to Bose and he was asked to give his written explanation for his rude and insolent behaviour towards his superior officer R. N. Chatterjee. He was also asked to explain another matter, that is, not bringing to Chatterjee's notice the fact that on 18th August, 1958, he had bought copper sheets at Rs. 3-1-0 per lb. from Messrs. Joydeb Nityalal Paramanick and when he was sent again to purchase the same commodity from the same firm on 21st August, 1958, he bought it at the rate of Rs. 3-4-0 per lb. In his reply, dated 20th September, 1958, Bose stated that what was set out in the charge-sheet was distortion of facts and that at the time of enquiry he would place all the facts before the enquiry officer. He, however, denied the charges. To this the company replied saying that the statement was vague and that in his own interest and in the interest of justice he should give his precise explanation. To this Bose replied saying that he had nothing further to say. Then some further correspondence ensued between Bose and the company and as a result of something which Bose had said in one of his letters he was served with a second charge-sheet.

Eventually an enquiry was held by the Managing Director at which he found that the two charges set out in the first charge-sheet were made out. On the basis of the findings the company dismissed Bose from his post. No separate report had been drawn up by the Managing Director who held the enquiry but all material things were set out in the letter, dated 29th October, 1958, addressed by him to Bose.

The Tribunal observed that no enquiry was held on the second charge-sheet and, therefore, the charge-sheet should be ruled out from consideration and that as the findings were based not merely on the charges set out in the first charge-sheet but on certain other charges which Bose was not given an opportunity to explain the enquiry was vitiated and the dismissal could not be sustained. It, therefore, proceeded to consider the evidence adduced before the domestic Tribunal and held that the allegation of insubordination against Bose has not been proved by convincing evidence. It, therefore, ordered the reinstatement of Bose with full back wages and allowances from the date of his dismissal upto the date on which he will be reinstated.

It is no doubt true that no enquiry was held on the charges contained in the second charge-sheet and therefore, that charge-sheet was rightly kept out of consideration by the Managing Director and the Tribunal. It is true that a reference is made to certain extraneous matters in the letter of the Managing Director, dated 29th October, 1958, addressed to Bose. But considering the letter as a whole and particularly the last paragraph it seems to us to be abundantly clear that the decision of the Managing Director to dismiss Bose was based only on the charge of insubordination. In this connection it will be useful to quote that paragraph :

" After giving your matter our very careful consideration, we have, therefore, painfully come to the decision that in the interest of discipline and business you should be forthwith dismissed from our service. Accordingly your service will no longer be required by us from today. In taking this action against you we have also taken into consideration your past record which is very much against you."



It is true that the last sentence suggests that the past record of Bose has also been taken into consideration. But it does not follow from this that that was the effective reason for dismissing him. The Managing Director having arrived at the conclusion that Mr. Bose's services must be terminated in the interest of discipline, he added one more reason to give additional weight to the decision already arrived at. Upon this the Tribunal would follow that the Tribunal was not competent to go behind the finding of the Managing Director and consider for itself the evidence adduced before him. The order of the Tribunal quashing the dismissal of Bose and directing his reinstatement is, therefore, set aside as being contrary to law.

Coming next to the question of the lock-out it is abundantly clear that the lock-out was ordered by the company because of a sudden strike, no doubt a token one, launched by the workmen. It would appear that the strike was only to be partial and notice of it was given on the previous day. In order to appreciate the background of the strike and lock-out it is desirable to set out certain facts. By an agreement, dated 23rd November, 1956, the management had agreed to pay 37 days' wages to its factory employees for the year 1955-56 as bonus. It was also agreed at that time that bonus was not to be a condition of service. On 10th September, 1958, the respondent union made a demand for seven days' bonus over and above the usual bonus of 37 days. In reply to this the company stated in its letter, dated 11th October, 1958, that it does not agree to the demand that bonus is payable as a condition of service, that although no bonus is payable the company, as a gesture of goodwill, have offered to pay to the workmen 15 days' consolidated wages as bonus and expressed the hope that its offer would be accepted. On 13th October, 1958, the company again wrote to the union pointing out that the workmen had resorted to go slow tactics which adversely affected their business which was of repairing ships and then observed :

"We should also strongly suggest that the management and the Union jointly approach the Labour Directorate at once on the following issues :

1. Whether the workmen are justified in stopping overtime as and when they like.
2. Bonus.

In consideration of this we may even agree to pay the workmen certain sum of money, as may be recommended by the Conciliation Officer, on advance account pending the adjudication by the Tribunal of the issue of bonus. It should, however, be clearly understood, that if the Tribunal decides against payment of bonus or allows bonus less than the amount advanced to them, the entire advance money or the difference will be recovered from the wages of the workmen by instalments as may be directed by the Tribunal.

This suggestion was peremptorily rejected by the respondent union by its letter dated 15th October, 1958, the relevant portion of which is as follows:

"We would simply ask where had your good sense for tripartite conference before which you have adopted now we think as a measure of delaying tactics. We know better what to do when we will be asked to attend tripartite conference."

On 16th October, 1958, the company wrote to the Labour Commissioner, West Bengal, apprising him of the situation in the factory and requesting him to intervene. It seems that on that day a representative of the company discussed the situation with Mr. Basu, the Assistant Labour Commissioner. Next day the company wrote to Mr. Basu in which it observed that although the financial position of the company does not justify the demand of bonus the company was prepared to make *ex gratia* payment of bonus on the same basis as in the previous year subject to three conditions:

"(i) the Union condemns the workmen's conduct in stopping overtime since 10th October, 1958, and putting the company to considerable loss.

(ii) the Union undertakes to see that the workmen do not stop doing overtime in future.

(iii) the bonus is not to be considered as a condition of service."

On 5th November, 1958, the respondent Union wrote to the company a letter in which they made ten demands, the first of which was that 37 days' wages as bonus should be paid to all workmen at the works and head office. Then they went on a

partial strike on 13th November, 1958. On that very day the company published a lock-out notice on its notice board and served copy thereof on the union. That notice reads thus :

" For sometime past the workmen by taking resort to organised slow down and by refusing to work overtime and by keeping a strike notice hanging on us have to a great extent crippled our ship repairing business and have made it difficult for us to accept major ship repairs or large orders. Today the workmen have resorted to a strike when we have on our hands a ship in dry dock awaiting unlocking today and another ship is due to sail in two days' time. This strike is definitely illegal and in consequence of this illegal strike we have no choice but hereby to declare lock-out.

The lock-out continued till 5th January, 1959, on which date the company's works were re-opened. The termination of the lock-out was brought by a settlement made between the parties on 3rd January, 1959. In that settlement it was agreed that 1% of the sale proceeds of the ship repairing section, less sales tax, for the whole year will be paid as bonus to the workmen irrespective of profit and loss of the company and 15 days' wages will be paid as Puja bonus to the workmen every year irrespective of profit and loss of the company. It is not necessary to refer to the other terms of the agreement.

It seems to us that the attitude of the company was a reasonable one and that it even proposed to the union and through it to its workmen that work should go on, that the dispute should be taken before the Conciliation Officer for conciliation and that in the meanwhile they were prepared to grant some interim relief to the workmen. But instead of accepting this reasonable offer the union spurned it contemptuously and for coercing the company encouraged its members to strike work on 13th November, 1958. It is true that the strike was intended to be a token one. But the object of that strike being to circumvent settlement in an amicable manner, even though the company was ready for such settlement, we have no doubt that the strike was unjustified. It is in the light of this finding that the lock-out has to be judged. In our opinion, while the strike was unjustifiable the lock-out when it was ordered on 13th November, 1958, was justified. It seems to us, however, that though the lock-out was justified at its commencement its continuance for 53 days was wholly unreasonable and, therefore, unjustified. In a case where a strike is unjustified and is followed by a lock-out which has, because of its long duration, become unjustified it would not be a proper course for an Industrial Tribunal to direct the 'payment of the whole of the wages for the period of the lock-out. We would like to make it clear that in a case where the strike is unjustified and the lock-out is justified the workmen would not be entitled to any wages at all. Similarly where the strike is justified and the lock-out is unjustified the workmen would be entitled to the entire wages for the period of strike and lock-out. Where, however, a strike is unjustified and is followed by a lock-out which becomes unjustified a case for apportionment of blame arises. In our opinion in the case before us the blame for the situation which resulted after the strike and the lock-out can be apportioned roughly half and half between the company and its workers. In the circumstances we, therefore, direct that the workmen should get half their wages from 14th November, 1958, to 3rd January, 1959, (both days inclusive).

The appeal is thus allowed partly and the award modified to the extent to which the appeal has been allowed. We make no order as to costs.

K. S.

*Appeal partly allowed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, N. RAJAGOPALA AYYANGAR AND T. L. VENKATARAMA AYYAR, JJ.

Ramnath Verma and others, etc.

.. Appellants \*

v.

The State of Rajasthan and others (In all the Appeals)

.. Respondents

*Motor Vehicles Act (IV of 1939), section 68-C—Publication of draft scheme by State Transport Undertaking—Objections by existing permit-holders—Government appointing the Legal Remembrancer to consider the objections—Constitution of India (1950), Article 14—Scope—Discrimination envisaged under.*

Where the existing permit-holders who objected to the draft scheme published by the State Transport Undertaking never applied (before the Legal Remembrancer appointed by the State Government to consider the objections) that they wanted to lead evidence on any point in support of their objections that the scheme should be rejected in its entirety it could not be said that the Legal Remembrancer had shut out evidence relating to the inquiry before him which the objectors desired to produce. On the facts and circumstances it must be held that there was an effective hearing by the Legal Remembrancer.

Discrimination envisaged under Article 14 of the Constitution is conscious discrimination and a discrimination arising out of oversight is no discriminations at all. Where in cancelling permits a few permit-holders on the overlapping route have been left out by oversight and not favoured deliberately and the State is prepared to consider and deal with those permits in the same manner as that of the appellants, it cannot be claimed that there has been discrimination.

Appeals from the Judgment and Order, dated the 3rd May, 1961, of the Rajasthan High Court, in D.B. Civil Writs Nos. 40, 39, 45, 46 and 77 of 1961.

*Sarjoo Prasad*, Senior Advocate (*V. P. Tyagi, D. P. Gupta and B. P. Maheshwari*, Advocates, with him), for Appellants.

*C.K. Daphtary*, Solicitor-General of India (*Kansingh, S.K. Kapur and P.D. Menon*, Advocates, with him), for Respondents (In all the Appeals).

The Judgment of the Court was delivered by

*Wanchoo, J.*—These five appeals on certificates granted by the Rajasthan High Court raise common questions and will be dealt with together. Appeals Nos. 142, 144 and 145 are with respect to Jaipur-Bharatpur route, Appeal No. 143 with respect to Jaipur-Shahapur-Alwar-Himkathana route, and appeal No. 146 with respect to Ajmer-Kotah route. It appears that the Rajasthan State Roadways, which is a State Transport Undertaking, published five schemes in pursuance of section 68-C of the Motor Vehicles Act, (IV of 1939) (hereinafter called the Act). Later, the Government of Rajasthan appointed the Legal Remembrancer to consider objections to these five draft schemes. Objections were filed by the Stage carriage permit-holders who were plying on these five routes. The objections with reference to the three routes with which these appeals are concerned were heard on 7th and 14th December, 1960 and the draft schemes were approved by the Legal Remembrancer on 14th and 15th December, 1960, with slight modifications.

It appears further that the objectors relating to Jaipur-Ajmer and Jaipur-Kotah routes, which were among the five schemes, published as above, objected to these two schemes on various grounds and prayed that they should be given an opportunity to show that the two draft-schemes did not provide an efficient, adequate, economical and properly co-ordinated road transport service and should therefore be not approved and also prayed that evidence might be taken in support of their contentions. One of the permit-holders on the Jaipur-Ajmer route was Malik Ram who had contended that the draft-scheme should be rejected in its entirety and had desired to lead evidence for that purpose. The Legal Remembrancer, however, held on the basis of an earlier decision of the Rajasthan High Court in *Chandar Bhan v. The State of Rajasthan*<sup>1</sup> that it was not open to him to reject the scheme in its entirety and he could

\*C.A. Nos. 142-146 of 1962.

11th April, 1962.

1. (1961) Raj. Law Weekly 47.

only either approve of it or modify it. He further held that he could take no evidence while considering objections to the scheme and all that he had to do was to hear arguments on either side. Malik Ram then moved the Rajasthan High Court by a writ petition which was dismissed. He then came to this Court by Special Leave challenging the view taken by the Legal Remembrancer on the two points above. This Court allowed Malik Ram's appeal and held that it was open to the Legal Remembrancer to reject the draft scheme or to take evidence, if necessary, though it was pointed out that it would be within the discretion of the State Government or the officer appointed by it to hear objections to decide whether the evidence intended to be produced was necessary and relevant to the inquiry, and if so to give a reasonable opportunity to the party desiring to lead evidence to do so within reason, and that the State Government or the officer concerned would have all the powers of controlling the giving and recording of evidence that any Court has. This decision was given on 14th April, 1961 (see *Malik Ram v. State of Rajasthan*<sup>1</sup>).

In the meantime a large number of writ petitions were filed in the Rajasthan High Court challenging the approved schemes with respect to the three routes with which we are concerned in the present appeals and also with respect to the other two routes. These petitions came to be heard after the decision of this Court in *Malik Ram's case*<sup>1</sup>. So far as the petitions relating to Jaipur-Ajmer route were concerned, they were not pressed in view of the decision of this Court quashing the scheme with respect to that route and directing the Legal Remembrancer to hear the objections over again. With respect to Ajmer-Kotah route, the High Court allowed the objections on the basis of the decision of this Court in *Malik Ram's case*<sup>1</sup>, as the objectors in those cases had wanted to lead evidence on the question of rejection of the draft-scheme in its entirety, and they had not been given an opportunity to do so. But with respect to the three routes with which the present appeals are concerned, the High Court dismissed the writ petitions on the ground that there was nothing to indicate that the appellants desired to lead evidence in support of their case that the draft-schemes should be totally rejected. It was contended before the High Court that it was useless for the appellants to make any application for the taking of evidence because it would in any case have been rejected as the Legal Remembrancer had already taken the view that he could not reject the schemes as a whole. The High Court was however not impressed with this argument and held that the order of the Legal Remembrancer did not show that he thought that the draft scheme should be totally rejected but felt unable to do so because of the decision of the High Court in *Chandar Bhan's case*<sup>2</sup>. On the other hand, the High Court was of the view that the Legal Remembrancer considered the objections raised before him in detail and his order showed that he only thought that the schemes should be modified in part and were otherwise fit for approval. The appellants then applied to the High Court for certificates, which were granted ; and that is how the matter has come up before us.

The main contentions of the appellants before us are the same which they raised before the High Court. They urge that they did not get a proper hearing before the Legal Remembrancer because of his view that it was not open to him to reject the schemes in their entirety and that they were not given an opportunity to lead evidence to convince the Legal Remembrancer that the schemes should be rejected in their entirety. It is not in dispute that the appellants never applied before the Legal Remembrancer that they wanted to lead evidence on any point in support of their objections. Only in one writ petition (see C.A. No. 144 of 1962) it was averred that the Legal Remembrancer did not allow the appellants to lead evidence but that in our opinion is not correct, because the Legal Remembrancer has filed an affidavit to the effect that no such oral request was made to him by the objectors on the three routes with which these appeals are concerned. The High Court therefore was right in saying that it could not be said in these cases that the Legal Remembrancer had shut out evidence relating to the inquiry before him which the objectors desired to produce. But it is urged on behalf of the appellants that as the Legal Remembrancer had already taken one view on the case of Jaipur-Ajmer route it was useless for them

1. (1963) 1 S.C.J. 461; A.I.R. 1961 S.C. 1575. 2. (1961) Raj. L. W.

to make an application to him for leading evidence for that would have inevitably been rejected in view of the earlier judgment of the Rajasthan High Court referred to above. Even though, this may be so, it is remarkable that that did not prevent the objectors on the Jaipur-Ajmer and Jaipur-Kotah routes from making applications to the Legal Remembrancer that the draft-schemes should be totally rejected and they should be given an opportunity to lead evidence to show this. We fail to see why the appellants could not have taken the same course if they really desired to lead any evidence in order to make out their case for total rejection of the schemes with which they were concerned. It seems to us clear therefore that at the stage when objections were being heard by the Legal Remembrancer there was no desire on the part of the appellants to lead any evidence in support of their objections. Nor does it appear that when the writ petitions were filed in the High Court the appellants claimed that they had desired to lead evidence and had been shut out by the Legal Remembrancer. It was only after the decision in *Malik Ram's case*<sup>1</sup> that applications were filed taking advantage of that decision and pointing out that the wrong approach of the Legal Remembrancer in holding that it was not open to him to reject the draft-scheme in its entirety had resulted in the appellant's not getting an effective hearing. But it does not seem to have been suggested even at that stage (except in one case) that the appellants had desired to lead evidence before the Legal Remembrancer and he had shut them out. Nor was it shown at that stage what evidence the appellants could produce in support of their objections if an opportunity had been given to them. Lastly even in this Court the appellants have not indicated what evidence they could produce in support of the objections raised by them. It seems to us therefore that the appellants never really desired to produce any evidence in order to establish that the schemes as a whole should be rejected and that they put forward the contention that they would have produced evidence if given an opportunity to do so, merely taking advantage of the decision of this Court in *Malik Ram's case*<sup>1</sup>. Further it seems to us on looking at one of the objections filed before the Legal Remembrancer in C.A. No. 142 of 1962 as a sample that there was nothing in the objections which really required the giving of evidence and which would show that there could be any desire on the part of the objectors to lead evidence. The objections were of a general nature and all that was desired was that

"the State Government must weigh the objections of the undersigned with reference to the actual conditions obtaining on the said route, by such method as holding public inquiry on site, by looking into the past records of service provided by the objector, by inspecting the vehicle of the objector and by comparing the actual facilities provided by the objector."

In short, a perusal of the objections shows that what was being contended before the Legal Remembrancer was not so much that the draft-schemes were not efficient, adequate, economical and properly co-ordinated but that the objectors were providing transport service which was more efficient, adequate economical and properly co-ordinated than the service proposed to be provided in the draft-schemes. That however is hardly a reason for rejecting the draft-schemes in their entirety. Further, a perusal of the order of the Legal Remembrancer summarising the objections which are relevant under section 68-D shows that the objections were of such a nature as not to require the production of evidence in support of them for the questions of fact raised there were not in dispute. Therefore, there could be an effective hearing before the Legal Remembrancer if objectors were given a chance to put forward their arguments in support of the objections even without any evidence. We are therefore of opinion that the appellants cannot in the circumstances take advantage of the decision in *Malik Ram's case*<sup>1</sup>, and on the facts and circumstances in the present appeals there is no doubt that they had an effective hearing and the order of the Legal Remembrancer approving the schemes is not in any way vitiated by the wrong view taken by him that he had no power to reject the draft-schemes in their entirety. It seems that he considered the draft-schemes on merits as required by sections 88-C and 68-D and held that it was in accordance with the requirements of section 68-C. The facts that in some cases the number of buses might have been reduced or the

fares have been raised or some of the direct services had to be cut down where their routes overlapped with the routes in the three draft-schemes would not necessarily lead to the conclusion that the draft-schemes were not in conformity with the requirements of section 68-C. The contention therefore based on the judgment of this Court in *Malik Ram's case*<sup>1</sup> must on the facts and circumstances of these appeals be rejected.

Besides this main objection, three subsidiary points have been raised on behalf of the appellants. It appears that in some cases the objectors served routes which overlapped the three routes which have been taken over. In these cases what has been done is that in some cases the permits of the objectors have been cancelled with respect to the overlapping part of the routes while in other cases the objectors are allowed to ply even on the overlapping part but they have been forbidden to pick up passengers on the overlapping part for destinations within the overlapping part. This latter method is called making the permits ineffective for the overlapping part. Now the grievance of those whose permits have thus been rendered ineffective for the overlapping part is two-fold. In the first place, it is said that this cannot be done and in the second place, it is said that even if this can be done, the result is that those whose permits have been made ineffective for the overlapping part will not be entitled to compensation under section 68-G read with section 68-F (2). So far as the first contention is concerned, we are of opinion that there is no force in it. Under section 68-C, it is open to frame a scheme in which there is a partial exclusion of private operators. Making the permits ineffective for the overlapping part only amounts to partial exclusion of the private operators from that route. In the circumstances an order making the permit ineffective for the overlapping part would be justified under section 68-C. As to the second point, there is no doubt that where the permit is made ineffective the permit-holder would not be entitled to any compensation under section 68-G. It is said that this amounts to discrimination between those whose permits have been cancelled for the overlapping part and who would get compensation and those whose permits have been made ineffective and who would therefore not get compensation. Now we should have thought that the making of the permit ineffective for the overlapping part of the route and allowing the permit-holder to pick up passengers on the overlapping route for destinations beyond that portion of the route would be to the advantage of the permit-holder. In any case, if any permit-holder feels that he would rather have his permit cancelled for the overlapping route and get compensation it is for him to raise that objection before the State Government or the officer hearing objections. If he does not do so, he cannot be heard to say that there is discrimination because his permit has been rendered ineffective and he gets no compensation, for it may very well be that he is still better off than the person whose permit has been cancelled for the overlapping part of the route. In any case unless facts are brought on the record which would show that in spite of the advantage which the permit-holder, whose permit has been made ineffective for the overlapping part of the route, gets by picking up passengers on the overlapping route for destinations beyond that part is not equal to the compensation which he would get in case his permit is cancelled for the overlapping part of the route, there would be no case for discrimination under Article 14 of the Constitution. In the present appeals no such case has been made out on the facts and therefore we must reject this argument based upon discrimination.

Secondly, it is urged that in the case of some persons, the permits have neither been cancelled nor made ineffective over the overlapping route and this amounts to discrimination. The reply of the State to this contention is that it was by oversight that permits of certain permit-holders on the overlapping routes have not been cancelled or made ineffective and it is further said that the State would have corrected this oversight but for the stay order obtained from this Court. Discrimination envisaged under Article 14 is conscious discrimination and a discrimination arising out of oversight is no discrimination at all. In the present case the discrimination has resulted because of an oversight which the State is prepared to rectify. It is not the

1. (1963) 1 S.C.L. 461 : A.I.R. 1963 S.C. 106.

case of the appellants that these few permit-holders are being favoured deliberately for ulterior reasons. We therefore accept the reply of the State that a few permit-holders on the overlapping route have been left out by oversight and that their permits will be dealt with in the same manner as of the appellants, as soon as the stay order passed by this Court comes to an end. There is therefore no force in this contention also and it is hereby rejected.

Lastly, it is urged that the permits on the Ajmer-Kotah route have been cancelled or rendered ineffective between Deoli and Ajmer only and therefore the permit-holders are entitled to ply between Deoli and Kotah. It appears however that Deoli-Kotah part of the Ajmer-Kotah route is common to Jaipur-Kotah route from Deoli to Kotah and the necessary orders for exclusion of permit-holders have been passed in connection with the Jaipur-Kotah route. The scheme with respect to that route was quashed by the High Court and the matter sent back for re-hearing the objectors in accordance with the decision of this Court in *Malik Ram's case*<sup>1</sup>. Therefore, the question whether the permit-holders can ply on the Deoli-Kotah portion of the Ajmer-Kotah route will depend on the decision of the Jaipur-Kotah scheme. If that scheme is upheld on re-hearing, the exclusion will continue. But if that scheme is not upheld, the position may have to be reviewed in connection with this portion of the Ajmer-Kotah route. In the circumstances no relief can be granted to the appellants of the Ajmer-Kotah route at this stage.

The appeals are hereby dismissed with costs—one set of hearing costs

K.S.

*Appeals dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR, K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

Bhaiya Punjalal Bhagwanddin

.. *Appellant* \*

v.

Dave Bhagwatprasad Prabhuprasad and others

.. *Respondents.*

*Bombay Rents, Hotel and Lodging House Rates Control Act (LVII of 1947), section 27 and rule 4 of the Rules—Tenancy according to Indian calendar month—How far to be deemed to be by British calendar—Section 12—Suit for recovery of possession by landlord from tenant in arrears of rent—Notice determining tenancy—If condition precedent—Payment of arrears of rent within two months of filing suit for eviction—Effect—If entitles tenant to relief against forfeiture.*

Where a tenant is in possession under a lease from the landlord, he is not to be evicted for a cause which would give rise to a suit for recovery of possession under section 12 of Bombay Rents Control Act 1947, if his tenancy has not been determined already. It follows that whenever a tenant acts in a way which would remove the bar on the landlords right to evict him, it is necessary for the landlord to serve him with a notice determining his tenancy and also serve him with a notice under sub-section (2) of section 12 of the Act. There is nothing in section 12 which overrides the provisions of the Transfer of Property Act.

The provisions of section 27 of the Act and rule 4 of the Bombay Rents, Hotel and Lodging House Rates Control Rules, 1948, do not in any way convert the month of the tenancy according to the Indian calendar to the month of the British calendar. Therefore the notice to quit on the last day of the Indian calendar month in the instant case was valid notice and determined the tenancy.

Sub-section (2) of section 12 of the Act permits the landlord to institute a suit for the eviction of a tenant on the ground of non-payment of rent after the expiration of one month from the service of the notice demanding the arrears of rent and clause (a) of sub-section (3) empowers the Court to pass a decree in case the rent had been payable by a month. The tenant's paying the arrears of rent after the institution of the suit therefore does not affect his liability to eviction and the Court's power to pass a decree for eviction. The use of the expression "the Court may pass a decree for eviction" in sub-section (3) of section 12 does not mean that the Court has a discretion to pass or not to pass a decree for eviction in case the other conditions mentioned in that clause are satisfied.

Appeal by Special Leave from the Judgment and Order, dated the 10th October, 1961, of the Gujarat High Court in Civil Revision Application No. 378 of 1960.

1. A.I.R. 1961 S.C. 1575.

*R. Ganapathy Iyer, B. R. G. K. Achar and K. L. Hathi, Advocates, for Appellant.*

*M. S. K. Sastri and M. S. Narasimhan, Advocates, for Respondents.*

The Judgment of the Court was delivered by

*Raghubar Dayal, J.*—This appeal, by Special Leave, is against the judgment and decree of the High Court of Gujarat.

The appellant was a tenant of certain residential premises situate at Anand, and belonging to the respondents-landlords. Under a contract between the parties, he held them at Rs. 75 per mensem according to Indian Calendar. In 1951 the appellant applied for fixation of standard rent. On 31st March, 1954, the standard rent was fixed at Rs. 25 per mensem. The appellant did not pay the arrears of rent from 27th July, 1949 to 5th July, 1954. On 16th October, 1954, the landlords gave him notice to quit the premises stating therein that rent for over six months was in arrears and that he was to quit on the last day of the month of tenancy which was Kartak Vad 30 of Samvat Year 2011. The appellant neither paid the arrears of rent nor vacated the premises. On 16th December, 1954, the respondents filed the suit for ejectment basing their claim for ejectment on the provisions of section 12 (3) (a) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bom. Act LVII of 1947), hereinafter called the Act.

Within two months of the institution of the suit, the appellant deposited an amount of Rs. 1,075 in Court towards arrears of rent and, with the permission of the Court, the respondents withdrew a sum of Rs. 900 which was the amount due for arrears up to that time. The Trial Court decreed the suit for ejectment together with arrears of rent for three years and costs. An appeal against the decree for ejectment was dismissed by the appellate Court. This Revision to the High Court was also unsuccessful, and, it is against the order in Revision that this appeal has been preferred.

Four points were urged before the High Court : (1) That the month of tenancy was not by the Indian Calendar, but was by the British Calendar and that the Courts below had ignored evidence in that regard. (2) Assuming that the month of tenancy was by the Indian Calendar according to the lease, it would be deemed to be by the British Calendar in view of the provisions of section 27 of the Act. (3) As the arrears of rent had been paid within two months of the institution of the suit, the appellant be deemed to be ready and willing to pay the rent and that therefore the landlord was not entitled to recover possession of the premises. (4) It is discretionary with the Court to pass a decree for ejectment in a case under section 12 (3) (a) of the Act, as the expression used in that sub-clause is 'the Court may pass a decree for eviction in any such suit for recovery of possession'.

The High Court held that the findings of the Courts below that the month of tenancy was by the Indian Calendar was based on a consideration of the evidence on the record and therefore was binding. It also held that it could not be deemed to be by the British Calendar in view of section 27 of the Act which provided that the rent would be recovered according to the British Calendar, notwithstanding anything contained in any contract and did not provide for the tenancy to be by the month according to the British Calendar even if the tenancy under the contract was by a different Calendar. The High Court also held that the tenant's depositing arrears of rent within two months of the institution of the suit would not justify holding that the tenant was ready and willing to pay the amount of standard rent and that therefore the landlord was not entitled to recover possession of the premises in view of sub-section (1) of section 12 of the Act. Lastly, the High Court held that the Court is bound to pass a decree for ejectment under section 12 (3) (a) if it be proved that the rent was payable by the month, that it had been in arrears for a period of six months and that the tenant failed to make payment of the arrears until the expiration of the period of one month after the service of notice referred to in sub-section (2) of that section. As a result, the Revision was dismissed.



Two points have been urged for the appellant in this Court. One is that the month of the tenancy was to be by the British Calendar in view of section 27 of the Act and rule 4 framed thereunder, and that there could be no forfeiture of the tenancy when the arrears of rent had been paid within two months of the institution of the suit.

The significance of the first question is that if the appellant's tenancy was to be by the month of the British Calendar, notice to quit was a bad notice as it did not comply with the requirements of section 106 of the Transfer of Property Act and that therefore there had been no determination of the tenancy which is a condition precedent for the landlord being entitled to possession and, consequently, for instituting a suit for ejectment on any ground whatsoever, including the ground of rent being in arrears.

The first point to determine, therefore, is whether it is a condition precedent for the institution of a suit by a landlord for the recovery of possession from a tenant who has been in arrears of rent that there had been first a determination of the contractual tenancy. If it is not a condition precedent, it will not be necessary to determine whether the month of the tenancy continued to be according to the Indian Calendar according to the contract, or had been according to the British Calendar in view of section 27 of the Act. When a tenancy is created under a contract between the landlord and the tenant, that contract must hold good and continue to be in force till, according to law or according to the terms of the contract, it comes to an end. Section 111 of the Transfer of Property Act states the various circumstances in which a lease of immovable property determines. Clause (h) provides for the determination of the lease on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other. There is nothing in the Act which would give a right to the landlord to determine the tenancy and thereby to get the right to evict the tenant and recover possession. This Act was enacted for the purpose of controlling the rents and repairs of certain premises and of evictions due to the tendency of landlords to take advantage of the extreme scarcity of premises compared to the demand for them. The Act intended therefore to restrict the rights which the landlords possessed either for charging excessive rents or for evicting tenants. A tenant stood in no need of protection against eviction by the landlord so long as he had the necessary protection under the terms of the contract between him and the landlord. He could not be evicted till his tenancy was determined according to law and therefore there was no necessity for providing any further protection in the Act against his eviction so long as his tenancy continued to exist under the contract.

Sub-section (1) of section 12 of the Act provides that a landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of the Act. It creates a restriction on the landlord's right to the recovery of possession. When the landlord will have such a right is not provided by it. Ordinarily, the landlord will have a right to recover possession from the tenant when the tenancy had determined. The provisions of this section therefore will operate against the landlord after the determination of the tenancy by any of the modes referred to in section 111 of the Transfer of Property Act. What this section of the Act provides is that even after the determination of the tenancy, a landlord will not be entitled to recover possession, though a right to recovery possession gets vested in him, so long as the tenant complies with what he is required to do by this section. It is this extra protection given by this section which will be useful to the tenant after his tenancy has determined. The section does not create a new right in the landlord to evict the tenant when the tenant does not pay his rent. It does not say so, and therefore, it is clear that a landlord's right to evict the tenant for default in payment of rent will arise only after the tenancy is determined and the continued possession of the tenancy is not on account of the contractual terms but on account of the statutory right conferred on him to continue in possession so long as he

complies with what sub-section (1) requires of him. The landlord is restricted from evicting the tenant till the tenant does not do what he is required to do for peaceful possession under sub-section (1) of section 12. We are therefore of opinion that where a tenant is in possession under a lease from the landlord, he is not to be evicted for a cause which would give rise to a suit for recovery of possession under section 12 if his tenancy has not been determined already. It follows that whenever a tenant acts in a way which would remove the bar on the landlord's right to evict him, it is necessary for the landlord to serve him with a notice determining his tenancy and also serve him with a notice under sub-section (2) of section 12 of the Act.

In this connection reference may be made to what was stated in *Dr. K. A. Dhairyawan and others v. J. R. Thakur and others*<sup>1</sup>. In that case, the landlord granted a lease of a parcel of land to the lessees for a certain period. The lessee was to construct a building on that land. On the termination of the lease, the lessees were to surrender and yield up the demised premises including the building to the lessors. After the expiry of the period of the lease, the lessor sued for a declaration that they were entitled to the building and were entitled to claim possession of the same. The lessees pleaded that they were also lessees of the building and were protected from eviction therefrom by the provisions of the Bombay Rents, Hotel and Lodging House Control Act, 1947, and that the covenant for delivering possession of that building could not be enforced as the lease in respect of the land could not be terminated on account of the protection given by the Act. It was held that under the lease there was a demise only of the land and not of the building, and, consequently, the provisions of the Act did not apply to the contract of delivery of possession of the building. It was contended that even in such a case, possession of the building could not be given until the lease had been determined, which, in law, could not be determined so long as the respondents could not be evicted from the demised land of which they were tenants within the meaning of the Act. This contention was repelled. It was said at page 808 :

"This contention is without force as the provisions of the Act do not provide for the continuation of a lease beyond the specified period stated therein. All that the Act does is to give to the person who continues to remain in possession of the land, although the period of the lease had come to an end, the status of a statutory tenant. That is to say, although the lease had come to an end but the lessee continued to remain in possession without the consent of the lessor, he would none the less be a tenant of the land and could not be evicted save as provided by the Act."

This means that the provisions of the Act did not affect the terms of the lease according to which the lease came to an end after the expiry of the period for which it was given. The lessee's possession after the expiry of the lease was by virtue of the provisions of the Act and not by virtue of the extension of the period of the lease. It is a necessary consequence of this view that the restriction on the landlord's right to recover possession under section 12 of the Act operates after he has determined the tenancy and that till then the rights between the parties with respect to eviction would be governed by the ordinary law.

It was said in *Raghubir Narayan Lotlikar v. Fernandes*<sup>2</sup> at page 511 :

"In our opinion, section 28 (Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. Act LVII of 1947)), applies only to those suits between a landlord and a tenant where a landlord has become entitled to possession or recovery of the premises demised. Under the Transfer of Property Act a landlord becomes entitled to possession when there is a determination of tenancy. A tenancy can be determined in any of the modes laid down in section 111, and once the tenancy is determined, under section 108 (e) the lessee is bound to put the lessor into possession of the property. It is, therefore, only on the determination of the lease or the tenancy that the landlord becomes entitled to the possession of the property, and when he has so become entitled to possession, if he files a suit for a decree for possession, then section 28 applies and such a suit can only be filed in the Small Causes Court."

Again it was said at the same page :

"Section 12 postulates the fact that a landlord is entitled to recovery of possession and he is only entitled to possession under the provisions of the Transfer of Property Act. It is only when he so becomes entitled that the Legislature steps in and prevents the enforcement of his right by the protection which it gives to the tenant. No question of the application of section 12 can arise if a landlord is not entitled to possession at all."

1. (1958) S.C.J. 1060 : (1959) S.C.R. 799.

2. (1952) 54 Bom. L.R. 505.

A similar view was expressed in *Karsandas v. Karsanji*<sup>1</sup>. It was said at page 118 :

“.....that a tenancy must be duly determined either by a notice to quit or by efflux of time or under one or the other of the clauses of section 111, Transfer of Property Act, before a landlord can sue to evict his tenant on any of the grounds contained in the clauses of section 13 (1) of the Bombay Rent Act as applied to Saurashtra. Therefore, a notice determining the tenancy and calling upon the tenant to quit was in this case a necessary pre-requisite to the institution of the suit.”

The cases reported as *Rai Brij Raj Krishna and another v. S. K. Shaw & Brothers*<sup>2</sup> and *Shri Hem Chand v. Shrimati Sham Devi*<sup>3</sup> are distinguishable. In the former case, section 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act (III of 1947), came for interpretation by this Court and, in that connection it was said at page 150 :

“Section 11 begins with the words ‘Notwithstanding anything contained in any agreement or law to the contrary’, and hence any attempt to import the provisions relating to the law of transfer of property for the interpretation of the section would seem to be out of place. Section 11 is a self-contained section, and it is wholly unnecessary to go outside the Act for determining whether a tenant is liable to be evicted or not, and under what conditions he can be evicted. It clearly provides that a tenant is not liable to be evicted except on certain conditions and one of the conditions laid down for the eviction of a month to month tenant is non-payment of rent.”

In the present case, section 12 of the Act is differently worded and cannot therefore be said to be a complete Code in itself. There is nothing in it which overrides the provisions of the Transfer of Property Act.

*Shri Hem Chand's case*<sup>3</sup> dealt with the provisions of section 13 (1) of the Delhi and Ajmer Merwara Rent Control Act (XXXVIII of 1952). This section provided that no decree or order for the recovery of possession of any premises shall be passed by any Court in favour of the landlord against a tenant, notwithstanding anything to the contrary contained in any other law or any contract. It was held that the Rent Control Act provided the procedure for obtaining the relief of ejectment and that being so the provisions of section 106 of the Transfer of Property Act had no relevance, in considering an application for ejectment made under that Act. There is nothing in the Act corresponding to the provisions of section 13 (1) of the Delhi and Ajmer Merwara Act. It is unnecessary for us to consider whether *Shri Hem Chand's case*<sup>3</sup> was rightly decided or not.

In *Meghji Lakhamshi and Brothers v. Furniture Workshop*<sup>4</sup> the Privy Council dealt with an application for possession under section 16 of the Increase of Rent (Restriction) Ordinance, No. 22 of 1949 (Kenya) whose relevant portion is :

“(1) No order for the recovery of possession of any premises to which this Ordinance applies, or for the ejectment of a tenant therefrom, shall be made unless... (k) the landlord requires possession of the premises to enable the reconstruction or rebuilding thereof to be carried out.....”

It was said at page 90 :

“In the present case the only question is whether section 16 (1) (k) is so framed as” to envisage or make provision for such an order.

An application for possession under section 16 presupposes that the contractual tenancy of the demised premises has been determined. It is not possible to determine it as to part and keep it in being as to the remainder. In the present case the tenancy of the entire demised premises had been determined.”

The right to possession is to be distinguished from the right to recover possession. The right to possession arises when the tenancy is determined. The right to recover possession follows the right to possession, and arises when the person in possession does not make over possession as he is bound to do under law, and there arises a necessity to recover possession through Court. The cause of action for going to Court to recover possession arises on the refusal of the person in possession, with no right to possess, to deliver possession. In this context, it is clear that the provisions of section 12 deal with the stage of the recovery of possession and not with the stages prior to it and that they come into play only when the tenancy is determined and a right to possession has come into existence. Of course, if there was no contractual tenancy and

1. A.I.R. 1953 Sou. 113.

2. (1951) S.G.J. 238 : (1951) S.C.R. 145.

3. I.L.R. (1955) Punj. 36.

4. L.R. (1954) A.C. 80.

a person is deemed to be a tenant only on account of a statute giving him right to remain in possession, the right to possession arises on the person in possession acting in a manner which, according to the statute, gives the landlord right to recover possession, and no question for the determination of the tenancy arises, as really speaking, there was no tenancy in the ordinary sense of that expression. It is for the sake of convenience that the right to possession, by virtue of the provisions of a statute, has been referred to as statutory tenancy.

In *Ebner v. Lascelles*<sup>1</sup> it was said at page 497, dealing with the provisions of Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. 5, c. 17) :

"It has been truly said that the main rights conceded to a tenant under these Acts are, first, a right to hold over or 'status of irremovability, and, next, a right not to have his rent unduly raised. The right to hold over is a right that comes into existence after the expiration of the contractual tenancy. During the contractual tenancy the tenant, being in possession under the protection of his contract, has no need of the protection of the Act to enable him to retain possession, but during that tenancy the Act protects him in regard to rent by providing that, notwithstanding any other agreements which he may make with his landlord as to rent, he is not to be charged a higher rent than the law allows, and if he is charged a higher rent than that he can have it reduced. The right to hold over after the termination of the contractual tenancy, and the right to protection during the contractual tenancy are two rights which must be kept distinct from each other."

It may be mentioned that section 5 of the aforesaid Act of 1920 provided that no order or judgment for the recovery of possession of any dwelling house to which the Act applied or for ejectment of a tenant therefrom would be made or given unless the case fell within one of the clauses mentioned in sub-section (1).

We are therefore of opinion that so long as the contractual tenancy continues, a landlord cannot sue for the recovery of possession even if section 12 of the Act does not bar the institution of such a suit, and that in order to take advantage of this provision of the Act he must first determine the tenancy in accordance with the provisions of the Transfer of Property Act.

It is now necessary to determine whether a notice served on the appellant to quit the tenancy on 16th October, 1954, the last date of the month according to the Hindu Calendar, as 16th October, happened to be Kartik Vad 30 of S. Y. 2011, the tenancy having commenced from Kartik Sud I of S. Y. 1963. It is not disputed that originally the tenancy was according to the Hindu Calendar. The contention for the appellant is that this month to month tenancy, according to the Hindu Calendar, was converted to a similar tenancy according to the British Calendar in view of the provisions of section 27 of the And and rule 4 of the Rules framed under the Act.

Section 27 of the Act reads :

"(1) Notwithstanding anything contained in any law for the time being in force or any contract, custom or local usage to the contrary, rent payable by the month or year or portion of a year shall be recovered according to the British Calendar.

(2) The State Government may prescribe the manner in which rent recoverable according to any other Calendar before the coming into operation of this Act shall be calculated and charged in terms of the British Calendar."

Rule 4 of the Bombay Rents, Hotel and Lodging House Rates Control Rules, 1948, hereinafter called the Rules, reads :

"Calculation of rent according to British Calendar.—If, before the Act comes into force, the rent in respect of any premises was chargeable according to a Calendar other than the British Calendar, the landlord shall recover from the tenant rent for the broken period of the month, year or portion of the year immediately preceding the date on which the Act comes into force, proportionate amount according to the aforesaid Calendar month, year or portion of the year at which the rent was then chargeable. After such date the landlord shall recover rent according to the British Calendar. The rent chargeable per month according to the British Calendar shall not exceed the rent which was chargeable per month according to the other Calendar followed immediately before such date."

There is nothing in the aforesaid rule or the section about the conversion of the month of the tenancy from the month according to the Hindu Calendar to the month according to the British Calendar. They only provide for the recoverability of the rent

according to the British Calendar. Since the enforcement of the Act on 13th February, 1948, the monthly rent would be for the month according to the British Calendar. The monthly rent could be recovered after the expiry of a month from that date or the rent for the period from the 13th February to the end of the month could be recovered at the monthly rate and thereafter after the expiry of each calendar month. There is nothing in the section or the rule in regard to the date from which the month for recovery of rent should commence. This provision was made, probably, as a corollary to the statute providing for standard rents. Standard rents necessitate standard months. There are a number of calendars in use in this country. The Hindus themselves use several calendars. The Muslims use a different one. Some calendars are used for particular purposes. It appears to be for the sake of uniformity and standardisation that a common calendar was to govern the period of the month of the tenancy and the date for the recovery of the rent. Rule 4 provided a procedure for adjustment of the recovery of the rent according to a calendar other than the British Calendar, and further provided that the rent chargeable per month, according to the British Calendar, would not exceed the rent which was chargeable per month according to the other calendar followed immediately before that date. In the absence of any specific provision in the Act with respect to any alteration to be made in the period of the month of the tenancy, it cannot be held merely on the basis of an alteration in the period for the recovery of rent that the monthly period of tenancy had also been changed. The tenancy can be from month to month and the recoverability of the rent may not be from month to month and may, under the contract, be based on any period say, a quarter or half year or a year. There is nothing in law to make the month for the period of recovering rent synchronize with the period of the month of the tenancy. The tenancy must start on a particular date, and, consequently, its month would be the month from that date, according to the calendar followed. The months of tenancy according to that calendar are settled by contract from the commencement of the tenancy. The tenancy under a lease for a certain period starts from a certain date, be it according to the British Calendar or any other Calendar. The period of lease, and consequently the tenancy, comes to an end at the expiry of that period according to the calendar followed by the parties in fixing the commencement of the tenancy. A lease, even according to the British Calendar, can start from any intermediate date of the calendar month. There is nothing in section 27 to indicate that the month of the tenancy to such a lease will start from the first of a regular month. Section 27 simply states that the rent would be recovered according to the British Calendar without fixing the first date of the month as the date from which the month, for the purposes of the recovery of the rent, would be counted. It follows that the month of the tenancy which commences on the 14th of a month., would be from the 14th to the 13th of the next month, according to the British Calendar. The rent would be recoverable with respect to this period of a month. No interference with any such term of the contract has been made by any provisions of the Act and therefore we hold that the provisions of section 27 of the Act and rule 4 of the Rules, do not in any way convert the month of the tenancy according to the Indian Calendar to the month of the British Calendar.

The High Court said in the judgment that Mr. Parghi, who was appearing for the appellant, was unable to cite any decision in support of the contention raised by him. Our attention, however, has been drawn to two cases decided by the Bombay High Court. They are Civil Revision Applications Nos. 247 of 1956 and 1583 of 1960 decided by Dixit and Tendolkar, JJ. and Patwardhan, J., on 22nd February, 1957 and 16th August, 1961, respectively. The latter decision had to follow the earlier one. In the earlier case, the notice to quit required the tenant to give possession on 1st May, 1953. The tenancy had commenced according to the Hindu Calendar. The notice was given according to the British Calendar. The High Court held the notice to be valid, agreeing with the contention that the effect of the provisions of section 27 of the Act was to make the tenancy which was originally according to the Hindu Calendar, a tenancy according to the British Calendar. The ratio of the decision, in the words of the learned Judges, is :

"Now rent is payable for occupation by the defendant and therefore, the tenancy must be deemed to be one according to the British calendar from the first of the month to the end of the month.... Here is a local law which by section 27 makes the tenancy as one according to the British Calendar."

We are of opinion that this view is wrong. We, therefore, hold that the notice to quit issued to the appellant was therefore a valid notice as held by the Court below and determined the tenancy of the appellant.

The second contention that, the appellant's having paid the arrears of rent within 2 months of the institution of the suit, there would be no forfeiture of the tenancy has no force in view of the provisions of section 12 of the Act. Sub-section (2) permits the landlord to institute a suit for the eviction of a tenant on the ground of non-payment of rent after the expiration of one month from the service of the notice demanding the arrears of rent, and clause (a) of sub-section (3) empowers the Court to pass a decree in case the rent had been payable by a month, there was no dispute about the amount of standard rent, the arrears of rent had been for a period of six months and the tenant had neglected to make the payment within a month of the service of the notice of demand. The tenant's paying the arrears of rent after the institution of the suit therefore does not affect his liability to eviction and the Court's power to pass a decree for eviction. It is true that the expression used in clause (a) of sub-section (3) is 'the Court may pass a decree for eviction in any such suit for recovery of possession', but this does not mean as contended for the appellant, that the Court has discretion to pass or not to pass a decree for eviction in case the other conditions mentioned in that clause are satisfied. The landlord became entitled to recover possession when the tenant failed to pay rent and this right in him is not taken away by any other provision in the Act. The Court is therefore bound in law to pass the decree when the requirements of sub-section (2) of section 12 are satisfied. This is also clear from a comparison of the language used in clause (a) with the language used in clause (b) of sub-section (3) which deals with a suit for eviction which does not come within clause (a) and provides that no decree for eviction shall be passed in such a suit if on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent then due and thereafter continues to pay or tender in Court regularly such rent till the suit is finally decided and also pays costs of the suit as directed by the Court. It is clear that where the Legislature intended to give some benefit to the tenant on account of the payment of the arrears during the pendency of the suit, it made a specific provision. In the circumstances, we are of opinion that the Court has no discretion and has to pass a decree for eviction if the other conditions of sub-section (2) of section 12 of the Act are satisfied.

The result therefore is that this appeal fails, and is accordingly dismissed with costs.

K.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, K. C. DAS GUPTA AND J. R. MUDHOLKAR, JJ.  
M/s. L.H. Sugar Factories & Oil Mills (Pvt.) Ltd., Pilibhit .. *Appellants* \*

v.

The Workmen

.. *Respondents.*

*Industrial Dispute—Sugar factory—Seasonal workers entitled to three days closure holidays at end of "crushing season" under an award of Industrial Tribunal—Interpretation of "crushing season".*

Where under the terms of the award of an Industrial Tribunal seasonal workers in a sugar factory were entitled to three days closure holidays at the end of "crushing season", on a question as to when a "crushing season" ended,

*Held.*—The crushing season must be deemed to have ended on the date when the crushing operations in the factory came to an end and not on the date on which the manufacturing processes in the

factory came to an end, unless it is shown that in the industry it has acquired some other meaning the expression "crushing season" must be given its ordinary meaning.

Appeal by Special Leave from the Award, dated the 1st May, 1961, of the Industrial Tribunal (III), U.P. at Allahabad in Reference No. 69 of 1959.

*G. S. Pathak*, Senior Advocate, (*J. B. Dadachanji*, *O. G. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellants.

*B. P. Maheshwari*, Advocate, for Respondents.

The Judgment of the Court was delivered by

*Mudholkar, J.*—The only point for consideration in this appeal by Special Leave from an award of the Industrial Tribunal at Allahabad is whether the "crushing season" of 1958-59 must be deemed to have ended on 12th March, 1959 when the actual crushing of sugarcane stopped or on 16th March, 1959 when all ancillary operations in the factory came to an end and the entire machinery was at a stand-still. According to the appellants the "crushing season" came to an end on the latter date while according to the respondents who are the employees of the factory it came to an end on the former date.

The importance of determining the date on which the season terminated arises out of the admitted position that only those seasonal workers who are borne on the muster roll of the factory on the day next to the date on which the crushing season ended would be entitled to three days' closure holidays. It is the case of the respondents that the appellants employ about 1,600 seasonal workers and about 650 permanent workers. It is common ground that the crushing process terminated on 12th March, 1959 and on that day about 1,000 of the 1,600 seasonal workers left for their homes by the evening after receiving all their dues. The remaining seasonal workers continued to work in the factory till 16th March, 1959 and, therefore, under a term of an award of the Industrial Tribunal in Reference No. 33 of 1953 and dated 15th April, 1953 they are entitled to three days' closure holidays. The case of the appellants, however, is that the crushing season must be regarded as having ended on 16th March, 1959 which was the last day on which the factory was worked and that only those seasonal workers who were borne on the muster roll of the factory on 17th March, 1959 would be entitled to three days' closure holidays. The 600 seasonal workers who worked till the evening of 16th March, 1959 would, therefore, according to them not be entitled to closure holidays. During arguments *Mr. Pathak* also suggested that the fact that between 12th March and 16th March, 1959, 600 seasonal workers continued to work in the factory has not been established in this case.

Taking up the last point, it is sufficient to point out that the evidence of *W.W. 1*, *B. S. Chauhan*, who is a member of the executive of the U.P. Trade Union Congress, Kanpur, shows that the seasonal workers other than those who left on the evening of 12th March, 1959 were borne on the muster roll of the appellants on 13th March, 1959. His evidence on the point has not been challenged in the cross-examination. Nor have the appellants examined any witness for the purpose of showing how many seasonal workers were borne on the muster roll on 13th March, 1959. The only witness examined by them, *Shri K. K. Sinha*, who is working as Manufacturing Chemist, has no knowledge about the matter because, as admitted by him in his cross-examination, he was not working in the mills in the 1958-59 crushing season. Since the total number of seasonal workers was 1,600 and nearly a thousand had left on 12th March, 1959, the number of those who continued to work till 16th March, 1959, must be six hundred. We must, therefore, proceed on the basis that the names of about 600 seasonal workers continued to be borne on the muster roll of the appellants on 13th March, 1959.

What has to be considered then is what was the date on which the crushing season of 1958-59 ended. It seems to us clear that the crushing season must be deemed to have ended on the date on which the crushing operations in the factory came to an end and not on the date on which the manufacturing processes in the factory came to an end. We must give to the expression "crushing season" its ordinary meaning unless it is shown that in the industry it has acquired some other meaning. There was no evidence before the Tribunal to the effect that "crushing

season" meant the period during which the factory was actually working and not merely the period during which the crushing operations were being carried on.

Clause (3) of the Award of 1953 runs as follows :

"All permanent workers and such seasonal employees as are on the factory's roll on the day following the close of the crushing season will be entitled to the closure holidays."

There is nothing in the Award to indicate that according to the Tribunal "crushing season" meant anything else than the period during which crushing operations were carried on. Since, as already pointed out, the operations came to an end on 12th March, 1959, the crushing season must be held to have ended on that day. Those seasonal workers who were borne on the muster roll on 13th March, 1959 would be entitled to three days' closure holidays. Agreeing with the Tribunal we, therefore, uphold the Award and dismiss the appeal with costs.

*Appeal dismissed.*

K.S.

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. SUBBA RAO, K. N. WANCHOO AND J. C. SHAH, JJ.

Dahya Lala and others

.. *Appellants \**

*v.*  
Rasul Mahomed Abdul Rahim and others

.. *Respondents.*

The State of Maharashtra

.. *Intervener.*

*Bombay Tenancy and Agricultural Lands Act (1948), sections 4 and 29—Tenant from mortgagee in possession—Eviction on redemption of mortgage—Right of tenant to restoration of possession under Bombay Tenancy and Agricultural Lands Act (1948)—Mamlatdar refusing to restore possession—Jurisdiction under Article 227 of the Constitution to interfere.*

All persons other than those mentioned in clauses (a), (b) and (c) of section 4 of the Bombay Tenancy and Agricultural Lands Act, 1948, who lawfully cultivate land belonging to other persons whether or not their authority is derived directly from the owner of the land must be deemed tenants of the lands. The Legislature by restricting the exclusion to mortgagees in possession from the class of deemed tenants intended that the tenant lawfully inducted by the mortgagee shall on redemption of the mortgage be deemed to be tenant of the mortgagor. The tenant inducted by the mortgagee is entitled to claim the protection of the Bombay Tenancy and Agricultural Lands Act, 1948 as a deemed tenant. Where the tenant has been evicted in execution of the award of the Debt Adjustment Court and without an order of the Mamlatdar, and the Revenue Authorities in refusing to give him assistance illegally refused to exercise jurisdiction vested in them by law, the High Court was competent to exercise the powers vested in it by Article 227 of the Constitution of India.

Appeal by Special Leave from the Judgment and Order, dated the 19th day of July, 1957, of the Bombay High Court in Special Civil Application No. 809 of 1957.

W. S. Barlingay, Senior Advocate, (Ganpat Rai, Advocate, with him), for Appellants.

G. B. Pai and J. B. Dadachanji, Advocates, S. N. Andley, Rameshwar Nath and P. L. Vohra, Advocates of M/s. Rajinder Narain & Co., for Respondents 1-5.

R. Ganapathy Iyer, and R. H. Dhebar, Advocates, for Respondent No. 6 and Intervener.

The Judgment of the Court was delivered by

Shah, J.—Survey No. 126 admeasuring 11 acres and 20 gunthas of Mouje Telod District Broach belonged to the ancestors of the appellants. By deed dated 24th July, 1891, the owners mortgaged the land to one Umiyashanker with possession. Shortly after the mortgage, the mortgagee inducted one Mohammed Abdul Rahim as a tenant on the land.

The appellants as owners of the equity of redemption applied to the Court constituted under the Bombay Agricultural Debtors' Relief Act, XXVIII of 1947 for adjustment of the debt due under the deed, dated 24th July, 1891 and for redemption of the land mortgaged. On 19th February, 1954, an award was made in this application by compromise between the parties declaring that Rs. 3,000 were due to the



mortgagee under the deed, dated 24th July, 1891, that "the land in dispute was in the possession of Mohammed Abdul Rahim as tenant of the mortgagee, and that the mortgagor had the right to take possession of the land from the said tenant." In execution of the award, Mohammed Abdul Rahim—who will hereinafter be referred to as the respondent—was evicted. On 7th June, 1954, the respondent applied to the Mahalkari of Hansot for an order under section 29 of the Bombay Tenancy and Agricultural Lands Act, 1948 restoring possession of the land. The Mahalkari rejected the application and that order was confirmed in appeal by the District Deputy Collector, and by the Bombay Revenue Tribunal in revision from the order of the Deputy Collector. The High Court of Judicature at Bombay was then moved by the respondent under Article 227 of the Constitution. The High Court following its earlier judgment in *Jaswantrai Tricumal Vyas v. Bai Jiwi and others*<sup>1</sup>, set aside the order passed by the Tribunal and ordered that possession of the land be restored to the respondent and declared that the respondent was entitled to continue in occupation as tenant on the same terms on which he was a tenant of the mortgagee. The mortgagors have appealed to this Court against that order of the High Court with Special Leave.

The Bombay Tenancy Act of 1939 was enacted to protect tenants of agricultural lands in the Province of Bombay and for certain other purposes. That Act was repealed by section 89 of the Bombay Tenancy and Agricultural Lands Act, 1948, which came into operation on 28th December, 1948. By the repealing clause, certain provisions of the Act of 1939 with modifications were continued. By the Act of 1948, under section 2 (18), as it stood at the material time, a tenant was defined as

"an agriculturist who holds land on lease and includes a person who is deemed to be tenant under the provisions of this Act."

Section 14 of the Act provides that notwithstanding any agreement, usage, decree or order of a Court of law, the tenancy of any land held by a tenant shall not be determined unless the conditions specified in that section are fulfilled. It is unnecessary to set out the conditions because it is common ground that the tenancy of the respondent was not sought to be determined on any of the grounds in section 14: it was in execution of the award made by the Debt Relief Court that the respondent was dispossessed. Section 29, by sub-section (2) provides that

"no landlord shall obtain possession of any land or dwelling house held by a tenant except under an order of the Mamlatdar. For obtaining such order he shall make an application in the prescribed form....."

Section 4 of the Act in so far as it is material provides :

"A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not—(a) member of the owner's family, or (b) a servant on wages payable in cash or kind but not in crop share or a hired labourer cultivating the land under the personal supervision of the owner or any member of the owner's family, or (c) a mortgagee in possession".

Section 4 seeks to confer the status of a tenant upon a person lawfully cultivating land belonging to another. By that provision, certain persons who are not tenants under the ordinary law are deemed to be tenants for purposes of the Act. A person who is deemed a tenant by section 4 is manifestly in a class apart from the tenant who holds lands on lease from the owner. Such a person would be invested with the status of a tenant if three conditions are fulfilled—(a) that he is cultivating land lawfully, (b) that the land belongs to another person, and (c) that he is not within the excepted categories.

The respondent was on 28th December, 1948 undoubtedly cultivating land which belonged to another person; he was lawfully cultivating the land because he derived his right to cultivate it from the mortgagee of the land, and he did not fall

within the excepted categories. *Prima facie*, he was a "deemed tenant" within the meaning of section 4 of the Act.

But Dr. Barlingay, on behalf of the appellants, contended that a person can be said to be lawfully cultivating land within the meaning of section 4 only if he has derived his right to cultivate directly from the owner of the land, and not from some other person who has a limited interest, such as a mortgagee from the owner. Counsel also contended that the expression "mortgagee in possession" in clause (c) of section 4 includes a person claiming a derivative right such as a tenant of the mortgagee in possession. We are unable to agree with these contentions. The Bombay Tenancy Act of 1939 conferred protection upon tenants against eviction, converted all subsisting contractual tenancies for less than ten years into tenancies for ten years, restricted the rights of landlords to obtain possession of land even on surrender, granted the status of protected tenants to all persons who had personally cultivated and for six years prior to the date specified, provided for fixation of maximum rates of rent, abolition of cesses and suspension and remission of rents in certain contingencies, and barred eviction of tenants from dwelling houses. The Act was found inadequate and was substituted by the Bombay Tenancy and Agricultural Lands Act of 1948. The latter Act preserves the essential features of the Act of 1939 and provides for additional rights and protection to tenants such as fixation of reasonable rent, commutation of crop share into cash, right to produce of naturally growing trees on land, relief against termination of tenancy for non-payment of rent, special rights and privileges of protected tenants, vesting of estate in Government for management, restriction on transfer of agricultural land and the constitution of Special Tribunals for deciding disputes relating to value of land. The two Acts were manifestly steps in the process of agrarian reform launched with the object of improving the economic condition of the peasants and ensuring full and efficient use of land for agricultural purpose. The provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 must be viewed in the light of the social reform envisaged thereby.

The Act of 1948, it is undisputed, seeks to encompass within its beneficent provisions not only tenants who held land for purpose of cultivation under contracts from the owners but persons who are deemed to be tenants also. The point in controversy is whether a person claiming the status of a deemed tenant must have been cultivating land with the consent or under the authority of the owner. Counsel for the appellants submits that tenancy postulates a relation based on contract between the owner of land, and the person in occupation of the land, and there can be no tenancy without the consent or authority of the owner to the occupation of that land. But the Act has by section 2 (18) devised a special definition of tenant and included therein persons who are not contractual tenants. It would therefore be difficult to assume in construing section 4 that the person who claims the status of a deemed tenant must be cultivating land with the consent or authority of the owner. The relevant condition imposed by the statute is only that the person claiming the status of a deemed tenant must be cultivating land "lawfully". It is not the condition that he must cultivate land with the consent of or under authority derived directly from the owner. To import such a condition is to rewrite the section, and destroy its practical utility. A person who derives his right to cultivate land from the owners would normally be a contractual tenant and he will obviously not be a "deemed tenant". Persons such as licencees from the owner may certainly be regarded as falling within the class of persons lawfully cultivating land belonging to others, but it cannot be assumed therefrom that they are the only persons who are covered by the section. The Act affords protection to all persons who hold agricultural lands as contractual tenants and subject to the exceptions specified all persons lawfully cultivating lands belonging to others, and it would be unduly restricting the intention of the Legislature to limit the benefit of its provisions to persons who derive their authority from the owner, either under a contract of tenancy, or otherwise. In our view, all persons who cultivate land belonging to other persons whether or not their authority is derived directly from the owner of the land must be deemed tenants of the lands.

Under the Transfer of Property Act, the right of a tenant who has been inducted by a mortgagee in possession ordinarily comes to an end with the extinction of the mortgage by redemption, but that rule, in our judgment, has no application in the interpretation of a statute which has been enacted with the object of granting protection to persons lawfully cultivating agricultural lands. Nor has the contention that the expression "mortgagee in possession" includes a tenant from such a mortgagee any force. A mortgagee in possession is excluded from the class of deemed tenants on grounds of public policy : to confer that status upon a mortgagee in possession would be to invest him with rights inconsistent with his fiduciary character. A transferee of the totality of the rights of a mortgagee in possession may also be deemed to be a mortgagee in possession. But a tenant of the mortgagee in possession is inducted on the land in the ordinary course of management under authority derived from the mortgagor and so long as the mortgage subsists, even under the ordinary law he is not liable to be evicted by the mortgagor. It appears that the Legislature by restricting the exclusion to mortgagees in possession from the class of deemed tenants intended that the tenant lawfully inducted by the mortgagee shall on redemption of the mortgage be deemed to be tenant of the mortgagor. In our view, therefore, the High Court was right in holding that the respondent was entitled to claim the protection of the Bombay Tenancy and Agricultural Lands Act, 1948 as a deemed tenant.

One more argument about the jurisdiction of the High Court under Article 227 of the Constitution to set aside the order of the Bombay Revenue Tribunal may be considered. The High Court in setting aside the order of the Revenue Tribunal exercised jurisdiction under Article 227 of the Constitution, and it was urged by Counsel for the appellants that this was not a fit case for exercise of that jurisdiction. But the Legislature has expressly prohibited, by section 29 (2) of the Act, landlords from obtaining possession of any lands otherwise than under an order of the Mamlatdar. The possession of the disputed land was obtained by the appellants in execution of the award of the Debt Adjustment Court, and without an order of the Mamlatdar. The respondent was therefore unlawfully dispossessed of the land, and the Revenue Authorities in refusing to give him assistance illegally refused to exercise jurisdiction vested in them by law. The question being one of jurisdiction, the High Court was, in our view, competent to exercise the powers vested in it by Article 227.

The appeal therefore fails and is dismissed with costs.

K.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR AND RAGHUBAR DAYAL, JJ.

Vithal Krishnaji Nivendkar

.. *Appellant \**

*v.*

Parduman Ram Singh and another

.. *Respondent.*

*Bombay Rents, Hotel and Lodging House Rates Control Act (LVII of 1947), section 18 (1)—“Fine, premium or other like sum or deposit or any consideration other than the standard rent”—Meaning of.*

If the donation has been received in respect of the granting of the lease and not as a free donation for the advancement of the purposes of the Sangh it will come within the expressions “premium” or “consideration” in section 18 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. There is evidence on record (in the instant case) to support the finding that the so-called donation was not a free gift but was received for the purpose of letting the premises to the first respondent. There is also nothing on record to show that the State Government has issued any directions exempting charitable trusts from the operation of the Act and further the amount charged for the premises cannot be said to be nominal and has not been shown to be concessional rent.

Appeal by Special Leave from the Judgment and Order, dated the 9th September, 1959, of the Bombay High Court in Criminal Appeal No. 916 of 1959.

*R. Gopalakrishnan*, Advocate, for Appellant.

*H. R. Khanna* and *R. H. Dhebar*, Advocates, for Respondent No. 2.

The Judgment of the Court was delivered by

*Raghubar Dayal, J.*—This appeal, by Special Leave, raises the question whether a sum of money paid ostensibly as a donation by a person to the person acting on behalf of the landlord, which was a charitable trust, in respect of the grant of a lease of the premises, came within the expression 'fine, premium or other like sum or deposit or any consideration other than the standard rent' in sub-section (1) of section 18 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bombay Act LVII of 1947), hereinafter called the Act.

The question arises in these circumstances. The appellant was the President, Trustee and Secretary of the Tillori Kunbi Samajonnati Sangh (hereinafter called the Sangh), Bombay, in 1958. The Sangh was a public trust registered under the Bombay Public Trusts Act, 1950. The first respondent approached him for taking on rent one of the residential blocks of Waghe Hall at St. Xavier Road, Parel, Bombay, which was owned by the aforesaid Sangh. The appellant agreed to grant the lease of the premises at a monthly rental of Rs. 85 in favour of the first respondent on payment of Rs. 3,251 as donation to the building fund of the said Sangh. The first respondent paid this amount in four instalments, three of which were paid prior to 1st May, 1958, and the fourth, of Rs. 1,000, on 1st May, 1958, before his actually occupying the premises. The appellant admits the receipt of this amount of Rs. 3,251, for donation to the building fund. He contends that he was not a 'landlord' as defined in the Act. The Presidency Magistrate, Seventh Court, Dadar, held that the amount was received as a premium, as a condition precedent for letting the premises to the first respondent and that therefore the appellant committed the offence under section 18 (1) of the Act.

On appeal, the High Court of Judicature at Bombay held that the aforesaid payment, even if it did not come within the expression 'premium or other like sum' for granting the tenancy of the premises, it was received by the appellant as 'consideration other than the standard rent' in respect of the grant of a lease of the premises and therefore the conviction was correct. It accordingly dismissed the appeal. It is against this order that the appellant has filed this appeal.

Learned counsel for the appellant has urged that various enactments allowed companies to receive donations and that the Memorandum of Association and the Rules of the Sangh also permitted receipt of gifts of money, that the first respondent made the donation voluntarily and that therefore the donation cannot amount to a 'premium' or 'consideration' contemplated by sub-section (1) of section 18 of the Act. The fact that the Sangh can legally receive donations from persons whether belonging to the Tillori Kunbi community or not has no bearing on the question before us. If the donation has been received in respect of the granting of the lease and not as a free donation for the advancement of the purposes of the Sangh, it will come within the expressions 'premium' or 'consideration' in section 18.

Both the Courts below have held that the so called donation was not a free gift to the Sangh but was paid by the first respondent and received by the appellant for the letting of the premises to the first respondent. There is evidence on the record to support this finding of fact. We see no reason to consider the finding vitiated by any error of law.

Our attention has been drawn by the learned Counsel for the appellant to the letter, dated 2nd July, 1958, sent by the first respondent to the Secretary of the Sangh. The first respondent said, in paragraph 1 :

".....I became a tenant of one of your ground floor blocks by paying a donation of Rs. 3,251 only and in return I was promised a clean new block."

This statement in no way supports the contention for the appellant that the amount was paid as a free gift for furthering the objects of the Sangh. On the other hand, it clearly states that the first respondent became a tenant by paying a donation of

Rs. 3,251. The mere use of the word 'donation' does not take away the effect of the other expressions used which clearly support the finding of the High Court that the payment was made for the purpose of getting the tenancy of the premises.

It was further urged that charitable trusts are exempt from the operation of the Act and reference was made to the provisions of section 4 of the Act. Clause (ii) of sub-section (2) of this section provides that the State Government may direct that all or any of the provisions of the Act shall not, subject to such conditions and terms as it may specify, apply generally to premises held by a public trust for a religious or charitable purpose and let at a nominal or concessional rent. There is nothing on record to show that the State Government had issued any such directions. Further, the amount charged for the premises let to the first respondent cannot be said to be nominal and has not been shown to be concessional rent. This contention therefore has no force.

The contention that the appellant does not come within the expression 'landlord' defined in sub-section (3) of section 5 has no force. The expression 'landlord' includes a person who is receiving, or is entitled to receive, rent in respect of any premises on account, or on behalf, or for the benefit of any other person, or as a trustee for any other person. The appellant was a trustee of the Sangh. He was receiving rent on account and on behalf of the Sangh and clearly therefore he comes within the expression 'landlord' as defined in the Act.

It is further contended that the amount paid does not come within the expressions 'premium' or 'consideration' in sub-section (1) of section 18 of the Act. We do not agree. 'Premium' means any amount paid for the purpose of getting a lease. It was certainly paid as a 'consideration' for obtaining the lease in this case. We agree with the High Court that there is no reason to restrict the expression 'consideration' to non-pecuniary consideration alone, as was held in *Karamsey Kanji v. Velji Virji*<sup>1</sup>. No good reason exists for restricting the meaning of this word to non-pecuniary consideration alone, even though any pecuniary consideration paid in respect of the grant of the lease will usually come within the expression 'premium'. The fact that the sentence of fine, according to the provisions of sub-section (1) of section 18, is not to be less than the 'value of the consideration received' is not sufficient to limit the expression 'consideration' to non-pecuniary consideration alone.

The previous rent-control Acts, viz., the Bombay Rent Restriction Act, 1939 (XVI of 1939) and the Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, 1944 (VII of 1944) which were repealed by the Act provided in sections 10 and 8 respectively, against the landlord's requiring the payment of any fine, premium or any other like sum in addition to the rent in consideration of the grant, renewal or continuance of a tenancy of any premises. The addition of the words 'deposit or any consideration' in sub-section (1) of section 18, must have been to cover all payments besides the standard rent in consideration of getting the tenancy. In the circumstances, it need not be a matter of surprise that certain extra payments may come within more than one of the expressions 'fine', 'premium', 'other like sum', 'deposit' or 'consideration'.

In this connection, reference may be made to *Explanation I* to sub-section (4) to section 18 which reads :

"For the purpose of sub-section (1)—

(a) except as provided in sub-section (3) receipt of rent in advance for more than three months in respect of premises let for the purpose of residence, or

(b) where any furniture or other article is sold by the landlord to the tenant either before or after the creation of tenancy of any premises, the excess of the price received over the reasonable price of the furniture or article,

shall be deemed to be a fine or premium or consideration."

The receipt of rent referred to in clause (a) and the excess of the price received over the reasonable price of the furniture or other article referred to in clause (b) is

always to be in cash and yet the *Explanation* provides that the receipt of rent and the excess of the price coming within the provisions of clauses (a) and (b) respectively, shall be deemed to be a 'fine or premium or consideration'.

Lastly, it was urged that the appellant just acted on behalf of the trust and not for any personal reasons. Such a consideration does not affect the question of the appellant's conduct coming within the provisions of sub-section (1) of section 18 and can affect only the sentence, which, in the present case, had been the minimum possible under the law. The appellant was sentenced to imprisonment till the rising of the Court and a fine of Rs. 3,251. Sub-section (1) of section 18 provides that a person, on conviction for the offence under that section shall be punished with imprisonment for a term which may extend to six months and shall also be punished with fine which shall not be less than the amount of fine, premium or sum or deposit or the value of the consideration received by him.

We are therefore of opinion, that the appellant has been rightly convicted under section 18 (1) of the Act and, accordingly dismiss the appeal.

K.L.B.

*Appeal dismissed.*

### THE SUPREME COURT OF INDIA.

PRESENT:—S.K. DAS, A.K. SARKAR, K.N. WANCHOO AND K.C. DAS GUPTA, JJ.  
Raja Rameshwara Rao .. Appellant\*

Commissioner of Income-tax, Hyderabad

.. Respondent.

*Income-tax Act (XI of 1922), section 4 (2) (vii) Income or capital—Jagir Abolition—Receipt of "interim maintenance allowances" by Jagirdar till settlement of "final commutation"—Whether income or capital.*

The interim maintenance allowances paid under the Hyderabad (Abolition of Jagir) Regulation, 1358-F, constituted "income-compensation" and were taxable. The Regulation advisedly called the payments 'maintenance allowances', a nomenclature peculiarly suited to payments of the nature of income. Payments were made for the interim period between the time when the income of the Jagir began to be collected by Government through the Jagir Administrator and 1st April, 1950, when compensation for loss of Jagir first became payable. The allowances were treated by the Regulations themselves as something other than compensation for loss of Jagir. They were certainly not windfall, for a right to them was created by the Regulation, a right which under section 21 could be enforced in a civil Court. Allowances were payable with a regularity and were of a recurring nature, both of which are recognized characteristics of income.

The payments were not income of any of the kinds that are commonly found, but *sui generis*. If a source had to be found for them, the Regulation is to be held the source.

Appeal from the Judgment and Order dated 3rd April, 1959, of the Andhra Pradesh High Court in Writ Petition No. 17 of 1956 (Referred Case).†

C. Krishna Reddy, A. V. V. Nair and P. Ram Reddy, Advocates, for Appellant.  
K.N. Rajagopal Sastri, Senior Advocate, (R. N. Sachthey, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Sarkar, J.—The appellant was the proprietor of the Wanaparathi Jagir in the former Indian State of Hyderabad. Certain payments described as interim maintenance allowances, were made to him under the Hyderabad (Abolition of Jagirs) Regulation, 1358-F, hereafter called the Abolition Regulation. These payments were brought to tax under the Income-tax Act, 1922, as income. The appellant contended that they were capital and not liable to be taxed. He took various proceedings and eventually a case was stated to the High Court of Andhra Pradesh for decision of the following question :

"Whether the interim maintenance allowances received by the assessee under the Hyderabad (Abolition of Jagirs) Regulation, 1358 Fasli, are income and therefore liable to tax".

\* Civil Appeal No. 420 of 1960.

† A.I.R. 1960 Andh. Pra. 42.

4th April, 1963.

The question was answered against the appellant by the High Court and hence this appeal.

The point at issue is whether these payments constituted capital or income. The answer to this question will have to be found in the Abolition Regulation under which the payments were made and another Regulation called the Hyderabad Jagirs (Commutation) Regulation, 1359-F (hereafter called the Commutation Regulation) which was intended to be supplementary to the earlier Regulation. The material provisions of these Regulations may, therefore, be referred to at once.

We shall first take up the Abolition Regulation. Under section 6 of this Regulation, the Jagirs were included in the "Diwani" (Government) as from "appointed day" to be fixed under section 5 and thereupon the powers, rights and liabilities of the Jagirdars in relation to the Jagirs ceased to be exercisable by or against them. Section 3 provided for the appointment of an officer called the Jagir Administrator. Section 8 provided for payment to Government of a specified percentage of the gross revenue, which, for practical purposes may be taken to be the total realisation or income of the Jagir, for meeting the administration expenses. Section 13 required a separate account in respect of each Jagir to be kept by the Jagir Administrator. Section 10 provided for payment to the Jagirdar out of the income of the Jagir of a sum equivalent to half of what he was getting before the commencement of the Regulation, as remuneration for managing the Jagir and for distribution of a like sum among the Hissedars (sharers in the Jagir income with the Jagirdar) in a certain proportion. Section 11 provided that the net income of the Jagir calculated in the manner prescribed, would be distributed between the Jagirdar and Hissedars in the proportion in which they were entitled to the income under the law in force before the commencement of the Regulation. Section 14 provided that the amounts payable to Jagirdars under the Regulation "shall be deemed to be interim maintenance allowances payable until such time as the terms for the commutation of Jagirs are determined." These are the interim maintenance allowances with regard to which the question has arisen in this case.

We turn now to the Commutation Regulation. Section 3 of this Regulation provided that the commutation sum for a Jagir would be a certain multiple of its basic annual revenue, the method of calculation of which was laid down in section 4. Section 5 stated that the commutation sum for every Jagir would be determined by the Jagir Administrator. Section 6 said that the commutation sum for each Jagir would be distributable between the Jagirdar and Hissedars in like proportion as the income was distributable between them under section 11 of the Abolition Regulation subject to certain deductions to which it is unnecessary to refer.

It is not in dispute that as a result of the Regulations the appellant's rights in his Jagir were extinguished. The appellant contends that he was divested of the Jagir as from the "appointed day" fixed under section 5 which was, it is said, September 15, 1949. It appears that a somewhat different view was taken in *Shanmugha Rajeswara Sethupathi v. Income-tax Officer, Karaikudi*<sup>1</sup>. We do not think it necessary in the present case to fix the precise point of time when the Jagir was taken away from the appellant and we will proceed on the basis that the appellant's contention is the correct one.

As we have earlier said, the real point for decision is whether the payments were of income nature or of the nature of capital. If they were made as compensation for the deprivation of the Jagir, they would undoubtedly be capital. It may be stated that it is common case of the parties that the commutation sum payable under the Commutation Regulation was paid as such compensation.

The first thing that we wish to observe is that the two Regulations made a clear distinction between the interim maintenance allowances and the commutation sum. The allowances were paid under the Abolition Regulation which said nothing about the right to the payment of the commutation sum; that right was created only by

1. (1962) 44 I.T.R. 853.

the Commutation Regulation. The allowances were measured as a fraction of the current income while the commutation was a multiple of annual revenue. The allowances were recurring payments for a certain time while the commutation sum was a fixed sum payable at once or by instalments. Then we find that under section 14 of the Abolition Regulation the interim maintenance allowances were "payable until such time as the terms for the commutation of Jagirs are determined". In other words, after the terms for commutation are determined, the interim maintenance allowances are to cease to be payable. It follows that when compensation begins to be paid, the payments of the maintenance allowances have to stop.

Lastly, we find this distinction emphasised in sub-section (2) of section 7 of the Commutation Regulation. That provision is in these terms :

"The payment to a Jagirdar or Hissedar of his appropriate share in the commutation sum of the Jagir shall constitute the final commutation as from the 1st April, 1950, of his rights in the Jagir and if any payment by way of an interim maintenance allowance under the said Regulation is made in respect of a period the whole or part of which is subsequent to the said date, the amount of such payment or, as the case may be, the appropriate proportion of such amount shall be recovered from the recipient thereof by deduction from the first payment made to him on account of his share in the commutation sum for the Jagir."

The words "said Regulation" in this sub-section refer to the Abolition Regulation.

It seems to us that though somewhat cumberously worded, the intention behind the sub-section is not in any serious doubt. Its object was to provide that the date of determination of the terms of commutation mentioned in section 14 of the Abolition Regulation would be April 1, 1950 and no interim maintenance allowances would be paid in respect of any period after that date but thereafter only commutation sum would be paid. Now this commutation sum is the sum determined as provided in sections 3 and 4 of the Commutation Regulation. The interim maintenance allowances are no part of the commutation sum so determined. Furthermore, the sub-section expressly provides that if any interim maintenance allowance is paid in respect of a period subsequent to April 1, 1950, that payment is to be recovered out of the commutation sum payable under this Regulation. Quite clearly, therefore, only what was paid in respect of the period prior to April 1, 1950 was to be interim maintenance allowance, and what was thereafter paid was towards the commutation sum.

It was contended on behalf of the appellant that the words "final commutation" in the sub-section showed that the interim maintenance allowances were also part of the commutation sum. It seems to us impossible to accept this contention for that would make the two the same, which, as we have shown earlier, they could not be. "Final commutation" meant the only commutation that the Jagirdar was to get in respect of his rights in the Jagir, that is to say, he was to get no other commutation. In fact, as already stated, if any interim maintenance allowance was paid after the commutation became payable, that was to be recovered from and not added to, the commutation.

We have earlier said that it is not in dispute that the commutation sum was paid as compensation for the loss of the Jagir and was, therefore, capital which was not liable to be taxed. We thus find that the Regulations made a clear distinction between the commutation sum or compensation and the interim maintenance allowances. These allowances were obviously not intended to be compensation.

The question then arises, if these allowances were not paid as compensation for the loss of the Jagir and were not of the nature of capital as such, what was their nature? We think that if we have regard to the provisions of the Regulations under which they were paid, as we must, there is no doubt that they were of the nature of income. No doubt they were not income of any of the kinds that are commonly found, but are, as Lord Radcliffe said in a case to which we shall later refer, *sui generis*. We proceed now to discuss why we think they were income.



These allowances, we notice, were treated by the Regulations as something other than the compensation for the loss of the Jagir. They were, therefore, not treated as capital as representing compensation for the Jagir. If they were not treated as capital for the reason that they were not compensation for the loss of the Jagir, we find no ground on which we can say they were capital. It would follow that they must be income and taxable as such. They were certainly not windfall for a right to them was created by the Abolition Regulation, a right which under section 21 could be enforced in a civil Court. Then we find that these allowances were payable with a regularity and were of a recurring nature, both of which are recognised as characteristic of income : see the *Commissioner of Income-tax v. Shaw Wallace & Co.*<sup>1</sup> Next we observe that the Regulation advisedly called the payments "maintenance allowances", a nomenclature peculiarly suited to payments of the nature of income. Lastly, it may be pointed out that the payments were made for the interim period between the time when the income of the Jagir began to be collected by the Government through the Jagir Administrator and April 1, 1950, when the compensation for the loss of the Jagir first became payable. The payments were, therefore, by way of compensation for the loss of income in the interim period. In the words of Jenkins, L.J., as will appear later, they were "income compensation" and therefore of income nature.

We think for all these reasons the interim maintenance allowances were taxable income. If a source had to be found for them, the Regulation had to held to be the source.

A case very near to the one in hand and a case that throws a great deal of light on the problem that faces us is the *Commissioner of Inland Revenue v. Butterley Co., Ltd.*<sup>2</sup>. We think a detailed reference to it can be very profitably made. That case was concerned with the English Coal Industry Nationalisation Act, 1946, which nationalised the collieries and divested all owners of them and the businesses concerning them. Under this Act and the Coal Industry (No. 2) Act, 1949, the assessee company became entitled to compensation for the assets transferred to the Government and to certain payments called "revenue payments" and "interim income" for the period between what was called the primary vesting date and the date on which compensation for the assets taken away was fully satisfied. The question was with regard to these payments. The assessee company had contended in the beginning that the payments were not of income nature at all. In the Court of Appeal however that contention was abandoned and it was conceded that the payments were of income nature. The only dispute was whether they were income chargeable to profits tax as profits of a trade or business carried on by the assessee company. The decision was that payments were not income or profit of any trade or business.

We will first read from a part of the judgment of Jenkins, L.J., in the Court of Appeal. He said (page 437) :

"The Act of 1946 studiously avoids describing the interim income as interest on, or income of the compensation."

Then the learned Lord Justice pointed out that the payments were to be calculated by reference to the past earning of the concern and bore no relation at all to the amount of the compensation and proceeded to observe (page 438) :

"I find it difficult to hold that the interim income payable under these Acts, defined and measured in the way it is, can properly be described as income of the compensation ; and there is, I think, much to be said for the view that, *albeit* itself in the nature of income, it is not income, of the compensation but rather income-compensation, if I may use that expression, that is to say a series of periodical payments an independent right to which is conferred by the Act by way of compensation for the loss of income sustained in respect of the period between the primary vesting date and the ascertainment and satisfaction of the compensation."

We think these observations can be applied in all their force to the payments with which the present case is concerned. Here also the interim payments had no relation to the commutation sum, that is, compensation for the loss of the Jagir.

1. (1932) L.R. 59 I.A. 206; 63 M.L.J. 124 (P.C.). - 2. (1957) 36 T.C. 411.

It is clear that Jenkins, L.J., was treating the payment as a species of income and we also think that the payments in the present case cannot be treated otherwise.

There are some observations in the speech of Lord Radcliffe when he dealt with this case on appeal to the House of Lords which we think may be usefully quoted here. He observed (pages 449-50),

"The Coal Industry Nationalisation Act, 1946, legislated for a revolution in the coal industry of this country. These interim income payments which are now in question are the product of that disturbance and adjustment, and it does not seem to me at all surprising that they cannot well be related to any of those other kinds of receipt which normally come into the accounts of a company conducting a trade or business. They are *sui generis* and it would, I think, lead to confusion if they were described in any terms except those which are strictly applicable to their own special circumstances. Thus, they were paid because the nationalisation Statute decreed that they should be paid. They would not have been payable to the respondents if they had not been conducting a colliery business at the vesting date, and in that sense, of course, they were paid to and received by the respondents for no other reason than that they had been owners of colliery assets and had been in the colliery trade. Equally of course, the interim income payments that the respondents got were fixed either as a proportion of the profits which they had been earning in the colliery trade before the date of vesting or by a computation of interest at varying rates upon sums received from time to time by way of capital compensation. But, when all that is said the fact remains that the only identifiable origin of the payments was the Statute which authorised them and at the same time defined their terms and methods of computing. It is natural enough that moneys paid in this way, described by their instrument of creation as 'interim income', should be regarded as inherently of an income nature when the question arises of subjecting them to any tax that bears upon income as a chargeable subject. But I do not think that in any proper use of the words can they be said to arise from a source of income, in the sense that income or profits—for the moment I am not concerned with any difference between the two terms—can be said to arise from a trade or a business or an investment or some other piece of property that admits of use or enjoyment."

He also observed,

"I have already explained why they were not income from investments. By a similar process of reasoning they were not, in my view, income from property. It does not clear up the matter to say that the right to compensation—and, for the matter, the right to interim income—was a chose in action. The interim income payments did not arise from the right to compensation as income arises from income-producing property. They arose from the Statute itself which decreed that they were to be paid."

We venture to think that the observations that we have read from the English case in the proceeding paragraphs give the correct picture of the nature of the payments. It was found unarguable that the interim payments under the English Acts were not of income nature. The payments with which we are concerned were made under statutory provisions completely *pari materia* with those under consideration in the English case. We, therefore, hold that the interim payments to the appellant were income and liable to tax.

It appears that there were in this case four payments totalling Rs. 1,47,857-4-0 of which the first was made on January 25, 1950, and the other three on April 10, 1950, July 3, 1950 and August 3, 1950, respectively. It does not appear to have been found whether the last three payments, which it will be noticed had been made after April 1, 1950, were in respect of the commutation sum or interim maintenance. It was for that reason that the Tribunal directed the Income-tax Officer concerned to institute an enquiry as to the nature of these three payments. Apparently, the High Court approved of that order. We also take the same view. We think that the question was answered correctly by the High Court by saying that the interim maintenance allowances received by the assessee which do not form part of the commutation amount are income and are liable to be taxed and that the payments made subsequent to April 1, 1950 towards commutation amount are not income and not liable to be taxed.

The result is that this appeal fails and is accordingly dismissed with costs.

V.B.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Gondumogula Tatayya, etc.

Appellants \*

v.

Penumatcha Anande Vijaya Venkatarama Timma Jagapathiraju,  
etc.

Respondents.

*Madras Estates Land Act (I of 1908) (as amended in 1936 and 1945), section 3 (2) (d), Explanation (1) —“ Estates ”—“ Meaning of ”—Minor Inams—Service Inams—When “ estates ”—Crucial test.*

The crucial test to find out whether the subject-matter of a grant falls within the definition of an “ estate ” under section 3 (2) (d) of the Madras Estates Land Act is whether at the time of the grant the subject-matter was a whole village or only a part of a village. If at the time of the grant it was only a part of a village, then the Amending Act of 1945 makes no difference to this and such a part would not be an estate within the meaning of the term. But if the grant was of the whole village and named one then it would be an estate. Merely because the Mokhasa grant in the instant case is an estate within the meaning of section 3 (2) of Madras Estates Land Act, minor inams which were not grants of whole villages would not constitute an estate within the meaning of section 3 (2) (d).

Appeals by Special Leave from the Judgment and Decree, dated the 29th April, 1954, of the Madras High Court in Second Appeals Nos. 1228 to 1242 of 1949.

R. Mahalingier and Ganpat Rai, Advocates, for Appellants.

A. V. Viswanatha Sastri, Senior Advocate (T. V. R. Tatachari, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

S. K. Das, J.—These are fifteen appeals by Special Leave. They have been heard together as they raise common questions of law and fact and this judgment will govern them all.

These appeals arise out of fifteen suits filed by certain inamdars (respondents herein) of a village called Goteru for ejecting the tenants, who are the appellants before us, from various holdings in their possession after the expiry of the period of their leases and for other reliefs, such as, arrears of rent and damages. The lands lie in village Goteru, one of the villages in the Nuzvid zamindari. Goteru, Komaravaram and Surampudi are three *mokhasa* villages in the said zamindari. It was admitted that the *mokhasas* were included in the assets of the zamindari at the time of the Permanent Settlement in 1802. The case of the inamdars-respondents was that in eight of the suits the land was a *karnam* service inam and in seven suits the land was a *sarvadumbala* inam. These inam lands were pre-settlement inams and were enfranchised by the Government on the basis that they were excluded from the assets of the zamindari at the time of the permanent settlement and separate title deeds were subsequently issued to the inamdars. According to the inamdars these inam lands were not “ estates ” within the meaning of section 3 (2) of the Madras Estates Land Act, 1908 (Madras Act I of 1908) and the inamdars were entitled to both *melvaram* and *kudivaram* therein; the respondents leased out these lands to the appellants for a fixed period under an express contract with the appellants, who were the lessees concerned, that they were to quit and deliver possession at the end of their lease periods; the appellants, however, did not vacate the lands, but continued to be in possession. Twelve acres and 52 cents of the suit lands were *karnam* service inam and the rest *sarvadumbala* inam.

The appellants contended *inter alia* that the suit lands formed part of the *mokhasa* of village Goteru and were included in the assets of the zamindari at the time of the Permanent Settlement, that the inams were part of an estate and that the appellants had acquired rights of occupancy in the lands in suit under the provisions of the Madras Estates Land Act.

They also raised certain other pleas with which we are not now concerned. The main defence of the appellants was that they had got permanent occupancy rights in the suit lands and, therefore, they were not liable to be ejected and the Civil Court had no jurisdiction to try the suits.

The learned District Munsif of Tanuku who tried the suits in the first instance dealt with them in three batches. He held in three separate judgments that the suit lands were pre-settlement minor inams, that they were not included in the assets of the zamindari at the time of the Permanent Settlement and that they were not "estates" within the meaning of the provisions of the Madras Estates Land Act. The learned Munsif also held that as there was a clear undertaking to vacate the lands at the expiry of the period of the leases, no notice to quit was necessary. In the result he decreed the suits. The tenants, appellants herein, then preferred fifteen appeals against the judgments and decrees of the learned Munsif. These appeals were heard together by the learned Subordinate Judge of Eluru. By a common judgment delivered on 29th March, 1948, the learned Subordinate Judge agreed with the learned Munsif in respect of all the findings and dismissed the appeals. Then there were Second Appeals to the High Court of Judicature at Madras. In these appeals only two points were urged on behalf of the appellants. The first point was that the finding of the Courts below that the suit lands were excluded from the assets of the zamindari was vitiated by reason of the burden of proof being wrongly placed on the appellants. The second point was that the inamdars having conceded in the plaints that the tenants were holding over after the expiry of their leases, the inamdars were not entitled to recover possession without issuing notices to quit as required by law. With regard to the first point the High Court pointed out that though it was settled law that the burden was upon the landlord to make out his right to evict a tenant from the holding, *sarvadumbala* inams or inams granted for public services of a pre-settlement period were ordinarily excluded from the assets of the zamindari at the time of the Permanent Settlement except in some specific cases, where such lands were as an exception included in the assets of the zamindari, the exceptions being found in the four western *palayams* of the zamindars of Venkatagiri, Karvetnagar, Kalahasti and Sydapur and the *mokhasas* in Masulipatam district. Therefore, with regard to pre-settlement *sarvadumbala* inams or public service inams, the person who alleged that they were included in the assets of the zamindari had to prove that they were so included. The High Court then observed that the Courts below did not base their judgments on onus of proof but came to their conclusions on a consideration of the evidence given in the suits; therefore, where the entire evidence was gone into, the question of burden of proof was immaterial. The High Court pointed out that the question whether the predecessors of the respondents herein were granted both the *varams* or *melvaram* only was not raised before it and the contentions of the parties in the High Court centered round the only question whether the suit lands were pre-settlement inams excluded from the assets of the zamindari or whether they were included in those assets. The High Court pointed out that this was really a question of fact and in Second Appeal the High Court could not interfere with a finding of fact unless there were permissible grounds for such interference. The High Court held that there were no such permissible grounds. However, the High Court referred again to the documentary evidence given in the case, namely, Exhibit A-1, extract from the Register of Village Service Inams in the unfranchised *mokhasa* village of Goteru, Exhibit A-2, the title deed granted to the predecessors in interest of the inamdars wherein it was specifically recited that the inams were held for service, Exhibit A-5, a settlement, dated 13th December, 1942, Exhibit A-7, a Register of Service Inams of Goteru, dated December, 1949, Exhibit A-6, a public copy of the village account of Goteru, Exhibit B-1, Register of Inams of village Goteru prepared in 1859, Exhibit 27. Bhuband accounts relating to Goteru, Komaravaram and Surampudi *mokhasas* and Exhibit A-28 *Jamabandi pysala Chitta*, etc., and came to the conclusion that the inams in question, both the *karnam* service inams and the *sarvadumbala* inams were pre-settlement inams and the documents showed that they were not taken into consideration in determining the assets of the zamindari. On the second question of notice the High Court came to the conclusion that the appellants herein were not

tenants holding over but were persons who continued to be in possession without the consent of the inamdars after the termination of the tenancy ; that being the position, no notice was necessary and the suits for eviction were maintainable.

In the appeals before us learned Advocate for the appellants has not canvassed the question of notice. He has canvassed two points only ; first he has argued somewhat faintly that the finding of the Courts below that the service inams were pre-settlement inams and were excluded from the assets of the zamindari was not a correct finding ; secondly, he has argued that by reason of the amendments made in section 3 (2) (d) of the Madras Estates Land Act in 1936 and 1945 these minor inams constituted an estate within the meaning of the aforesaid provisions and under section 6 of the said Act, the appellants had acquired a permanent right of occupancy in their holdings, therefore they were not liable to be ejected and the Civil Court had no jurisdiction to deal with the suits.

As to the first point urged before us, it is sufficient to state that it relates to a question of fact on which there is a concurrent finding by the Courts below and the appellants have not been able to satisfy us that there are any special reasons, such as, a manifest error of law in arriving at a finding, or a disregard of the judicial process or of principles of fair hearing etc., which would justify us in going behind such a concurrent finding. We must, therefore proceed on the footing that the inams in question were pre-settlement inams, eight of them *karnam* service inams and seven others *sarvadumbala* inams.

This brings us to the second point urged before us. That point does not appear to have been agitated in the High Court. But as it relates to the interpretation of section 3 (2) (d), and *Explanation* (1) appended thereto, of the Madras Estates Land Act, we have allowed learned Advocate for the appellants to argue the point before us. Section 3 (2) (d) and *Explanation* (1) appended thereto, is in these terms :

" 3. In this Act, unless there is something repugnant in the subject or context :—

(2) " Estate " means :—

(d) any inam village of which the grant has been made, confirmed or recognised by the Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors in title of the grantees.

*Explanation* (1).—Where a grant as an inam is expressed to be of a named village, the area which forms the subject-matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain lands in the village of that name which have already been granted on service or other tenancy or been reserved for communal purposes.

It is worthy of note here that when the Madras Estates Land Act was enacted for the first time in 1908 section 3 (2) (d) was as follows :

" Any village of which the land revenue alone has been granted in inam to a person not owning the *Kudiyaram* thereof provided that the grant has been made, confirmed or recognized by the British Government or any separated part of such village."

Owing to a variety of reasons which it is not necessary to state here, there was an amendment by which clause (d) as it originally stood was repealed and a fresh clause substituted by section 2 (i) of the Madras Estates Land (Third Amendment) Act, 1936 (Madras Act XVIII of 1936). The old *Explanations* (1) and (2) were renumbered as *Explanations* (2) and (3) respectively and a new *Explanation* was inserted as *Explanation* (1) by section 2 (1) of the Madras Estates Land (Amendment) Act, 1945 (Madras Act II of 1945). The reasons why the amendments became necessary have been explained in the Full Bench decision of the Madras High Court in *Mantravadi Bhavanarayana v. Merugu Venkatadu*<sup>1</sup>. In *Narayanaswami Nayudu v. Subramanyam*<sup>2</sup>, it was observed by the Madras High Court that the existence of service inams was very

1. (1953) 2 M.L.J. 748 : I.L.R. (1954) Mad. 116.

2. (1915) 29 M.L.J. 478 : I.L.R. 39 Mad. 683.

common in villages and that where there was a subsequent grant of the village, to hold that such grant was not an estate as defined in section 3 (2) (d) by reason of the existence of minor inams would result in the exclusion of *agraharams*, *shrotriyams* and *mokhasa* villages from the operation of the Act, and that could not have been the intention of the Legislature. In that decision Srinivasa Ayyangar, J., observed :

"The definition in sub-section (2), clause (d) excludes from the definition of 'Estate' what are known as minor inams, namely, particular extents of land in a particular village as contrasted with the grant of the whole village by its boundaries. The latter are known as 'whole inam villages'. The existence of 'minor inams' in whole inam villages is very common and if these inam villages do not come within the definition of 'Estate' almost all the *agraharam*, *shrotriya* and *mokhasa* villages will be excluded. This certainly cannot have been intention of the Legislature."

This interpretation of section 3 (2) (d) was accepted without question until the decision in *Ademma v. Satyadhyana Thirthaswamivarur*<sup>1</sup>, where for the first time a different note was struck. It was held therein that where portions of the estate had previously been granted as minor inams, a subsequent grant of the rest of the village was not an estate as it was not of the whole village. The Legislature thereupon intervened and enacted *Explanation* (1) with the object of restoring the view of the law which had been held before the decision in *Ademma v. Satyadhyana Thirthaswamivarur*<sup>1</sup>. The crucial test to find out whether the subject-matter of a grant falls within the definition of an estate under section 3 (2) (d) of the Act is whether at the time of the grant the subject-matter was a whole village or only a part of a village. If at the time of the grant it was only a part of a village, then the Amending Act makes no difference to this and such a part would not be an estate within the meaning of the term. But if the grant was of the whole village and a named one then it would be an estate. Learned Advocate for the appellants has referred us to the *mokhasa* sanad of 8th December, 1802. That sanad gives a list of villages of which Goteru is one. The argument of learned Advocate for the appellants is that the inam lands being within village Goteru, they also are "estates" within the meaning of section 3 (2) (d) read with *Explanation* (1). It appears to us that this argument is clearly erroneous. There is no doubt that the *Mokhasa* Grant is an estate within the meaning of the section 3 (2) of the Madras Estates Land Act and that is not disputed before us. That does not, however, mean that the minor inams would also constitute an estate within the meaning of section 3 (2) (d). As was pointed out in *Mantravadi Bhavanarayana v. Merugu Venkatadu*<sup>2</sup> the crucial test is whether at the time of the grant the subject-matter was a whole village or only part of a village. In *District Board, Tanjore v. M. K. Noor Mohamed Rowther*<sup>3</sup> this Court observed that "Any anything less than a village however big part it might be of that village. In other words, the grant must either comprise the whole area of a village or must be so expressed as is tantamount to the grant of a named village as a whole, even though it does not comprise the whole of the village area, and in the latter case, in order to come within the scope of the definition it must fulfil the conditions : (a) the words of the grant should expressly (and not by implication) make it a grant of a particular village as such by name and not a grant of a defined specific area only ; and (b) that it has been granted for service or other tenure ; or (c) that it had been reserved for communal purposes. The minor inams under consideration in these suits were pre-settlement inams and the finding which cannot now be challenged is that they were excluded from the assets of the zamindari at the time of the Permanent Settlement in 1802, though the *mokhasas* were not so excluded. That being the position, the minor inams were not grants of whole villages and were not estates within the meaning of section 3 (2) (d) of the Madras Estates Land Act. Therefore, the appellants cannot claim the benefit of section 6 of the said Act.

Learned Advocate for the appellants also addressed us at some length on the beneficial nature of provisions of the Madras Estates Land Act and submitted that

1. (1943) 2 M.L.J. 289.  
2. (1953) 2 M.L.J. 748 : I.L.R. (1954) Mad. S.C. 446.  
3. (1952) 2 M.L.J. 586 (S.C.) : A.I.R. 1953 116.

the appellants herein should not be deprived of the benefits of that Act. But the appellants must satisfy us first that they come within the protection of benefits of the Act. If the lands which they held were not an "estate" within the meaning of the Act, then there can be no question of giving them the benefit of the Act. In our opinion, there is no substance in the second point urged on behalf of the appellants.

In the result the appeals fail and are dismissed with costs; one hearing fee.

K.S.

*Appeals dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—S. J. IMAM, J. L. KAPUR, K. SUBBA RAO AND J. R. MUDHOLKAR, JJ.

T. P. Daver

*Appellant\**

v.

Lodge Victoria, No. 363, S.C. Belgaum and others

*Respondents.*

*Clubs—Masonic Lodge—Suspension or expulsion of members—Nature and extent of right—Jurisdiction of Courts.*

A member of a Masonic Lodge is bound to abide by the rules of the lodge; and if the rules provide for expulsion, he shall be expelled only in the manner provided by the rules.

The lodge is bound to act strictly according to the rules; whether a particular rule is mandatory or directory falls to be decided in each case, having regard to the well-settled rules of construction in that regard.

The jurisdiction of a civil Court is rather limited; it cannot obviously sit as a Court of Appeal from decisions of such a body; it can set aside the order of such a body, if the said body acts without jurisdiction or does not act in good faith or acts in violation of the principles of natural justice.

[In the instant case there were concurrent findings by the Courts below that the lodge has acted in good faith and there were no exceptional circumstances for the Supreme Court to depart from its ordinary practice of not interfering with concurrent findings of fact.]

Appeal from the Judgment and Decree dated the 25th September, 1958, of the Mysore High Court in Regular Appeal (B) No. 256 of 1956.

*Naraindas C. Malkani*, Advocate and *G. Gopalakrishnan*, Advocate of *M/s. Gargrat & Co.*, for Appellant.

*Bishan Narain*, Senior Advocate, (*S. P. Varma*, Advocate, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

*Subba Rao, J.*—This appeal on certificate relates to an internal dispute of the members of a Masonic Lodge called the "Lodge Victoria No. 363, S.C." at Belgaum.

There is a Scottish institution known as "Grand Lodge of Ancient Free and Accepted Masons of Scotland" at Edinburgh, hereinafter called the "Grand Lodge of Scotland." Under its supervision there are Provincial or District Grand Lodges spread throughout the world. There are Daughter Lodges under the superintendence of the District Grand Lodges. The Grand Lodge of Scotland is governed by its own written Constitution and Laws. There is also a separate Constitution and Laws for every District Grand Lodge. One such District Grand Lodge known as "The Grand Lodge of All Scottish Freemasonry in India and Pakistan" has its headquarters at Bombay. The aforesaid daughter Lodge at Belgaum is directly under the said District Grand Lodge and is governed by the Constitution and Laws of the latter.

The appellant was a member of the Lodge Victoria, having joined it in the year 1948. On October 16, 1952, the second respondent made a complaint against the

appellant to the Master, Lodge Victoria, alleging that the appellant was guilty of 12 masonic offences. It was alleged therein that, as the appellant had committed masonic offences, he should be tried by the Lodge for the charges levelled against him under Law 198 of the Constitution. On October 20, 1952, notice of the said complaint was issued to the appellant and he was required to send to the Secretary of the Lodge his answers to the charges within 14 days from the date of the notice. He was also informed that he was entitled to be present and to state his defence at the special meeting to be held on November 8, 1952. On the same day, the Secretary of the Lodge sent notices to all the members of the Lodge asking them to attend the said special meeting convened for considering and passing judgment on the said complaint. On October 27, 1952, the appellant submitted his answer *in extenso* to the various charges levelled against him in the complaint; in that answer he requested that :

“ my complete replies be read *in toto* to the brethren assembled to decide this matter and I be informed of the total number of brethren present and the number of votes cast one way or the other.”

A perusal of that reply also shows that the appellant understood the charges levelled against him as relating to certain offences alleged to have been committed by him and his reply proceeded on that basis. On November 8, 1952, the special meeting of the Lodge was held and the minutes show that 18 members attended the meeting, that each charge was read at the meeting, that comments of the members were invited and that decision was taken on each of the charges. Each of the charges was put to vote and the members present unanimously held that every one of the charges levelled against the appellant was established. In the result they passed a resolution excluding the appellant from the Lodge until the exclusion was confirmed by the District Grand Lodge under Law 199 of the Constitution. On November 15, 1952, the said decision was communicated to the appellant. On November 24, 1952, the appellant preferred an appeal against that order to the District Grand Lodge. On October 5, 1953, a meeting of the District Grand Lodge was convened to consider the appeal and the appeal was dismissed. It was noted in the proceedings of the District Grand Lodge that though earlier an adjournment was given to enable the appellant to appear in person at the meeting, he remained absent. On a further appeal to the Grand Lodge of Scotland, the said Lodge considered the sentence imposed on the appellant as one of suspension *sine die* and recommended to the Lodge Victoria to review the suspension after a period of 12 months if the appellant applied for reinstatement. It does not appear that the appellant filed any application for review. On September 7, 1954, the appellant instituted a suit in the Court of the Civil Judge, Senior Division, Belgaum, for a declaration that the resolution of the Victoria Lodge dated November 8, 1952, was illegal and void and that he continued to be a member of the Lodge despite the resolution, for an injunction to restrain the officers and servants of the said Lodge from preventing him from exercising his rights therein, and for recovery of damages. To that suit he made the Victoria Lodge, the first defendant; the complainant, the second defendant; the Secretary of the Lodge, the third defendant; and the District Grand Lodge, Bombay, the fourth defendant. The defendants contested the suit. The learned Civil Judge dismissed the suit. The appeal filed by the appellant to the High Court of Mysore was also dismissed. The present appeal has been filed on a certificate issued by the said High Court.

Learned counsel for the appellant raised before us all the contentions which his client had unsuccessfully raised in the Courts below. Before we advert to the said contentions it would be convenient to notice briefly the law on the subject relevant to the present enquiry.

The source of the power of associations like clubs and lodges to expel their members is the contract on the basis of which they become members. This principle has been restated by Lord Morton in *Bonsor v. Musicians' Union*<sup>1</sup>. There, one Bonsor who became a member of a trade union, was expelled. In that context Lord Morton observed :



"When Mr. Bonsor applied to join the respondent union, and his application was accepted, a contract came into existence between Mr. Bonsor and the respondent, whereby Mr. Bonsor agreed to abide by the rules of the respondent-union, and the union impliedly agreed that Mr. Bonsor would not be excluded by the union or its officers otherwise than in accordance with the rules."

This contractual origin of the rule of expulsion has its corollary in the cognate rule that in expelling a member the conditions laid down in the rules must be strictly complied with. In *Maclean v. The Workers' Union*<sup>1</sup>, the contractual foundation of the power is described thus :

"In such a case as the present, where the tribunal is the result of rules adopted by persons who have formed the association as a trade union, it seems to me reasonably clear that the rights of the plaintiff against the defendants must depend simply on the contract and that the material terms of the contract must, be found in the rules."

Proceeding on that basis, the learned Judge observed :

"It is certain, therefore, that a domestic tribunal is bound to act strictly according to its rules and is under an obligation to act honestly and in good faith."

The same idea was expressed by the Calcutta High Court in *Ezra v. Mahendra Nath Banerji*<sup>2</sup> thus :

"..... where the rule provides in any particular respect that some condition must be fulfilled, then that condition must be strictly complied with, since the power of expulsion is itself dependent on the terms of the rule."

The next question is whether the doctrine of strict compliance with rules implies that every minute deviation from the rules, whether substantial or not, would render the act of such a body void. The answer to this question will depend upon the nature of the rule infringed ; whether a rule is mandatory or directory depends upon each rule, the purpose for which it is made and the setting in which it appears. We shall consider this aspect of the doctrine when we deal with the argument of the learned counsel that in the present case the rules have not been complied with.

The scope of the jurisdiction of a civil Court *vis-a-vis* the decisions of tribunals is also well settled. In *Maclean v. The Workers' Union*<sup>1</sup>, Maugham, J., observed :

"It appears to me that we have no power to review the evidence any more than we have a power to say whether the tribunal came to a right conclusion."

Much to the same effect the Judicial Committee observed in *L. A. P. O. Beilly v. C. C. Gittens*<sup>3</sup> at Page 316 :

"..... It is important to bear in mind that neither the learned Judge nor their Lordship's Board is entitled to sit as a Court of Appeal from the decisions of a domestic tribunal such as the stewards of the Trinidad Turf Club."

Later on, the Privy Council stated at Page 317 :

"All these matters, however, are essentially matters for the domestic tribunal to decide as it thinks right. Provided that the tribunal does not exceed its jurisdiction and acts honestly and in good faith, the Court cannot intervene, even if it thinks that the penalty is severe or that a very strict standard has been applied."

Another aspect which may also be noticed is how far and to what extent the doctrine of bias may be invoked in the case of domestic tribunals like those of clubs. The observations of Maugham, J., in *Maclean's case*<sup>1</sup>, in this context may be noticed. The learned Judge observes in that case thus :

"A person who joins an association governed by rules under which he may be expelled,..... has in my judgment no legal right of redress if he be expelled according to the rules, however unfair and unjust the rules or the action of the expelling tribunal may be, provided that it acts in good faith. .... The phrase, "the principles of natural justice," can only mean in this connection the principles of fair play so deeply rooted in the minds of modern Englishmen that a provision for an inquiry necessarily imports that the accused should be given his chance of defence and explanation. On that point there is no difficulty. Nor do I doubt that in most cases it is a reasonable inference from the rules that if there is anything of the nature of a *lis* between two persons, neither of them should sit on the tribunal."

1. L.R. (1929) 1 Ch. D. 602, 623. .... 3. (1949) 2 M.L.J. 574 : A.I.R. 1

2. I.L.R. (1946) 2 Cal. 88, 109.

Another difficulty that one is confronted with in proceedings held by committees constituted by clubs is to demarcate precisely the line between the prosecutor and the Judge. Maugham, J., noticed this difficulty and observed in *Macleans' case*<sup>1</sup> at Page 626 thus :

"In many cases the tribunal is necessarily entrusted with the duty of appearing to act as prosecutors as well as that of Judges ; for there is no one else to prosecute. For example, in a case where a council is charged with the duty of considering the conduct of any member whose conduct is disgraceful and of expelling him if found guilty of such an offence, it constantly occurs that the matter is brought to the attention of the council by a report of legal proceedings in the press. The member is summoned to appear before the council. The council's duty is to cause him to appear and to explain his conduct. It may be that in so acting the council are the prosecutors. In one sense they are ; but if the regulations show that the council is bound to act as I have mentioned and to that extent to act as prosecutors, it seems to be clear that the council is not disqualified from taking the further steps which the rules require."

Though it is advisable for a club to frame rules to avoid conflict of duties, if the rules sanction such a procedure, the party, who has bound himself by those rules, cannot complain, unless the enquiry held pursuant to such rules discloses *mala fides* or unfair treatment.

The following principles may be gathered from the above discussion. (1) A member of a masonic lodge is bound to abide by the rules of the lodge ; and if the rules provide for expulsion, he shall be expelled only in the manner provided by the rules (2) The lodge is bound to act strictly according to the rules whether a particular rule is mandatory or directory falls to be decided in each case, having regard to the well settled rules of construction in that regard. (3) The jurisdiction of a civil Court is rather limited ; it cannot obviously sit as a Court of Appeal from decisions of such a body ; it can set aside the order of such a body, if the said body acts without jurisdiction or does not act in good faith or acts in violation of the principles of natural justice as explained in the decisions cited *Supra*.

Bearing the said principles in mind, we shall now proceed to consider the arguments of learned counsel for the appellant.

The first contention is that Lodge Victoria has no jurisdiction to decide on the question whether a member committed a masonic offence, for it is said, such offences are within the jurisdiction of the District Grand Lodge, Bombay. The question falls to be decided on a construction of the relevant Laws of the Lodge.

The said Laws read :

*Law 198.* Every Daughter Lodge shall be entitled to try any member accused of any offence. A complaint, in writing, shall be served on the accused brother, by registered letter posted to his last known address, specifying the offence of which he is charged, which he shall be entitled to answer in writing within fourteen days of the date of posting of the complaint, or within such longer time as may be specified in the complaint. On the answer being lodged, or on the expiry of the time for doing so the matter of the complaint shall be brought before the Lodge for consideration and judgment, either at a special meeting called for that purpose, or at a regular meeting of the Lodge. The meeting at which it is to be considered must be called by circular sent by the Secretary, which shall state the fact that the complaint, and answer, if any, are to be brought before the Lodge for consideration and judgment. In the case of a Lodge which does not convene its meetings by circular, the meeting shall be called in such manner as may be ordered by Grand Committee, or by Grand Secretary on its behalf. Notice of the meeting shall be sent to the accused brother by registered letter posted to his last known address at least fourteen clear days prior to the day of the meeting and that whether he has lodged written answer or not, and he shall be entitled to appear at the meeting and any adjournment thereof and state his defence. After the case has been considered, the Lodge shall give its decision. Such decision shall be by votes of a majority of the qualified members voting thereon, and only those present throughout the hearing of the case shall be entitled to vote. If the complaint be sustained, the Lodge shall pronounce such admonition or sentence as shall be decided by the majority of votes as aforesaid. A Daughter Lodge may not, however, pronounce a sentence of expulsion as power to expel is vested in Grand Lodge alone, but, if the circumstances are deemed of sufficient gravity, a Daughter Lodge may recommend to Grand Lodge that a brother be expelled from the craft. The judgment pronounced shall be intimated forthwith in writing by registered letter to the said brother, who shall therein be apprised that it shall be final unless appealed against to the Provincial or District Grand Lodge, or to Grand Lodge in the case of a Daughter Lodge not within the jurisdiction of a Province or District within one month after the date of posting the said intimation. In special circumstances, Grand Committee, through Grand Secretary, may extend the period within which an appeal may be made.

*Law 128:* A Provincial or District Grand Lodge shall hear and determine all subjects of masonic complaint, dispute, or difference initiated before or appealed or remitted to it respecting Daughter Lodges or brethren of the Scottish Craft within the Province or District, and may admonish, or pronounce a sentence of suspension, and, in the case of a Lodge, may suspend its Charter. The procedure in all such subjects of complaint, dispute, or difference shall be regulated *mutatis mutandis* by Laws 104 to 111 inclusive.

*Law 56:* The Grand Lodge shall hear and determine, through its Grand Committee as hereinbefore provided, all subjects of Masonic complaint or irregularity respecting Lodges of Brethren within the jurisdiction, and may proceed to admonish, or fine, or suspend, or expel.

Under Law 198, every Daughter Lodge will be entitled to try any member accused of an offence; under Law 128, a Provincial or District Grand Lodge shall hear and determine all subjects of masonic dispute or difference initiated before it respecting the brethren of the Scottish Craft; and Law 56 provides that the Grand Lodge shall hear such complaints and inflict suitable punishments in respect thereof. It will be seen that two different expressions are used: the expression "offence" is used in Law 198, while the expression "masonic complaint" is used in Law 128. It is, therefore, said that, as in the complaint the appellant is alleged to have committed masonic offences, the proper forum is the District Grand Lodge and not the Daughter Lodge. It is common case that the expressions "offence" and "masonic complaint" have not been defined in the Laws. In its legal significance an offence means an act or omission made punishable by any law for the time being in force. The expression "masonic complaint" is a comprehensive term; it may mean any complaint pertaining to masonic matters. It is not necessary to decide whether the expression "masonic complaint" is wide enough to take in an "offence". But Law 198 expressly confers a jurisdiction on a Daughter Lodge to try a member if he commits an offence; the jurisdiction conferred on it cannot be excluded by Law 128, which is a general law. The question therefore is whether the allegations made against the appellant constituted "offences" within the meaning of Law 198. The word "offence" in the context of that Law can only mean the infringement of the Laws of the Daughter Lodge. As all the Laws have not been placed before us, we are not in a position to hold whether the allegations amounted to "offences" or not in the aforesaid sense. But the complainant, the appellant and the members of the Lodge, including its office-bearers, proceeded on the basis that the appellant committed "offences". The complaint discloses as many as 12 charges. The appellant answered them *seriatim*. Indeed, in his answer he specifically stated:

"Further if my accuser and others of his mind have, thought this alleged "offence" serious enough to be included in this complaint, why did they not take any action in the matter immediately instead of raking it up after sleeping over it for no less than 3-4 years?"

This shows that even the appellant proceeded on the basis that the allegations, if established, would amount to "offences" within the meaning of the said law. In the special meeting of the Lodge it was held that the charges have been established: and on that basis punishment was imposed on the appellant. The appellant did not take any objection either that the allegations did not amount to "offences" within the meaning of Law 198 or that the Lodge had no jurisdiction to decide whether he committed the offences. It is, therefore, manifest that all the parties concerned in the matter accepted the position that if the acts alleged to have been committed by the appellant were established; he would have committed "offences" under the Laws. If the allegations against the appellant amounted to "offences" Law 198 is immediately attracted. If that be so, neither Law 128 nor Law 56, which deal with the jurisdiction of a District Grand Lodge in respect of "masonic complaints", can oust the jurisdiction expressly conferred on the Daughter Lodge. We therefore, hold that the Daughter Lodge had jurisdiction to entertain the complaint filed by the 2nd respondent against the appellant and decide it on merits.

The next question is, whether Law 198 has been strictly complied with. Relevant part of Law 198 reads:

"On the answer being lodged, or on the expiry of the time for doing so, the matter of the complaint shall be brought before the Lodge for consideration and judgment, either at a special meeting called for

that purpose, or at a regular meeting of the Lodge. The meeting at which it is to be considered must be called by circular sent by the Secretary, which shall state the fact that the complaint, and answer if any, are to be brought before the Lodge for consideration and judgment."

As we have already indicated in the narration of facts, notice was issued to the members fixing the date of the special meeting along with the notice issued to the appellant *i.e.*, the notice was issued to the members before the appellant filed his answer in respect of the allegations made against him in the complaint. It is, therefore, contended that the notice of the special meeting issued to the members was not in strict compliance with the said Law. We do not see any contravention of the Law. The Law does not say that notice to the members should be issued only after the answer was lodged by the person against whom a complaint was made. But what it says is that the matter of the complaint shall be brought before the Lodge for consideration after the answer was lodged or on the expiry of the time for doing so. It also does not prescribe that the answer should be communicated to the members, but only indicates that the notice shall state the fact that the complaint and the answer, if any, will be brought before the Lodge for consideration and judgment. To put it in other words, the gist of the relevant part of the Law is that in the special meeting convened for the purpose or at a regular meeting of the Lodge, the matter of the complaint shall be brought for consideration and judgment. In the present case it is not disputed that the prescribed notice was given to the members and at the meeting all of them had considered the complaint as well as the answer lodged by the appellant. Therefore, the law in this regard has been strictly complied with.

The next contention relates to the following part of Law 198 :

"Notice of the meeting shall be sent to the accused brother by registered letter posted to his last known address atleast fourteen clear days prior to the day of the meeting and that whether he has lodged a written answer or not, and he shall be entitled to appear at the meeting and any adjournment thereof and state his defence."

It is contended that under the said part of the law, the accused is entitled to have another 14 days after he filed his answer to enable him to file his case before the Lodge and that in the instant case no such additional period was given to him. That is so. The position, therefore, is that the appellant was given notice of the hearing as required by the law, but he was not given the entire period prescribed thereunder. The question is whether this error in the procedure vitiated the trial. It is obvious that the appellant was not prejudiced. He never made a complaint of it. Indeed in his answer he made it clear that he would not be present at the enquiry. The Law itself enabled him to apply for further time, but he did not ask for it, as he did not want to appear at the meeting. He did not raise this objection either in the appeal before the District Grand Lodge or in the second appeal before the Grand Lodge of Scotland. Before the said appellate Lodges he took the decision on merits. Indeed, by his answer and subsequent conduct he clearly waived the said requirement of the Law. Can he now be allowed to rely upon a breach of the procedural rule to invalidate the proceeding? In our view, he cannot do so. There is a distinction between the jurisdiction of a Lodge and the irregular exercise of it in the matter of the taking of procedural steps. A party to a dispute can certainly waive his objections to some defects in procedure. In this case the appellant could have taken objection for his being given a shorter period of notice than prescribed under the Law for his appearance before the meeting of the Lodge. He did not do so. The appellant has, by his aforesaid conduct, clearly waived his right under the said Law. Having waived it, he is now precluded from relying upon the said defect. We, therefore, hold that it is not open to the appellant to rely upon the said defect for invalidating the proceeding.

The argument that the members of the Lodge were both the prosecutors and the Judges, and therefore the principles of natural justice have been violated has not much force in the context of the present enquiry. We are dealing with a case of a Lodge and not with that of a tribunal or a Court. It is true that the earlier resolution, Exhibit 114, shows that 11 members of the Lodge were not well disposed towards the appellant; but here we are concerned with the complaint filed by

the 2nd respondent. Notice of the complaint was given to all the members of the Lodge. It may be that some of them did not like the appellant, and one of them is the complainant himself. But 22 members of the Lodge met and unanimously held, after considering the complaint and the answer given by the appellant that he was guilty. If the appellant had any objection for one or some of the members taking part in the meeting, he could have raised an objection, but he did not do so. The rules governing tribunals and Courts cannot *mutatis mutandis* be applied to such bodies as Lodges. We have to see broadly in the circumstances of each case whether the principles of natural justice have been applied. In the circumstances of this case, particularly when we find that the appellant had not raised any objection, we cannot say that the resolution passed by the Lodge Victoria is bad for violating any principles of natural justice.

Lastly an attempt was made to persuade us to resurvey the entire material to ascertain the correctness or otherwise of the decision of the Lodge. As we have pointed out earlier, civil Courts have no jurisdiction to decide on the merits of a decision given by a private association like a Lodge. Both the Courts below have held that the Daughter Lodge has acted in good faith in the matter of the complaint against the appellant. That is a concurrent finding of fact; and it is the practice of this Court not to interfere ordinarily with concurrent findings of fact. There are no exceptional circumstances for our departing from the said practice.

In the result, the appeal fails and is dismissed. No costs.

K.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P.B. GAJENDRAGADKAR, K.N. WANCHOO, K.C. DAS GUPTA AND J.C. SHAH, JJ.

Michael Golodetz & others

.. *Appellants\**

v.

Serajuddin & Co.

.. *Respondent.*

*Arbitration Act (X of 1940), section 34—Scope—Agreement to submit to foreign arbitration—Action by one of the parties in India—Stay of—Considerations.*

Where a party to an arbitration agreement commences an action for determination of a matter agreed to be referred under an arbitration agreement the Court normally favours stay of the action leaving the plaintiff to resort to the tribunal chosen by the parties for adjudication. The Court in such a case is unwilling to countenance, unless there are sufficient reasons, breach of the solemn obligation to seek resort to the tribunal selected by him, if the other party thereto still remains ready and willing to do all things necessary for the proper conduct of the arbitration. This rule applies to arbitrations by tribunals foreign as well as domestic. The Court is not obliged to grant stay merely because the parties have even under a commercial contract agreed to submit their dispute in a matter to an arbitration tribunal in a foreign country. It is for the Court having regard to all the circumstances, to arrive at a conclusion whether sufficient reasons are made out for refusing to grant stay. Whether the circumstances in a given case make out sufficient reasons for refusing to stay a suit is essentially a question of fact.

[In the instant case the facts established made out "sufficient reasons" for not granting stay].

Appeal by Special Leave from the Judgment and Order dated the 29th April, 1959, of the Calcutta High Court in Appeal from Original Order No. 177 of 1958.

S. T. Desai, Senior Advocate (D.N. Mukherjee and B.N. Ghosh, Advocates, with him), for Appellants.

C.K. Daphtary, Solicitor General of India (S.K. Kapur and P.K. Chatterjee, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

*Shah, J.*—The Appellants are a firm carrying on business as importers, in the name and style of "M. Golodetz & Company" at 120, Wall Street, New York in the United States of America. The respondents are a firm carrying on business, among others, as exporters of manganese ore and their principal office of business is at Bentinck Street in the town of Calcutta. By a contract in writing dated 5th July, 1955, the respondents agreed to sell and the appellants agreed to buy 25,000 tons of manganese ore on the terms and conditions set out therein. The contract contained the following arbitration clause :

"*Arbitration:* Any dispute arising out of the contract is to be settled by arbitration in New York according to the rules of the American Arbitration Association."

Between September, 1956 and August, 1957 the respondents supplied 5478 tons of manganese ore. Disputes having arisen between the parties about the liability of the respondents to ship the balance of the goods not delivered, the appellants referred them on or about 15th January, 1958, to the arbitration of the American Arbitration Association and claimed compensation on the plea that the respondents had unlawfully made default in shipping the balance of the goods agreed to be sold. On 2nd February, 1958, the respondents commenced an action on the original side of the High Court of Calcutta claiming a decree that the written contract dated 5th July, 1955, be adjudged void and delivered up and cancelled, that a perpetual injunction be issued restraining the appellants, their servants and agents from taking steps in purported enforcement of the said contract and that a declaration (if necessary) be made that the said contract stands discharged and that the parties have no rights and obligations thereunder. It was the case of the respondents that the appellants had accepted manganese ore shipped till August, 1957, in full satisfaction of their liability and that the contract was discharged and the rights and liabilities of the parties thereunder came to an end. In the alternative the respondents pleaded that the appellants had repudiated the contract or had committed breaches thereof and on that account also the contract stood discharged or had become void or voidable at their option and that they had avoided the same. In the further alternative they pleaded that the contract had become impossible of further performance and that the same stood frustrated or discharged and they were exempted from further performance thereof. The appellants thereupon petitioned the High Court of Calcutta for an order that the proceedings in Suit No. 194 of 1958 commenced by the respondents be stayed by an order under section 34 of the Arbitration Act X of 1940, and that an injunction be issued restraining the respondents, their agents and servants from proceeding with the hearing of the suit. Ray, J., who heard the petition held that to the agreement to submit the disputes to arbitration to a foreign arbitral body section 34 of the Indian Arbitration Act, 1940, applied, that the remedy of the party aggrieved by the manner in which the proceedings are conducted, or by the award was to contest the arbitration proceeding and the award in the foreign tribunal, according to the law applicable thereto, and that there was no sufficient reason for not staying the action filed in breach of the agreement to refer the disputes arising under the contract to arbitration. In appeal under the Letters Patent against the order, the High Court held that the Court of first instance had not exercised its discretion properly for it had failed to take into consideration certain important circumstances emerging from the evidence, viz., that all the evidence regarding the contract and the disputes was in India, that there were on account of the restrictions imposed by the Government of India special difficulties in securing foreign exchange for producing evidence before a foreign arbitration tribunal, that it would be impossible for the respondents to produce their evidence and therefore the foreign arbitration tribunal "would not be a safe and convenient forum for a just and proper decision of the disputes between the parties." The learned Judges also observed that it was conceded by the Advocate-General appearing on behalf of the appellants that the entire matter would be governed by the Indian laws the Indian Arbitration Act and the Indian Contract Act and on that account also the discretion of the Court to refuse

to stay the suit should be exercised. The High Court accordingly reversed the judgment of Ray, J., and vacated the order passed by him. Against that order, with Special Leave, this appeal is preferred.

We will assume for the purpose of this appeal, that section 34 of the Arbitration Act, 1940, invests a Court in India with authority to stay a legal proceeding commenced by a party to an arbitration agreement against any other party thereto in respect of any matter agreed to be referred, even when the agreement is to submit it to a foreign arbitration tribunal. Where a party to an arbitration agreement commences an action for determination of a matter agreed to be referred under an arbitration agreement the Court normally favours stay of the action leaving the plaintiff to resort to the tribunal chosen by the parties for adjudication. The Court in such a case is unwilling to countenance, unless there are sufficient reasons, breach of the solemn obligation to seek resort to the tribunal selected by him, if the other party thereto still remains ready and willing to do all things necessary for the proper conduct of the arbitration. This rule applies to arbitrations by tribunals, foreign as well as domestic. The power enunciated by section 34 of the Arbitration Act is inherent in the Court: the Court insists, unless sufficient reason to the contrary is made out, upon compelling the parties to abide by the entire bargain, for not to do so would be to allow a party to the contract to approbate and reprobate, and this consideration may be stronger in cases where there is an agreement to submit the dispute arising under the contract to a foreign arbitral tribunal. A clause in a commercial transaction between merchants residing in different countries to go to arbitration is an integral part of the transaction, on the faith of which the contract is entered into, but that does not preclude the Court having territorial jurisdiction from entertaining a suit at the instance of one of the parties to the contract, even in breach of the covenant for arbitration. The Court may in such a case refuse its assistance in a proper case, when the party seeking it is without sufficient reason resiling from the bargain. When the Court refuses to stay the suit it declines to hold a party to his bargain, because of special reasons which make it inequitable to do so. The Court ordinarily requires the parties to resort for resolving disputes arising under a contract to the tribunal contemplated by them at the time of the contract. That is not because the Court regards itself bound to abdicate its jurisdiction in respect of disputes within its cognizance: it merely seeks to promote the sanctity of contracts, and for that purpose stays the suit. The jurisdiction of the Court to try the suit remains undisputed: but the discretion of the Court is on grounds of equity interposed. The Court is therefore not obliged to grant stay merely because the parties have even under a commercial contract agreed to submit their dispute in a matter to an arbitration tribunal in a foreign country. It is for the Court, having regard to all the circumstances, to arrive at a conclusion whether sufficient reasons are made out for refusing to grant stay. Whether the circumstances in a given case make out sufficient reasons for refusing to stay a suit is essentially a question of fact.

In the present case the circumstances, in our judgment, are somewhat peculiar. The appellants in their petition for stay averred that the petition was *bona fide*, and was filed at the earliest possible opportunity, that the appellants were ready and willing to do all things necessary for the proper conduct of the arbitration proceeding and there was no sufficient reason why the matters in respect of which the suit had been filed could not be referred to arbitration in accordance with the arbitration agreement. The respondents by their counter-affidavit contended that the entire evidence regarding the subject-matter of the suit and all the witnesses in connection therewith were in India and that no part of the evidence regarding any of the aforesaid matters was in New York. They also submitted that the proper law applicable to the contract dated 5th July, 1955 was the Indian law and that the Indian law of Contracts would govern the rights and obligations of the parties. They also contended that the suit raised difficult questions of law applicable to the contract, and on that account also they should not be required to submit the dispute to adjudication by laymen. It was also submitted that the arbitration

clause even if it was binding on the respondents firm contemplated a foreign arbitration, i.e., the arbitration was to be held in New York and any award that might be made would be a foreign award, the arbitrators not being subject to the control of the Courts in India and therefore the provisions of the Arbitration Act including section 34 could not be availed of by the appellants. By their counter-affidavit the appellants did not challenge the assertion made by the respondents that all the evidence in connection with the dispute was in India and that no part of the evidence was in New York. The constituted attorney of the appellants in paragraph 11 of his counter-affidavit merely affirmed that

"there is no sufficient reason why the matters in respect of which the said suit has been filed should not be referred to arbitration in accordance with the arbitration clause in the said agreement. I deny that there is any valid and/or sufficient reason why the said disputes which are the subject-matter of the said suit should not be so referred to arbitration. I further say that it would be a cause of injustice to the petitioners to permit the respondents, subsequent to the conclusion of a contract to pick and to choose as whim or prejudice may dictate which clauses are binding and which are inoperative."

He further stated in paragraph 12:

"I do not admit that evidence with regard to matters mentioned in the said paragraph (10 (a) of the respondent's affidavit) is necessary or cannot be given before the arbitrators as alleged. In particular, I deny that if arbitration is held in terms of the agreement as deliberately concluded by and between the parties there will be any denial of justice as alleged or at all. I do not admit that it will be necessary or that it will not be possible for the respondent to send any representative or to take any witness to New York as alleged. On the other hand, if the suit is not stayed, the petitioners will be greatly prejudiced and will suffer hardship."

The High Court addressed itself to the question, whether the pleas raised by the respondents constituted sufficient reason within the meaning of the Arbitration Act, and pointed out, and in our judgment it was right in so doing, that the statement made in the affidavit of the respondents had remained practically unchallenged that all the evidence in the case relating to the disputes was in India and that was a strong ground for not exercising the discretion in favour of the appellants. It must be observed that having regard to the severe restrictions imposed in the matter of providing foreign exchange to individual citizens it would be impossible for the respondents to take their witnesses to New York and to attend before the arbitrators at the arbitration proceeding to defend the case against them and the proceeding before the arbitrators would in effect be *ex parte*. That would result in injustice to the respondents. Undoubtedly the appellants would be put to some inconvenience if they are required to defend the suit filed against them in India, but the High Court has considered the balance of inconvenience and the other circumstances and has come to the conclusion, and in our judgment that conclusion is right, that the facts established make out 'sufficient reason' for not granting stay.

It was urged by counsel for the appellants that the High Court for reasons which were not adequate interfered with the order which was within the discretion of the trial Judge, and on that account the order must be set aside. But the High Court has pointed out that Ray, J., 'did not give full, proper and adequate consideration to all the circumstances and failed to apply his mind to the relevant affidavits' from which it emerged that all the evidence relating to the dispute was in India and that he did not express his views on the diverse contentions raised and remained content to observe that he was not in a position to decide the questions raised thereby, and granted stay because he did not find any compelling reasons for exercising the discretion against the appellants. This criticism of the High Court appears not to be unjustified. The High Court was therefore competent on the view expressed in interfering with the discretion.

The two Courts below have differed on the question as to the law applicable to the contract. Ray, J., held that the contract was governed by the American law. In appeal Mr. S. Choudhary appearing for the appellants propounded that view, but the Advocate-General of Bengal who followed him conceded (as observed by the High Court) that the



“entire matter would be governed by the Indian Law, the matter of arbitration by the Indian Arbitration Act, and the other matters under the aforesaid contract by the Indian Contract Act, \* \* \* so far as the rights and obligations under the disputed contract are concerned, the parties must now be taken to have accepted the Indian Contract Act as the relevant law for their determination.”

Counsel for the appellants say that no such concession was made before the High Court by the Advocate-General, and the observations made in the judgment were the result of some misconception. Counsel relies in support of this submission upon an affidavit sworn by one Surhid Mohan Sanyal constituted attorney of the appellants filed in this Court on the day on which Special Leave to appeal was granted. Apart from the circumstance that the affidavit is couched in terms which are vague, and the denial is not sworn on matters within the personal knowledge of the deponent, it is a somewhat singular circumstance, that Sanyal who swore the affidavit relied upon, did not when he swore an affidavit in support of the petition for certificate under Article 133 of the Constitution before the High Court, make any such assertion.

But on the view expressed by us, we deem it advisable not to express any opinion on the question as to the law applicable to the contract. It will be for the Court trying the suit to deal with that question, and to decide the suit.

The appeal therefore fails and is dismissed with costs.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

Om Prakash Gupta

.. *Appellant\**

*v.*

Dr. Rattan Singh and another

.. *Respondents.*

*Delhi Rent Control Act (LIX of 1958)—Proceedings under—Denial of tenancy—Jurisdiction of Rent Control Authority to decide the question.*

The Rent Control Act proceeds on the assumption that there is relationship of landlord and tenant. If the relationship is denied the authorities under the Act have to determine that question also, because a simple denial of the relationship cannot oust the jurisdiction of the tribunals under the Act.

Appeal by Special Leave from the Judgment and Order, dated the 31st May, 1962 of the Punjab High Court (Circuit Bench) at Delhi in S.A.O. No. 86-D of 1962.

A. S. R. Chari, Senior Advocate (*M. K. Ramamurthi, D. P. Singh and R. K. Garg*, Advocates of *M/s. Ramamurthi & Co.*, with him), for Appellant.

G. S. Pathak, Senior Advocate (*F. C. Bedi and D. D. Sharma*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

*Sinha, C.J.*—This appeal by Special Leave is directed against the judgment and order of a learned single Judge of the Punjab High Court summarily dismissing the appeal filed by the appellant, by his order, dated 31st May, 1962, from the order of the Rent Control Tribunal, dated 7th March, 1962, confirming that of the Additional Rent Controller, Delhi, dated 27th July, 1961, whereby he had directed the appellant to be evicted from the premises in question.

It appears that the respondents are admittedly the landlords of the premises, No. 24, Ansari Road, Darya Ganj, Delhi. The appellant claims to have been in occupation of the premises since prior to 1950, at a monthly rent of Rs. 50. In 1955, the respondents had instituted a suit for the eviction of the All India Postal & R.M.S. Union, and the appellant was also impleaded as a party to the suit. The respondents, in 1958, made an application for amendment of the plaint on the ground that

\* Civil Appeal No. 541 of 1962.

they had come to know that the last owner, the father of the first respondent, had let the building to the appellant for his residential purposes and that the case should proceed against him only. But the Subordinate Judge, before whom the suit was pending, did not permit the amendment of the plaint but granted permission to withdraw from the suit with liberty to bring a fresh one, by his order, dated 8th May, 1959. Thereafter, on 25th February, 1960, the respondents made an application before the Rent Controller, Delhi, for the eviction of the appellant alone, without impleading the Union aforesaid as a party. The contention of the appellant was that the premises had been let out by the father of the first plaintiff-respondent to the All India Postal & R.M.S. Union for office-cum-residential purposes and the tenancy of the Union had never been terminated. The appellant also alleged that he was not a tenant and, therefore, the application for his eviction was not maintainable. The petition for eviction was founded on the allegation that the appellant as tenant had made persistent default in the payment of rent and, secondly, that the premises were *bona fide* required by the respondents for their own residence, as the first respondent was about to leave the employment of a certain hospital which had provided him—with residential accommodation, that is to say, the petition for eviction was brought under section 14 (i) (a) and (c) of the Delhi Rent Control Act (LIX of 1958)—which will be referred to in the course of the judgment as the Act. The appellant besides denying his tenancy and asserting the tenancy of the Union aforesaid stated that the respondents had already got suitable accommodation and that their requirement of the premises in question was not *bona fide*; the notice of demand for payment of rent served on the appellant was neither valid nor proper in law inasmuch as he was not the tenant in respect of the premises, and that the notice of demand should have been served on the Union. The appellant asserted that he was only a licensee of the Union, and that there was no relationship of landlord and tenant between him and the respondents. On 2nd April, 1960, the Additional Rent Controller passed an order directing the appellant to deposit the arrears of rent from 1st August, 1958, up-to-date, at the rate, of Rs. 50 per month, and future monthly rent, month by month, by the 15th of every following month. The respondents made an application on 16th May, 1961 under section 15 (7) of the Act for striking out his defence against eviction on the ground that the tenant had failed to make the payment or deposit, as directed by the order, dated 2nd April, 1960, aforesaid. The appellant denied that he had made any default in the regular payment of rent, but also asserted that if there was any such default it was not intentional and was the result of a miscalculation. By his order, dated 26th July, 1961, the Additional Rent Controller ordered the defence of the appellant to be struck out. An appeal against the order striking out his defence was made to the Rent Control Tribunal on 15th September, 1961, which was late by one day. The learned Tribunal dismissed the appeal as time-barred, as also on merits, by its order, dated 6th March, 1962. By his order, dated 27th July, 1961, the Additional Rent Controller passed an *ex parte* order of ejectment against the appellant holding that *prima facie* the relationship of landlord and tenant had been established, on the basis of certain rent receipts granted by the respondents to the appellant. He also held that the respondents' personal *bona fide* need for accommodation had been established. Appeal against that order was dismissed on 7th March, 1962, by the Rent Control Tribunal. On 28th May, 1962, the appellant filed a Second Appeal in the High Court of Punjab at Delhi against the order, dated 7th March 1962, of the Rent Control Tribunal, dismissing his appeal against the order of eviction. No Second Appeal was taken, to the High Court in respect of the dismissal of the appeal relating to the order, dated 6th March, 1962, of the Rent Control Tribunal dismissing his appeal in respect of the order of the Additional Rent Controller striking out his defence. The Second Appeal was dismissed summarily by a Single Judge on 31st May, 1962. The appellant moved this Court during the long vacation and obtained an order from the learned Vacation Judge granting Special Leave to appeal, on 5th June, 1962.

A preliminary objection was taken on behalf of the landlord-respondents that no Second Appeal having been filed against the order aforesaid of the Rent Control

Tribunal, dismissing his appeal in respect of the order of the Additional Rent Controller striking out his defence, that order had become final between the parties, and, therefore, this appeal was incompetent. As will presently appear, this question is bound up with the merits of the appeal and has, therefore, to be determined not as a preliminary objection but as one of the contentions between the parties, on the merits of the appeal itself.

It was argued on behalf of the appellant that the authorities under the Act had no jurisdiction to entertain the proceedings, inasmuch as it was denied that there was any relationship of landlord and tenant between the parties. Consequently, it was further contended, the provisions of section 15 (7) of the Act could not be applied against the appellant in the absence of a finding that he was the tenant in respect of the premises in question. It was also contended that the delay of one day made in preferring the appeal to the Rent Control Tribunal should have been condoned, and the order refusing condonation was vitiated by applying erroneous considerations. Other contentions raised related to concurrent findings of fact of the Rent Controller and the Rent Control Tribunal and we need not, therefore, take notice of these arguments. The most important question that arises for determination in this case is whether or not the Rent Control authorities had jurisdiction in the matter in controversy in this case. Ordinarily it is for the Civil Courts to determine whether and, if so, what jural relationship exists between the litigating parties. But the Act has been enacted to provide for the control of rents and evictions of tenants, avowedly for their benefit and protection. The Act postulates the relationship of landlord and tenant, which must be a pre-existing relationship. The Act is directed to control some of the terms and incidents of that relationship. Hence, there is no express provision in the Act empowering the Controller, or the Tribunal, to determine whether or not there is a relationship of landlord and tenant. In most cases such a question would not arise for determination by the authorities under the Act. A landlord must be very ill-advised to start proceedings under the Act, if there is no such relationship of landlord and tenant. If a person in possession of the premises is not a tenant, the owner of the premises would be entitled to institute a suit for ejectment in the Civil Courts, untrammelled by the provisions of the Act. It is only when he happens to be the tenant of premises in an urban area that the provisions of the Act are attracted. If a person moves a Controller for eviction of a person on the ground that he is a tenant who had, by his acts or omissions, made himself liable to be evicted on any one of the grounds for eviction, and if the tenant denies that the plaintiff is the landlord, the Controller has to decide the question whether there was a relationship of landlord and tenant. If the Controller decides that there is no such relationship the proceeding has to be terminated, without deciding the main question in controversy, namely, the question of eviction. If on the other hand, the Controller comes to the opposite conclusion and holds that the person seeking eviction was the landlord and the person in possession was the tenant the proceedings have to go on. Under section 15 (4) of the Act, the Controller is authorised to decide the question whether the claimant was entitled to an order for payment of rent, and if there is a dispute as to the person or persons to whom the rent is payable, he may direct the tenant to deposit with him the amount payable until the decision of the question as to who is entitled to that payment. "Landlord" has been defined under the Act as a person who is receiving or is entitled to receive the rent of the premises (omitting the words not necessary for our present purposes). If the Controller comes to the conclusion that any dispute raised by the tenant as to who was entitled to receive rent had been raised by the tenant for false or frivolous reasons, he may order the defence against eviction to be struck out (section 15 (5)). Similarly, if a tenant fails to make payment or deposit as required by section 15 (2), the Controller may order the defence against eviction to be struck out and proceed with the hearing of the application for eviction (section 15 (7)). Such an order was, as already indicated, passed by the Rent Controller in this case. Now, proceedings under section 15 are primarily meant for the benefit of the tenant, and the section authorises the Controller, after giving the parties an opportunity of being heard, to make an order directing the tenant to pay the amount found on calculation to be due to the landlord or to

deposit it with the Controller, within one month of the date of the order. Such an order can be passed by the Controller for the benefit of the tenant, only if the Controller decides that the person against whom the proceedings for eviction had been initiated was in the position of a tenant. Thus, any order passed by the Controller, either under section 15 or other sections of the Act, assumes that the Controller has the jurisdiction to make the order, *i.e.*, to determine the issue of relationship. In this case, when the Controller made the order for deposit of the arrears of rent due, under section 15 (1), and on default of that made the order under sub-section (7) of section 15, striking out the defence, the Controller must be deemed to have decided that the appellant was a tenant. Such a decision may not be *res judicata* in a regular suit in which a similar issue may directly arise for decision. Hence, any orders made by a Controller under the Act proceed on the assumption that he has the necessary power to do so under the provisions of the Act, which apply and which are meant to control rents and evictions of tenants. An order under section 15 (1) is meant primarily for the protection and benefit of the tenant. If the appellant took his stand upon the plea that he was not a tenant he should have simply denied the relationship and walked out of the proceedings. Instead of that, he took active steps to get the protection against eviction afforded by the Act, by having an order passed by the Controller, giving him a *locus poenitentiae* by allowing further time to make the deposit of rent outstanding against him. The Controller, therefore, must be taken to have decided that there was a relationship of landlord and tenant between the parties, and secondly, that the tenant was entitled to the protection under the Act. It is true that the Act does not in terms authorise the authorities under the Act to determine finally the question of the relationship of landlord and tenant. The Act proceeds on the assumption that there is such a relationship. If the relationship is denied, the authorities under the Act have to determine that question also, because a simple denial of the relationship cannot oust the jurisdiction of the tribunals under the Act. True, they are tribunals of limited jurisdiction, the scope of their power and authority being limited by the provisions of the Statute. But a simple denial of the relationship either by the alleged landlord or by the alleged tenant would not have the effect of ousting the jurisdiction of the authorities under the Act, because the simplest thing in the world would be for the party interested to block the proceedings under the Act to deny the relationship of landlord and tenant. The tribunals under the Act being creatures of the Statute have limited jurisdiction and have to function within the four-corners of the Statute creating them. But within the provisions of the Act, they are tribunals of exclusive jurisdiction and their orders are final and not liable to be questioned in collateral proceedings like a separate suit or application in execution proceedings. In our opinion, therefore, there is no substance in the contention that as soon as the appellant denied the relationship of landlord and tenant, the jurisdiction of the authorities under the Act was completely ousted. Nor is there any justification in the contention that the provisions of sub-section (7) of section 15 of the Act had been erroneously applied to the appellant. The orders under those provisions were for his benefit and he must be deemed to have invited the Controller to pass those orders in his favour. Otherwise, he should have walked out of the proceedings after intimating to the Controller that he was not interested to contest the proceedings inasmuch as he was not a tenant, and that a third party was the tenant. This order, of course, will bind only the appellant and no one else, and as he failed to take advantage of the order passed in his favour under section 15 (7), he cannot make a grievance of it. Whether or not a delay of one day should have been condoned was a matter of discretion with the appellate authority, and it is not for this Court to say that this discretion should have been exercised in one way and not in another. The crucial question is not whether the delay is of one day or more, but whether or not there was any justification for the delay. It is for the appellate authority to determine whether or not the appellant had satisfied it as to the sufficiency of the ground for condoning the delay. This question of condonation of delay is more or less of academic interest only, because the Tribunal not only considered the question of delay but also the appeal on its merits, and on merits also it came to the conclusion that there was no ground for interference with the orders passed by the

Rent Controller. Hence, the question of condonation of delay is of no importance in this case. What is of greater importance is the merit of the decision awarding possession to the landlord. In this connection, it may be added that it was a little inconsistent on the part of the appellant to have taken all the advantages the Act affords to a tenant and then to turn round and to assert that the Rent Controller had no jurisdiction in the matter, because he was not the tenant. The Rent Controller had to determine the controversy as between the parties for the purposes of disposing of the case under the Act. If the appellant really was a tenant, he has had the benefit of the provisions of the Act, including the six month's time as a period of grace after an order of the Rent Controller granting the landlord's prayer for eviction. If he was not the tenant, he has nothing to lose by the order of the Rent Controller. These proceedings cannot affect the interest of one who is not a party to the present case. Furthermore, a Second Appeal lay from the appellate order of the Rent Control Tribunal dismissing the appellant's appeal against the order striking out his defence. No such Second Appeal was taken to the High Court, though as already stated a Second Appeal was preferred against the order of the Rent Control Tribunal dismissing his appeal against the order of eviction. The position is that the appellate order of the Rent Control Tribunal, dated 6th March 1962, dismissing the appeal against the order striking out his defence became final between the parties and is no more open to challenge. Hence, it is no more open to the appellant to challenge the jurisdiction of the authorities under the Act.

In our opinion, therefore, there is no merit in this appeal. It is accordingly dismissed with costs.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

Lakshmi Narain

.. *Appellant\**

*v.*

The First Additional District Judge, Allahabad and others .. *Respondents.*

Miss A. Nihal Singh

.. *Intervener.*

*U.P. Civil Laws (Reforms and Amendment) Act (XXIV of 1954)—First appeal pending in High Court in suit decided prior to enactment of the Act of less than ten thousand rupees valuation—If could be transferred under section 24, Civil Procedure Code (V of 1908) to District Judge or Additional Judge empowered under the Act to hear and dispose of such appeals.*

A first appeal in a suit decided prior to the enactment of the U.P. Civil Laws (Reforms and Amendment) Act (XXIV of 1954), involving a valuation of less than ten thousand rupees could not be transferred by the High Court under section 24 of the Code of Civil Procedure (V of 1908) to a District Judge or Additional District Judge empowered under that Act to hear and dispose of such appeals. In the face of section 3 (1) of the Act it is impossible to hold that the District Courts were competent to hear appeals of the valuation of ten thousand rupees or less in suits decided before the Act came into force, and appeals from, which were pending before the High Court.

*Sarjudai v. Rampathi Kunnari*, (1962) All. L.J. 544, reversed.

Appeal from the Judgment and Order, dated the 13th July, 1962 of the Allahabad High Court in Special Appeal No. 82 of 1962.

*M. C. Setalvad*, Attorney-General for India (*B. C. Misra*, Advocate, with him), for Appellant.

*K. S. Hajela*, Senior Advocate (*C. P. Lal*, Advocate, with him), for Respondent No. 1.

*J. P. Goyal*, Advocate for Intervener.

The Judgment of the Court was delivered by

*Sinha, C.J.*—When we had finished the hearing of the case on 13th December, 1962, we intimated to the parties that the appeal was allowed and that our reasons would follow.

The only question for determination in this appeal is whether under the provisions of the U.P. Civil Laws (Reforms and Amendment) Act (U.P. XXIV of 1954)—which hereinafter will be referred to as the Act—a first appeal in a suit decided prior to the enactment of the Act, involving a valuation of less than ten thousand rupees could be transferred for hearing and disposal to a District Judge or Additional District Judge. The First Additional District Judge, Allahabad, is the first respondent in this appeal and appeared through counsel at the hearing. The other respondents, who were the respondents in the main appeal, have not entered appearance and apparently are not interested in the result of this appeal.

In order to bring out the points in controversy between the parties it is necessary to state the following facts. The appellant, as plaintiff, instituted Suit No. 7 of 1949 in the Court of the Civil Judge, Mathura, for possession of certain properties, on 26th January, 1949, against respondents 2 and 3. That suit stood dismissed on November 27, 1951. The unsuccessful plaintiff preferred a first appeal to the High Court of Judicature at Allahabad, and it was numbered First Appeal No. 37 of 1952. The First Appeal aforesaid remained pending in the High Court from 8th February, 1952, when it was instituted, until 23rd April, 1952, when it was notified to the parties that the appeal had been transferred to the Court of the District Judge, Allahabad, for hearing. This order was passed by the learned Chief Justice in Chambers, under section 24 (1) (a) of the Code of Civil Procedure, on his own motion without notice to the parties concerned. The order of the Chief Justice is in these terms :

"It is hereby ordered that first appeals mentioned in the list annexed hereto transferred under orders of this Court to the Court of the District Judge, Allahabad, are now transferred from that Court to the Court of the 1st Additional District Judge at Allahabad."

In the list annexed is the appeal now in question, along with a number of other appeals. This order of the learned Chief Justice appears to have been passed in view of the recent legislation, the Act aforesaid, which amended a large number of statutes, one of them being the Bengal, Agra and Assam Civil Courts Act (XII of 1887). Section 21, clause (a) of sub-section (1) was amended so as to substitute 'ten thousand rupees' for 'five thousand rupees', thus enabling District Courts to entertain first appeals up to a valuation of ten thousand rupees. The appellant appeared before that Court and raised a preliminary objection as to the jurisdiction of that Court to hear the appeal. That Court overruled the preliminary objection as to its jurisdiction, by its order, dated 31st May, 1962, observing that it could not contravene the orders of the High Court and that the remedy of the appellant, if any, lay in the High Court itself. Thereupon the appellant moved the High Court under Articles 226 and 227 of the Constitution for a writ of *certiorari* for calling for the records of the appeal, and for a writ of Prohibition restraining the first respondent from hearing the appeal. The writ petition was placed before a single Judge of that Court (Dwivedi, J.), who by his order, dated 11th July, 1962, dismissed the petition in view of a Division Bench ruling of the same Court in a judgment, dated 14th November, 1961, in the case of *Sarjudei v. Rampati Kunwari*<sup>1</sup>. The learned Single Judge rightly pointed out that he could not go behind the decision of the Division Bench, even though it was pressed upon him that the decision required reconsideration. The appellant then preferred an appeal from the order of the learned Single Judge, dismissing the appeal *in limine*. The appeal being Special Civil Appeal No. 82 of 1962, was dismissed summarily on 20th July, 1962, on the ground that the question raised in the appeal was concluded by the decision of the Division Bench aforesaid. The Division Bench refused to refer the question to a larger Bench and preferred to follow that decision. The appellant moved the High Court for Special Leave to appeal to this Court which was granted, and that is how the appeal has come to this Court. The Division Bench pointed out that though the question had "been exhaustively dealt with by this Court in the case of *Sarjudei v. Rampati Kunwari*<sup>1</sup>," the case involved a substantial question of law and was one o

1. (1962) All. L.J. 544.

general importance as a large number of such cases were pending. In view of those considerations, the Court granted the certificate under Article 133 (1) (c) of the Constitution. Curiously enough the Court granted costs to the appellant against the First Additional District Judge, Allahabad, who was the opposite party No. 1 in the High Court in those proceedings.

Before we deal with the main point in controversy, it is necessary to point out that this Act had come up for consideration before a Division Bench (Agarwala and Mulla, JJ.) in First Appeal No. 60 of 1955, and its judgment, dated 18th February, 1955, is reported in the case of *Cyril Spencer v. M. H. Spencer*<sup>1</sup>. The learned Judges held that the right of appeal was not merely a matter of procedure but a matter of substantive right and the right of appeal from the decision of an inferior tribunal to a superior tribunal becomes a vested right at the date of the institution of the suit. They also relied upon the provisions of section 3 of the Act, which will hereinafter be dealt with, and came to the conclusion that the right of coming up in appeal to the High Court having become vested before the Act came into force could not be affected by the provisions of the Act, and that, therefore, all appeals which lay to the High Court under the pre-existing law would still continue to lie in the High Court if the suit had been instituted prior to the coming into effect of the Act. In the result they allowed the appeal to be filed in the High Court. That case is a clear authority for the proposition that the Act, by section 3 (1), had saved pending appeals in the High Court from the operation of the Act. But it appears that in view of the pendency of a large number of first appeals involving valuations of ten thousand rupees or less, the High Court was inclined to reconsider the matter, and, therefore, gave notice to the parties in a number of pending first appeals and heard the matter afresh. The judgment of the Court, by a Division Bench consisting of Desai, C.J., and Ramabhadran, J., is reported in *Sarjudei v. Rampati Kunwari*<sup>2</sup>. This time the Bench came to a conclusion different from that of the previous Division Bench of the same High Court. It is the correctness of this decision which is challenged before us.

Turning to the merits of the decision, it appears that the High Court recognised the legal position that the Act had no retrospective operation, and that the right to appeal to a superior tribunal is a vested right which is determined at the date of the institution of the suit or proceeding. The High Court, in that view of the matter, accepted the position that in spite of the Act the pending appeal in that Court could be disposed of by it. But it took the view that the Act did not have the effect of amending the provisions of section 24 of the Code of Civil Procedure, under which "the right of a litigant to an appeal is always subject to the right of the High Court to transfer it under section 24". The High Court further took the view that this overriding power of the High Court to transfer a case to a competent Court was in supersession of the party's right to have the case tried by a particular Court. The High Court rightly raised the question whether District Judges or Additional District Judges were competent to dispose of cases like the one before them. The question thus rightly posed has been wrongly answered by reliance upon the doctrine that the right of the High Court to transfer a case from itself to another Court or from one Court to another overrides the right of a party to have its case determined by a particular Court. In effect, the High Court took the view that after the enforcement of the Act, appeals involving valuations up to ten thousand rupees could be dealt with by District Judges or Additional District Judges, and therefore, they were competent to deal with them, though such appeals could not have been entertained by those Courts on the date on which they were preferred, having in view the date of the decision of suit. The Court further held that it was irrelevant to consider whether or not the Act had been given retrospective effect. The High Court emphasised the fact that appeals like the one before them had been transferred to the District Courts not under the provisions of the Act but under section 24 of the Code of Civil Procedure. In this connection, the High Court proceeded to make the following observations :

1. 1955 All. L.J. 307.

2. 1962 All. L.J. 544.

"It is enough that the U.P. Amending Act contains no provision taking away our power transfer the appeals under section 24, Civil Procedure Code, or no provision laying down that District Judges are not competent to hear appeals arising out of suits instituted prior to its enforcement. There is nothing in the provisions of section 3 of the Act to render the District Judges incompetent to hear them. Sub-section (1) reserves rights acquired prior to the enforcement, but as have explained earlier, if the right of the parties to the appeals is affected, it is not on account of enforcing any provision of it but on account of our exercising our power under section 24, Civil Procedure Code."

With all respect, the High Court has completely misdirected itself in interpreting the provisions of section 3 (1) of the Act, which must govern this case. That section runs as under :

"Any amendment made by this Act shall not affect the validity, invalidity, effect or consequence of anything already done or suffered, or any right, title, obligation or liability already acquired or incurred or any release or discharge of or from any debt, decree, liability, or any jurisdiction already exercised, and any proceeding instituted or commenced in any Court prior to the commencement of this Act shall, notwithstanding any amendment herein made continue to be heard and decided by such Court."

The High Court has not given effect to the words "any proceeding instituted or commenced in any Court prior to the commencement of this Act shall, notwithstanding any amendment herein made continue to be heard and decided by such Court." Now, giving full effect to the words just quoted of section 3 (1) of the Act, the High Court and the High Court alone would be competent to hear and decide the appeals pending before it. In other words, the District Courts were not competent to hear such appeals, and, therefore, the High Court could not have transferred those appeals to be heard by the District Judge or Additional District Judge, inasmuch as section 24 postulates that the Court to which the suit or appeal or other proceeding is transferred should be competent to try or dispose of the same. (1) On the date the appeal in question was preferred in the High Court, the District Courts were not competent to hear such a case. The competency of those Courts to hear such cases arises by virtue of the amendment to section 21 of the Civil Courts Act, aforesaid. We are here not concerned with the question whether in the absence of a saving clause, like the one introduced by section 3 (1), the High Court would have been right in taking recourse to section 24 of the Code of Civil Procedure. But on the face of section 3 (1) of the Act, it is impossible to hold that the District Courts were competent to hear appeals of the valuation of ten thousand rupees or less in suits decided before the Act came into force, and appeals from which were pending before the High Court.

The High Court was led to the conclusion to which it came in view of the declared objects and reasons for the Amending Act. As a matter of fact, the High Court has relied upon the following extract from the Statement of Objects and Reasons:

"In order to reduce the volume of work in the High Court and to ensure quicker disposal of appeals, the Bengal, Agra and Assam Civil Courts Act, 1887, is proposed to be amended so that appeals in cases from Rs. 5,000 to Rs. 10,000 in valuation may be heard by District Judges."

It is true, as pointed out by the High Court, that the object behind the amendment in question was to give relief to the High Court. But the High Court was in error in thinking that the Legislature amended the law as "the relief was required instantaneously." The Amending Act may have given relief to the High Court in respect of appeals to be instituted after the commencement of the Act, but it did not grant the much required relief to that Court in respect of pending first appeals. On a plain reading of the provisions of section 3 (1), it is clear that the Legislature did not grant that very much needed instantaneous relief. If it intended to do so, it has failed to give effect to its intentions by the words used in section 3 (1).

The High Court was fully cognizant of the legal position, that District Judges could hear only such appeals, on transfer by the High Court, as they were competent to hear and dispose of. But its conclusion that such competency was there on the date the Act came into effect, suffers from the infirmity that it does not give effect to the concluding words of section 3 (1).

For the reasons aforesaid, it must be held that the High Court had not taken the correct view of the legal position. The appeal is accordingly allowed and the order



of the High Court transferring the appeal to the District Judge or the Additional District Judge is set aside. It is directed that the appeal be heard by the High Court itself, in the absence of any law to the contrary. There will be no order as to costs throughout, as the main respondent in this Court and below was a Court itself; and ordinarily no costs are granted against a Court.

K.S.

*Appeal allowed.*

# THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—S. J. IMAM, J. L. KAPUR, K. SUBBA RAO AND J. R. MUDHOLKAR, JJ;  
Kurapati Venkata Mallayya and another .. *Appellants\**

v.

Thondepu Ramaswami & Co., and another .. *Respondents.*

*Civil Procedure Code (V of 1908) Order 39, rule 1—Receiver—Authority “to collect the debts”—If gives power to institute suit in his own name—Suit in name of Receiver—Amendment as one on behalf of party—Effect on limitation—Civil Procedure Code (V of 1908), Order 6, rule 17.*

*Sale of goods—Contract of sale—Price if should be fixed.*

A Receiver authorised “to collect the debts” is empowered to institute suit therefor and a suit instituted by the Receiver in his own name is perfectly competent. Even assuming that it would have been more appropriate for the Receiver to show in the cause title that it was the firm (of which he was Receiver) was the real plaintiff and that the firm was suing through him it was merely a case of misdescription and the plaint could be amended at any time for the purpose of showing the correct description of the plaintiff, and the question of limitation would not arise in such a case.

It would not be correct to say that it is an invariable rule that where a contract of sale has taken place a price must necessarily have been agreed upon. (*Vide* section 9 (2) of the Sale of Goods Act).

Appeal from the Judgment and Decree dated the 17th November, 1955, of the Andhra Pradesh High Court in A.S. No. 51 of 1951.

A. Ranganadham Chetty, Senior Advocate, and (A. V. Rangam, Miss A. Vedavalli and K. R. Chaudhuri, Advocates, with him), or Appellant.

R. Ganapathy Iyer and R. Thiagarajan, Advocates and G. Gopalakrishnan, Advocate of M/s. Gagrati & Co., for Respondent No. 1.

The Judgment of the Court was delivered by

Mudholkar, J.—This is an appeal by a certificate granted by the High Court of Andhra Pradesh under Article 133 (1) (a) of the Constitution.

The relevant acts are these :

The plaintiff-respondent Ramaswamy & Co., who carry on business in tobacco at Guntur instituted a suit against the appellant-firm which also carries on similar business at that place and its alleged partners Kurapati Venkata Mallayya and Mitapalli Abbayya, for the recovery of the price of 112 bales of DB tobacco strips (hereafter referred to as DB strips) sold to them on June 5, 1946, amounting to Rs. 14,095 and interest thereon from the date of purchase to the date of suit. In addition, the respondent firm claimed interest from the date of suit to the date of realization. It is the respondent firm's case that the tobacco weighed 28,196 pounds and that the appellant firm purchased it by agreeing to pay its price at 8 annas per pound. Further according to the respondent-firm the appellant firm agreed to pay interest on the amount at 9 per cent per annum. The appellant-firm denied having purchased 112 bales of tobacco from the respondent-firm and denied also having agreed to pay its price at 8 annas per pound or at any other rate. They also denied the existence of any agreement to pay any interest.

According to the appellant-firm in May, 1946, it secured a contract to supply to the Russian Government 3,000 bales of inferior tobacco at the rate of 8 annas per pound. One Kottamasu Venkateswarlu (who was distantly related to the partners

of the appellant-firm) was the managing partner of the respondent-firm. This firm had some inferior tobacco and Venkateswarlu pressed the appellant-firm to take over 112 bales of that tobacco from it and tender them towards the contract with the Russian Government saying that the appellant-firm may deduct one anna per pound from the price received from the Russian Government towards their expenses and commission. The appellant-firm had reluctantly agreed to this request and despatched 97 out of the 112 bales to Kakinada after getting Agmark certificate with respect to them, with the assistance of Venkateswarlu. The representative of the Russian Government, however, rejected the goods on the ground that they were of inferior quality. Five bales out of these 97 bales were rejected by the Agmark authorities after re-inspection of the goods at Kakinada. Those bales were returned to Guntur along with other rejected bales which belonged to the appellant-firm but they were consumed in an accidental fire in the godown of the appellant-firm. The remaining 92 bales as said to be still lying with the shipping agent at Kakinada and that as the tobacco is of very poor quality no purchaser had yet been found for it. Fifteen bales out of the 112 bales which had not been sent to Kakinada got damaged and had to be rebaled. As a result of the rebaling they were reduced to ten bales and these are still lying with the appellant-firm, which the appellant-firm was willing to return to the respondent-firm on its paying the godown charges.

Thus, the main defence of the appellant-firm is that it never purchased 112 bales of tobacco from the respondent-firm and, therefore, the respondent-firm could not sue it for the price of those bales. It may be mentioned that before the institution of the suit a Receiver had been appointed in another suit for realisation of the debts due to the respondent-firm. The Court before which the suit was pending had made an order on 22nd June, 1949, permitting the Receiver to collect the debts due to the respondent-firm. In pursuance of this order the Receiver Suryanarayana instituted the suit out of which this appeal arises, describing himself thus in the plaint :

"I. Suryanarayana Garu, Receiver, appointed in O.S. No. 275 of 1948 on the file of the District Munsif's Court, Guntur."

The appellant-firm contended that the suit was untenable because a Receiver has no right to institute a suit in his own name and further that the Receiver had not been expressly authorised by the Court to institute the suit in question. The appellant-firm also contended that the suit was barred by time. It specifically contended that the respondent-firm was not entitled either to the alleged price or to any interest. The appellant-firm further contended that Mittapalli Abbayya ceased to be a partner of the firm since the year 1942 because as a result of a partition between Abbayya and his sons, Abbayya's interest in the appellant-firm fell to the share of one of his sons, Kotilingam.

In consequence of the plea taken by the appellant-firm that the suit was not tenable the respondent firm amended the plaint with the leave of the Court on 27th December, 1949, by describing the plaintiff as

"Messrs. Thondepu Ramaswami & Co., represented by I, Suryanarayana Garu Receiver appointed in O.S. No. 275 of 1948 on the file of the District Munsif's Court, Guntur."

In place of the original

"I. Suryanarayana Garu, Receiver, appointed in O.S. No. 275 of 1948 on the file of the District Munsif's Court, Guntur."

Thereupon the appellant-firm filed an amended written statement in which it contended that the amendment was made long after the period of limitation and that it does not cure the initial defect in the suit of having been filed by a person other than the one who was entitled to institute a suit and that consequently the suit was barred by limitation.

The trial Court held that the respondent-firm had established the contract alleged by it but that it had not established that the appellant-firm had agreed to pay the price at the rate of 8 annas per pound. It, however, held that the price of

tobacco was Rs. 5,693-3-0, but it, dismissed the suit on the ground that I. Suryanarayana was not entitled to institute a suit in his capacity as Receiver in O.S. No. 275 of 1948, that the amendment of the plaint was made beyond the period of limitation and that, therefore, the suit was barred by time.

In appeal the High Court held that the Receiver was entitled to institute the suit having been authorised by the Court to collect the debts of T. Ramaswami & Co., that at the most there was a misdescription of the plaintiff-firm in the cause-title of the suit which could be corrected any time and that consequently the suit was within time. It further held that the price of tobacco agreed to between the parties was 8 annas per pound and that the plaintiff was entitled to a decree for Rs. 14,098 and interest at 6% per annum from the date of delivery of the goods till realization.

The first point urged before us by Mr. Ranganadham Chetty on behalf of the appellant-firm is that the High Court, as well as the Subordinate Judge were in error in holding that the bales in question had been purchased by the appellant-firm from the respondent-firm. This, however, is a question of fact and since the two Courts below have found against the appellant-firm on this point this Court would not ordinarily interfere with such a finding. Mr. Ranganadham Chetty, however, contended on the authority of the decision in *Srimati Bibhabati Devi v. Kumar Ramendra Narayana Roy*<sup>1</sup> that the practice of the Court in appeals by Special Leave is not a cast iron one and that it would, therefore, be open to this Court to depart from it in an appropriate case. The aforesaid decision was referred to by this Court in *Srinivasa Ram Kumar v. Mahabir Prasad and others*<sup>2</sup> and it was pointed out that when the Courts below have given concurrent findings on pure questions of fact, this Court would not ordinarily interfere with them and review the evidence for the third time unless there are exceptional circumstances justifying a departure from the normal practice. Learned counsel contended that this is an unusual case because the reasons given by the High Court for holding that the transaction was a sale are quite different from those given by the trial Court and in fact one of the reasons given by the High Court proceeds on a view of an important piece of evidence which is diametrically opposite to that expressed by the trial Court. Mr. Ranganadham Chetty pointed out that in support of its claim the respondent-firm relied upon two entries in its account books Exhibits A-13 and A-14, that these entries were not relied upon by the trial Court, but the High Court has without giving any reasons for regarding them as genuine, acted upon them. What the trial Court has said in paragraph 14 of its judgment is as follows :

"In order to establish the sale of 112 bales of flue cured Virginia tobacco strips, Ramaswamy relies on certain entries in the account books of his firm. Exhibit A-13 is the katha on page 27 of the day book of Thondepu Ramaswamy & Co., containing an entry in respect of 112 bales weighing 28,196 pounds at Re 0-8-0 per pound and debiting a sum of Rs. 14,098. The words "Re. 0-8-0 per pound" are contained in the third line of the entry. The words "112 bales weighing 28,196 pounds at Re. 0-8-0 per pound" appear to be written closely. The sum of Rs. 14,098 appears in different ink. Exhibit A-14 is the katha of the 1st defendant firm found on page 111 of the corresponding ledger of Thondepu Ramaswamy & Co. On 5th June, 1946, a sum of Rs. 14,098 was debited in respect of 112 bales of baru tobacco weighing 28,196 pounds at Re. 0-8-0 per pound. In the second line of the entry the price therefor (.....) and the debit of the sum of Rs. 14,098 are found. On 21st August, 1946, interest of Rs. 267-1-0 was added. Exhibit A-17 is the interest Katha of Messrs. Thondepu Ramaswamy & Co. Exhibit A-16 is the katha at page 41 of the day book of Thondepu Ramaswamy & Co. The katha shows that on 21st August, 1946 two balancing entries for interest of Rs. 267-13-6 were made in the day book. The entry on the right hand side has been scored out and Ramaswamy has not been able to explain why and under what circumstances the entry happens to be scored out. The entry on the left hand side however, was not scored out. The totals do not tally unless the sum of Rs. 267-13-6 is included in the aggregate sum mentioned on the right hand side on page 41. It has been commented on behalf of the defendants that Ramaswamy himself has no personal knowledge of the entries, that the clerks who made the entries in the account books have not been examined and that Exhibits A-13, A-14 and A-16 cannot be relied on in order to come to the conclusion that the transaction relating to 112 bales was a sale and only a sale. Though Ramaswamy was not present

1. (1946) 2 M.L.J. 442 : L.R. 73 I.A. 246 at 259 (P.C.).

2. (1951) S.C.J. 261 : (1951) S.C.R. 277 at 281.

when the entries were made in the several registers of his firm, it is not disputed that the accounts have been maintained in the usual course of business."

It is no doubt true that in para. 28 while dealing with the question of price the trial Court has observed :

"Much reliance cannot be placed on the rate mentioned in Exhibits A-13 and A-14 and the price has to be determined independently having regard to the fact that the price of tobacco depreciates gradually with its age."

It will thus be seen that the trial Court has not rejected these entries outright but only rejected them in so far as they were intended to establish the price agreed to be paid to the respondent-firm. Dealing with this matter the High Court has observed thus :

"Exhibit A-13 is the entry in the day book of Thondepu Ramaswami & Co., under date 5th June, 1946 wherein a sum of Rs. 14,098 is debited to the defendant-firm in respect of 112 bales of tobacco weighing 28,196 pounds at 8 annas per pound. Though the figures "Rs. 14,098" were written in a different ink from the rest of the entry, this is not a suspicious circumstance because the rest of the entry which is in the same ink and which is written in a normal manner contains reference to the sale of 28,196 pounds at 8 annas per pound. The resultant total is entered in the column on the right hand side as Rs. 14,098. It may be that the figure of Rs. 14,098 was entered a little later before the accounts for the day were closed. Exhibit A-14 is the corresponding ledger of Thondepu Ramaswami & Co., and the entries in the day book are duly incorporated in the ledger."

Then later on the High Court has observed :

"At the same time the entries in the regularly kept books of the plaintiff firm cannot be thrown overboard particularly when no challenge was made of their genuineness."

The High Court has also stated :

"It is apparent from Exhibit A-23 that the defendant firm was shown to be a debtor not merely with respect to Rs. 14,098 the price of 28,196 pounds but also in respect of the interest due upon the sum, and the plaintiff firm has paid income-tax thereon."

All this shows that for accepting the entries *in toto* the High Court has given certain reasons and even though we may not agree with them it cannot be said that there is any unusual circumstance which would warrant our reviewing afresh the evidence on the point as to whether the transaction in question was a sale or not.

Mr. Ranganadham Chetty next contended that the Courts below have not borne in mind the true significance of the words "no price" occurring in the entry relating to the 112 bales in question in the verification register Exhibit A-28. The Entry reads thus :

"5th June, 1946. For 112 bales of Baru tobacco no price at Re. 0-8-0 per pound. ... 14,090-0-0."

The entries were in Telugu and the actual words used are "....." and according to Mr. Ranganadham Chetty they mean that there was no sale. The Courts below, however, which were conversant with the language, have understood the entry to mean "no price" and that is how the expression has been translated in the paper book and it is not open to Mr. Ranganadham Chetty to say that the meaning is otherwise than this. Mr. Chetty then contended that even accepting that the meaning is only "no price" the proper inference to be drawn is that there was no transaction of sale and that the rate of 8 annas per pound stated in the entry is given merely for valuing the 112 bales. That may be so, but it does not negative the effect of the other entries which clearly point to the transaction being a sale. Some point was also sought to be made by Mr. Ranganadham Chetty from the fact that no copy of the transport permit required to be taken for the transfer of excisable articles from one bonded warehouse to another was placed on record. We fail to see the significance of this because the appellant-firm admits that 112 bales of tobacco were actually received by it from the respondent-firm. It will thus be seen that there are no exceptional circumstances or unusual reasons which would induce us to re-examine the entire evidence on the point ourselves. We, therefore, decline to do so.

The next question is whether the suit was in proper form and was within time. Though the cause of action for the suit arose on 5th June, 1946, it is admitted before us that the Courts were closed on 5th June, 1949, and the suit was filed on the day

on which they reopened. It would, therefore, be within time if it was properly constituted on the date on which it was filed. In *Jagat Tarini Dasi v. Neba Gopal Chaki*<sup>1</sup> which is the leading case on the point it was held by the Calcutta High Court that a Court must authorise a Receiver to sue in his own name and a Receiver who is authorised to sue though not expressly in his own name, may do so by virtue of his appointment with full powers under section 503 of the Code of Civil Procedure (Act XIV of 1882). In coming to this conclusion the learned Judges pointed out that the object and purpose of the appointment of a Receiver may be generally stated to be the preservation of the subject-matter of the litigation pending judicial determination of the rights of the parties and that it does not necessarily follow that if he is authorized to sue, he cannot sue in his own name. Then the learned Judges pointed out :

"Though he is in one sense a custodian of the property of the person, whom in certain respects he is made to supplant, there seems to be no reason why his power should not be held to be co-extensive with his functions. It is clear that he cannot conveniently perform those functions, unless upon the theory that he has sufficient interest in the subject-matter committed to him, to enable him to sue in respect thereof by virtue of his office, in his own name.

On the whole, we are disposed to take the view that, although a Receiver is not the assignee or beneficial owner of the property entrusted to his care, it is an incomplete and inaccurate statement of his relations to the property to say that he is merely its custodian. When a Court has taken property into its own charge and custody for the purpose of administration in accordance with the ultimate rights of the parties to the litigation it is in *custodia legis*.

The title of the property for the time being, and for the purposes of the administration, may, in a sense be said to be in the Court. The Receiver is appointed for the benefit of all concerned ; he is the representative of the Court, and of all parties interested in the litigation, where in he is appointed. He is the right arm of the Court in exercising the jurisdiction invoked in such cases for administering the property ; the Court can only administer through a Receiver. For this reason, all suits to collect or obtain possession of the property must be prosecuted by the Receiver, and the proceeds received and controlled by him alone. If the suit has to be nominally prosecuted in the name of the true owners of the property, it is an inconvenient as well as useless form—inconvenient, because in many cases, the title of the owners may be the subject-matter of the litigation in which the Receiver has been appointed—useless, because the true owners have no discretion as to the institution of the suit, no control over its management, and no right to the possession of the proceeds." pp. 316-317).

Later the learned Judges pointed out, that for the time being and for the purpose of administration of the assets the real party interested in the litigation is the Receiver and, therefore, there is no reason why the suit could not be instituted in his own name. The learned Judges then referred to a number of cases in support of their conclusion. It seems to us that the view of the Calcutta High Court that a Receiver who is appointed with full powers to administer the property which is in *custodia legis* or who is expressly authorised by the Court to institute a suit for collection of the assets is entitled to institute a suit in his own name provided he does so in his capacity as a Receiver is correct. If any property is in *custodia legis* the contesting parties cannot deal with it in any manner, and, therefore, there must be some authority competent to deal with it, in the interest of the parties themselves. A Receiver who is placed in charge of the property on behalf of a Court can be the only appropriate person who could do so. His function cannot be limited merely to the preservation of the property and it is open to a Court if occasion demands, to confer upon him the power to take such steps including institution of suits in the interest of the parties themselves. Here, apparently the Receiver was not a person with full powers but by its order, dated 26th June, 1949, the Court authorised him to collect debts, particularly as some debts were liable to get barred by time. The Receiver, therefore, had the right to institute the suit in question. It is, however, contended that the order does not say specifically that he should institute a suit. In our opinion, the authority given to the Receiver "to collect the debts" is wide enough to empower the Receiver to take such legal steps as he thought necessary for collecting the debts including instituting a suit. The suit as originally instituted, was thus perfectly competent. The High Court has observed that even assuming that it would have been more appropriate for the Receiver to show in the cause-title that it was the firm which was the real plaintiff and that the firm was suing through him it was merely a case of

misdescription and that the plaint could be amended at any time for the purpose of showing the correct description of the plaintiff. We agree with the High Court that where there is a case of misdescription of parties it is open to the Court to allow an amendment of the plaint at any time and the question of limitation would not arise in such a case.

That brings us then to the third and the last point urged by Mr. Ranganadham Chetty. According to him the High Court was in error in holding that the tobacco was agreed to be sold at 8 annas per pound and that the respondent-firm was entitled to interest. The High Court has come to a conclusion different from that of the trial Court, and therefore, we allowed the parties to take us through the evidence. It was said that once it is found that there was a contract of sale it must necessarily be held to be for a price and that price also must ordinarily be said to have been agreed upon when the contract was made. That may be so, but it would not be correct to say that it is an invariable rule that where a contract of sale has taken place a price must necessarily have been agreed upon. In this connection we may refer to sub-sections (1) and (2) of section 9 of the Indian Sale of Goods Act, 1930 (III of 1930) which run thus :

“(1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.”

By enacting sub-section (2) the Legislature has itself accepted the existence of contracts wherein price is not fixed as not an unusual phenomenon.

In the case before us, no doubt, the respondent-firm has alleged that when the transaction was entered into, the parties fixed the price at 8 annas per pound. The trial Court was not prepared to accept the testimony of P.W. 4 Ramaswamy, a partner of the firm, to the effect that the price was settled at 8 annas per pound when the contract was made. It also refused to place reliance upon Exhibit-A-14 which is an entry dated 5th June, 1946, in the khata of the appellant-firm.

The entry reads thus :

“ Year, month and date	Particulars	Debit.
1946 June, 5.	Debit-Baru tobacco 112 bales of a net wt. of 28,196 pounds at Re. 0-8-0 per pound	
	Total value	14,098-0-0

As the trial Court has pointed out the words “ 112 bales weighing 28,196 pounds at 8 annas per pound ” appear to be written closely and that the sum of Rs. 14,098 appears to have been written in different ink. This entry is at the end of the page and if the words “ 112 bales weighing 28, 196 pounds at 8 annas per pound ” had been written contemporaneously there was no reason for writing them in a cramped style on the same page but rather on the next page. Then again if the figure of Rs. 14,098 had been written contemporaneously it should have appeared in the same ink and not in a different ink. These circumstances, in our opinion, detract from the value of this entry and we would, therefore, be justified in accepting the opinion of the trial Court on the point which had the original document before it rather than of the High Court. We may also refer to the verification register Exhibit A-28 which had already been set out earlier. The fact that the words “ no price ” occur therein clearly suggests that no price had been agreed upon at the time of the transaction. Our conclusion is fortified by the circumstance that the amount stated is Rs. 14,090 and not Rs. 14,098 and besides the figure of Rs. 14,090 is put in brackets. Had that been the price agreed upon it would not have been put in brackets. Another circumstance which makes the respondent-firm's claim doubtful is that the institution of the suit was delayed till the last moment and even the notice of demand was made almost at the close of three years from the date of transaction. This suggests that no price had actually been agreed upon between the parties and the respondent-firm was in a quandry as to what amount should be claimed by it from the appellant-firm. Again, as

has been rightly pointed out by the trial Court the tobacco was at least  $2\frac{1}{2}$  years old when it was purchased by the appellant-firm and, therefore, its rate could not have been as high as 8 annas per pound which according to the evidence appear to be the rate for the tobacco of the year 1945. Further the appellant-firm had agreed to supply 1,500 bales out of the 3,000 bales with respect to which it had entered into a contract with the Russian Government at 8 annas per pound, as is clear from Exhibit B-16 which is the telegram dated 15th May, 1946, sent by the representative of the Russian Government to the appellant-firm. So far as the remaining tobacco was concerned 1,250 bales were to be of tobacco leaf and only 250 bales were to be of tobacco strips. No doubt so far as these strips were concerned the rate was to be Re. 0-9-6 per pound. But as explained by the defendant in his evidence this was the price of first variety whereas the price of the second variety was 8 annas and the goods supplied by the respondent-firm were intended to be tendered for the contract with respect to the second variety. Normally no businessman would do business unless there is some profit in his transactions. If the appellant-firm had agreed to purchase the 112 bales in question at the rate of 8 annas per pound it would not only have not earned any profit by selling them to the Russian Government at the same rate but it would have incurred a loss because it had to incur the expenses for transporting the bales, first from the respondent-firm's godown to its godown and then from there to Kakinada. It also had to incur labour charges as well as godown charges. In the circumstances it would not be reasonable to infer that the appellant-firm had agreed to purchase the tobacco at 8 annas per pound. It was, however, said that where a person has to tender a large quantity of a commodity against a contract within a particular time and was in difficulties in procuring the commodity in sufficient quantities he would rather forego making any profit and would procure that commodity at an uneconomic price rather than commit a default and thus lay himself open to a claim for damages. We must bear in mind that the contract with the Russian Government was for delivery during the period "June-July", that is to say, the goods had to be tendered from the beginning of June till the end of July. The contract with the respondent-firm was entered into in the beginning of June. It is not shown that there was any dearth of tobacco strips of this particular variety in Guntur at that time nor even was a question put to Kurapati Venkata Mallayya in his cross-examination on the point. It would, therefore, be drawing a far-fetched inference if we were to say that the appellant-firm was prepared to do business with respondent-firm without earning any profit and in fact by incurring some loss. Finally we may mention that it was observed by the High Court that the Russians had agreed to buy tobacco at Re. 0-8-6 per pound and, therefore, the appellant-firm could still be making profit by purchasing tobacco from the respondent-firm at 8 annas per pound. In this connection the High Court has referred to the evidence of K. Venkata Mallayya himself and Exhibit A-31 which is a letter dated June 21, 1946 addressed by the representative of the Russian Government to the appellant-firm. The High Court has, however, lost sight of the fact that Mallayya had stated in his evidence that two contracts had been entered into by the appellant-firm with the Russian Government and that the rate of Re. 0-8-6 per pound was fixed with reference to the other contract and not with reference to the contract towards which the tobacco supplied by the respondent-firm was to be tendered. This answer was elicited by the respondent-firm in cross-examination and we see no reason why it should not be accepted. The High Court has, however, made no reference whatsoever to this answer. Disagreeing with it we, therefore, hold that the respondent-firm has failed to establish that the parties had agreed upon the rate at which the tobacco was sold when the contract was entered into and that that rate was 8 annas per pound.

The question then is what would be the appropriate rate? The High Court has made a passing reference to the evidence of P.W. 1 Lolla Venkata Subrahmanyam, P.W. 2 Addagalla Rama Koteswara Rao, and P.W. 3 Kathari Lingamurthi and observed:

"Their evidence renders it probable that the price of tobacco sold by the plaintiff-firm to the defendant-firm might well have been fixed at 8 annas per pound."

P.W. 1 Venkata Subrahmanyam is a dealer in tobacco. He produced three invoices Exhibits A-1, A-2, and A-3. Each of them refers to tobacco leaf. What he has stated is that the rate of tobacco strips is  $2\frac{1}{2}$  annas per pound higher than that for tobacco leaf. It seems to us unsafe to deduce the price of tobacco strips from the price of tobacco leaf. Apart from that, the transactions referred to in the invoices are subsequent to that in suit. The witness has admitted that the price of tobacco varies from day to day and also that it varies from grade to grade. Bearing in mind these statements and also the circumstance that Exhibits A-1 to A-3 do not show the grades of tobacco the evidence of this witness is of no assistance. The second witness, P.W. 2 Ramakoteswara Rao has merely produced one letter received from London Exhibit A-4 credit note Exhibit A-5 and two invoices Exhibits A-6 and A-7. Apart from the fact that he has no personal knowledge of anything these documents would only show the price of tobacco which is sold to the merchants in London. It is an admitted fact that the tobacco which the Russians wanted to buy was cheap tobacco, that is, tobacco which was not acceptable by London traders. Therefore neither the evidence of this witness nor the documents avail the respondent-firm anything. P.W. 3 Lingamurthy has produced two invoices both of which relate to transactions subsequent to the one in question before us and they do not disclose the grades of tobacco covered by the sales to which in the invoices relate. Further, the invoices refer to the stock of 1945-46 whereas the tobacco sold by the respondent-firm to the appellant-firm was of 1944 or earlier stock. In the circumstances, this evidence has no relevance for the purpose of determining the price of the tobacco strips in question. P.W. 4 Ramaswamy in his evidence has referred to certain transactions entered into by him; but it is not clear from his evidence as to the age and grades of tobacco in those transactions. That evidence is thus vague and of little value. In the circumstances we hold that the evidence adduced on behalf of the respondent-firm is inadequate for establishing the value of the tobacco strips sold by it to the appellant-firm.

Just because of this the suit need not fail. For, the appellant-firm has, by making an entry in its account books, admitted that the value of this tobacco is Rs. 5,639-3-0. The observations of the trial Court on this point are as follows :

"As per Exhibit B-5, the 1st defendant credited the suit firm with a sum of Rs. 5,639-3-0 for the value of 112 bales of tobacco at Rs. 100 per candy of 500 pounds. In Exhibit B-10, a candy of 500 pounds was valued at Rs. 67-8-0. If the tobacco sold by the suit firm to the first defendant firm corresponded to the quality of tobacco in respect of which the invoices Exhibits B-10 and B-12 were issued, there would have been no difficulty in the suit firm securing local customers and the stock of tobacco with the suit firm need not have remained idle from January, 1944 till June, 1946. Having regard to the fact that the tobacco which was sold by the suit firm to the 1st defendant firm was about 3 years old, the price of Rs. 100 which was noted in Exhibit B-5 appears to be a reasonable price."

We agree with what the trial Court has said that the price payable to the respondent-firm in respect of the tobacco strips would be Rs. 5,639-3-0. As regards interest, apart from the evidence of Ramaswamy, P.W. 4, there is no other evidence on record to show that the parties had agreed that it should be payable in default of payment of the price within  $1\frac{1}{2}$  months of delivery. As we have not accepted his evidence to the effect that the price had been settled when the transaction had been entered into, we cannot possibly accept his further statement that interest was agreed upon at that time. No custom or trade usage under which interest could be claimed has been established but under section 61 of the Sale of Goods Act the respondent is entitled to interest at 6 per cent per annum from the date of the transaction to the date of suit. We further award interest to the respondent-firm at 6 per cent per annum from the date of suit till realisation.

Accordingly we set aside the decree of the High Court, allow the appeal in part and pass a decree in favour of the respondent-firm for Rs. 5,639-3-0 with interest at 6 per cent per annum from the date of the transaction till realisation. The respondent-firm will get proportionate costs throughout from the appellant-firm, which would bear its own costs.



# THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—B.P. SINHA, *Chief Justice*, S. J. IMAM, K. SUBBA RAO, K.N. WANCHOO, J.C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Adhyaksha Mathur Babu's Sakti Oushadhalaya Dacca (P.),  
Ltd., and others, etc.

.. Petitioners\*

The Union of India and Others (In all the Petitions)

.. Respondents.

Naresh Chandra Ghosh

.. Intervener.

*Medicinal and Toilet Preparations (Excise duties) Act (XVI of 1955), section 21—Effect on State Excise Acts taxing medicinal preparations containing alcohol—Medicinal Preparations coming under section 19 of the Act—Omission of those items from the list appended to the Rules—Effect.*

Various Excise Acts of the States in so far as they impose duties on medicinal and toilet preparations containing alcohol are fiscal statutes for taxing these preparations. The Medicinal and Toilet Preparations (Excise Duties) Act XVI of 1955 is a fiscal statute for taxing those preparations enacted by Parliament under Entry 84 of List-I of the Seventh Schedule to the Constitution of India (1950) and therefore the Excise Acts of the various States which were the corresponding taxing statutes for these preparations must be held to be repealed so far as taxation on these preparations is concerned under section 21 of the Act and there can be no question of medicinal and toilet preparations being liable to duty under the Act as well as the various Excise Acts in force in the States.

The preparations, in the instant case, being medicinal preparations as defined in section 2 (g) of the Act, they will be governed by the Act and the omission of these preparations from the list appended to the Rules will not make any difference to their being medicinal preparations within the meaning of the Act, for taxation.

Petitions under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

A.V. Viswanatha Sastri, Senior Advocate, (A.N. Sinha, N.H. Hingorani and B.P. Jha, Advocates, with him), for Petitioners (In all the Petitions).

B. Sen, Senior Advocate, (R.H. Dhebar, Advocate, with him), for Respondents Nos. 1, 2 and 7 to 8 (In all the Petitions).

B. Sen, Senior Advocate, (S.C. Bose and P.K. Bose, Advocates, with him), for Respondent No. 3 (In all the Petitions).

Lal Narayan Sinha, Government Advocate for the State of Bihar (D.P. Singh, M.K. Ramamurthi, R.K. Garg and S.G. Agarwala, Advocates of M/s. Ramamurthi & Co., with him), for Respondent No. 4 (In all the Petitions).

K.S. Hajela, Senior Advocate, (C.P. Lal, Advocate, with him), for Respondent No. 5 (In all the Petitions).

Ranadeb Chaudhri, Senior Advocate, (L.R. Das Gupta and S.N. Andley and Rameshwar Nath, Advocates of M/s. Rajinder Narain & Co., with him), for Intervener.

The Judgment of the Court was delivered by

Wanchoo, J.—These six petitions under Article 32 of the Constitution raise a common point and will be dealt with together. The main question raised in all these petitions is whether the State Governments are entitled to tax the three Ayurvedic preparations, namely, *Mritasanjibani*, *Mritasanjibani Sudha* and *Mritasanjibani Sura*, which are manufactured by these petitioners, under the various Excise Acts in force in the respective States. Further points were raised in the petitions as regards the validity of the restrictions imposed in the matter of the import, export, possession and sale of these three Ayurvedic preparations. But the learned counsel for the petitioners stated before us that he was not pressing any other point except one viz., whether the various State Governments could tax these three Ayurvedic preparations under the various Excise Acts in force in the States concerned. We propose therefore, to deal with this point only in the present cases.

The case of the petitioners is briefly this. They carry on business as manufacturers of medicinal preparations according to the Ayurvedic system of medicines and among the Ayurvedic medicines manufactured by them are these three preparations. These Ayurvedic preparations are manufactured by the process of fermentation and distillation in accordance with the Ayurvedic system of medicine following the formula in standard books known as *Ayurved Sangraha*, *Bhaisajya Ratnabali* and *Arka Prakash*. These books, according to the petitioners, contain extracts from all authoritative ancient Ayurvedic treatises accepted throughout India and are in vogue as Ayurvedic pharmacopoeias in the various States. Though the three preparations have three different names they are in reality only one medicine and are prepared according to a single formula in these books. The petitioners aver that these three preparations are manufactured in accordance with the standard Ayurvedic pharmacopoeias in vogue in various States and are efficacious amongst others in the following diseases —

- (a) in typhoid fever (*Sannipatic jwara*) during collapsed condition ;
- (b) in cholera ;
- (c) in case of loss of appetite to increase power of digestion ;
- (d) in rheumatism, sciatica, etc., and
- (e) to remove weakness, impart strength and vigour and also as a general tonic and restorative for convalescent patients.

Before the Constitution came into force, all these three preparations were liable to Provincial excise duty under item 40 of List II of the Seventh Schedule to the Government of India Act, 1935. The constitution, however, made a change in the three legislative Lists with respect to excise and under item 51 of List II of the Seventh Schedule the States have the power to levy excise duty on alcoholic liquor for human consumption and on opium, Indian hemp, and other narcotic drugs and narcotics but not including medicinal and toilet preparations containing alcohol or any substance like opium, etc. Further, under item 84 of List I of the Seventh Schedule the Union has the power to impose duties of excise on tobacco and other goods manufactured or produced in India except (i) alcoholic liquors for human consumption and (ii) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance like opium, etc. Thus the Constitution took away the power of the States to impose duties of excise on medicinal and toilet preparations containing alcohol or any substance like opium, etc., and gave that power to the Union. However, Article 277 of the Constitution provided that

“any taxes, duties, cesses or fees which, immediately before the commencement of this Constitution were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law”.

In view of this Article, the State Governments continued to levy excise duties on medicinal and toilet preparations containing alcohol, opium, etc., till 1957 as Parliament had made no law to the contrary till then. In 1955, however, Parliament passed the Medicinal and Toilet Preparations (Excise Duties) Act No. XVI of 1955, (hereinafter referred to as the Act) which was brought into force from 1st April, 1957. We are in the present case concerned only with medicinal preparations and a “medicinal preparation” is defined in section 2 (g) of the Act as including “all drugs which are a remedy or prescription prepared for internal or external use of human beings or animals and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals”. Section 3 provides for levy of duties of excise at the rates specified in the Schedule, on all dutiable goods manufactured in India. Section 19 gives power to the Central Government to make rules to carry out the purposes of the Act and in particular section 19 (2) (xx) gives power to notify in the official gazette lists of the names and descriptions of preparations which would fall

for assesment under any particular item of the Schedule or for regulating their manufacture, transport and distribution. The Schedule (omitting the Explanations which are immaterial for present purposes) prescribing the duty is in these terms :—

Item	No.	Description of dutiable goods.	Rate of duty.
1		Medicinal and toilet preparations, containing alcohol, which are prepared by distillation or to which alcohol has been added, and which are capable of being consumed as ordinary alcoholic beverages	Rupees seventeen and annas eight per gallon of the strength of London proof spirit.
2		Medicinal and toilet preparations not otherwise specified containing alcohol.	
(i)		Ayurvedic preparations containing self-generated alcohol, which are not capable of being consumed as ordinary alcoholic beverages	Nil.
(ii)		Ayurvedic preparations containing self-generated alcohol, which are capable of being consumed as ordinary alcoholic beverages.	Rupees three per gallon.
(iii)		All others	Rupees five per gallon of the strength of London proof spirit.
3		Medicinal and toilet preparations, not containing alcohol, but containing opium, Indian hemp, or other narcotic drug or narcotic.	Nil.

The Central Government framed Rules under the Act in 1956 and the administration of the Act and the Rules was entrusted to State Governments. A list of medicinal preparations, which were capable of being used as ordinary alcoholic beverages, was also published along with the Rules, and rule 65 provides that "until a standard Ayurvedic pharmacopoeia has been evolved by the Central Government, the pharmacopoeias that are in vogue in the various States shall be recognised as standard Ayurvedic pharmacopoeias". The contention of the petitioners is that these three Ayurvedic preparations conform to the definition of medical preparations given in section 2 (g) of the Act. Further, in the Schedule to the Rules, *Mritanjibani Sura* was listed as a medicinal preparation in 1957. Further in 1958, *Mritasanjibani* and *Mritasanjibani Sudha* were also added under the head "medicinal preparations" in the Schedule to the Rules as the three are really one and the same medicine. The Act and the Rules came into force from 1st April, 1957, in accordance with the provision of section 1 (3) of the Act, which gives power to the Central Government to enforce the Act on such date as it may, by notification in the official gazette, appoint. The petitioners' case is that thereafter they began to pay duties of excise on these three medicines under item 1 in the Schedule to the Act at the rate of Rs. 17.50 nP. per gallon of the strength of London proof spirit, as these preparations were considered medicinal preparations containing alcohol which were prepared by distillation or to which alcohol was added and which were capable of being used as ordinary alcoholic beverages. This continued till August, 1960 when the Central Government purporting to act under section 19 of the Act amended the Rules and omitted from the Schedule to the Rules two of the three preparations, namely, *Mritasanjibani* and *Mritasanjibani Sudha*. Further in December, 1960, the Central Government again amended the Rules and omitted from the Schedule to the Rules the third preparation (namely, *Mritasanjibani Sura*). Consequently, various State Governments began demanding duties of excise on these three preparations at rates which are much higher than the rate of Rs. 17.50 nP. prescribed in the Schedule of the Act. The contention of the petitioners is that on the coming into force of the Act, the levy of excise duties on these medicinal preparations fell within item 84 of List I, with the result that thereafter it is not open to State Governments to levy duties of excise on these preparations in accordance with the various Excise Acts in force in the States. It is further contended

duty to reduce consumption. Further, it is urged that the purpose of the Act is only to impose duties for revenue purposes and it has nothing to do with the regulation of consumption of liquor and reducing such consumption. Therefore, the Excise Acts of the various States when they impose duty of excise on medicinal and toilet preparations had two purposes, namely, (i) to raise revenues and (ii) to reduce consumption of liquor, and therefore the Excise Acts of the various States cannot be said to be corresponding law which has been repealed by the Act which has only one purpose namely raising of revenue. We have not however been able to understand how any purpose behind a fiscal measure can have any relevance on the question of correspondence. Various Excise Acts of the States in so far as they impose duties on medicinal and toilet preparations containing alcohol are fiscal statutes for taxing these preparations. Now, the Act is a fiscal statute for taxing these preparations enacted by Parliament under entry 84 of List I of the Seventh Schedule to the Constitution, and therefore the Excise Acts which were the corresponding taxing statutes for these preparations must be held to be repealed so far as taxation on these preparations is concerned. There can therefore be no doubt that there is correspondence between the Acts and the various Excise Acts of the various States in so far as levy of duty on medicinal and toilet preparations is concerned and section 21 of the Act repeals all the Excise Acts of the States so far as such levy is concerned. There can thus be no question of medicinal and toilet preparations being liable to duty under the Act as well as the various Excise Acts in force in the States. This contention is hereby rejected.

The next question is whether these three preparations are medicinal preparations as defined in the Act in section 2 (g). The definition is an inclusive one and includes "all drugs which are a remedy or prescription prepared for internal or external use of human beings or animals and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals." According to the West Bengal Excise Rules, which deal with the manufacture of these three preparations, it appears that the preparations are to be made according to the recipe and direction laid down in *Arka Prakash*, *Ayurved Sangraha*, and *Bhaisajya Ratnabali*, and have to be manufactured only in bond by a qualified Kabiraj or by a Kabiraji firm having a qualified Kabiraj for supervision of the manufacturing operations. Further, the alcoholic content of the preparations must be below 42 per centum. According to the recipe found in these Ayurvedic books, the basic ingredient out of which these preparations are manufactured is *gur*; besides *gur* there are 42 other ingredients which have to be mixed. These ingredients are medicinal drugs according to Ayurveda. In addition to these ingredients, water is also mixed and the whole mixture is kept sealed for 20 days, presumably for the purpose of fermentation and thereafter the preparation is obtained by distillation and as already stated contains about 42 per centum of alcohol. Further, according to these books, the preparation is used as a tonic to build body and physique, to increase strength and appetite and to make appearance healthy and bright. It is also used in *Sannipat Jwara* (typhoid fever) in critical stages. It is also prescribed for cholera in frequent doses and finally is used in all conditions of collapse. The counter-affidavits filed on behalf of the Union and the States which are opposing these petitions do not definitely state that these preparations are not medicinal preparations. For example, in the affidavit of the State of West Bengal, it is stated that it is not admitted that these preparations are exclusively for medicinal purposes. It is also stated that these alcoholic preparations are capable of being used as ordinary alcoholic beverages. Similarly, in the affidavit of the Union, it is stated that it is not admitted that the preparations are efficacious remedies for any human ailment. On the other hand, a number of affidavits have been filed on behalf of the petitioners from registered Kabirajas to show that these preparations are manufactured according to the three Ayurvedic books already mentioned and are used for certain diseases including cholera. The respondents, however, rely on the advice of the Standing Committee consisting of the Drugs Controller of the Government of India and the Chief Chemist, Central Revenues Control Laboratory, which was of opinion after examining the formulae and the analytical data and the claims given on the label of the preparations

and also after carrying out tasting test, that these three preparations should be considered straightforward beverages and not as medicinal preparations. It was in consequence of this decision that these three preparations were taken out of the list attached to the Rules framed under the Act. The two members of the Standing Committee do not appear to be experts in Ayurvedic medicines and no affidavit has been filed of any Ayurvedic expert on behalf of the respondents. There seems no reason therefore not to accept the affidavits filed on behalf of the petitioners from qualified Ayurvedic practitioners : series F to F-16. These Ayurvedic practitioners are not connected with the petitioners and what they say in their affidavits is in accordance with the use to which these preparations can be put as medicines according to the three Ayurvedic text books already referred to. In these circumstances it would, in our opinion, be impossible to say that these preparations are not remedies prepared for internal use of human beings and are not intended to be used for or in the treatment, mitigation or prevention of disease in human beings. If, therefore, they are a remedy prepared for internal use of human beings and are intended to be used for or in the treatment, mitigation and prevention of disease in human beings, they would clearly be medicinal preparations within the meaning of section 2 (g) of the Act ; and if so, they would be liable to be taxed under the Schedule to the Act and not under the various Excise Acts of the different States concerned. It is only necessary to add that the definition of " medicinal preparation " contained in section 2 (g) of the Act, does not depart from the meaning of that expression when it occurs in item 84 of List I, and hence on the Act coming into force, the States lost the power to levy excise duty on these preparations.

We may in this connection refer to the counter-affidavit filed on behalf of the State of Uttar Pradesh, where it has been stated that on the basis of the formulae alleged by the petitioners in the Schedules, no standard medicinal preparation can be prepared as the mode of preparations contravenes all settled laws of biochemistry. This has been sworn by an Excise Inspector of the Excise and Intelligence Bureau of the State of Uttar Pradesh. It is not clear however from the counter-affidavit what qualifications the deponent has to make such a statement ; nor are we able to understand which laws of biochemistry are contravened by the mode of preparation prescribed in the three Ayurvedic text books already referred to. As against this, we may refer to the report of the Chopra Committee on *Indigenous Drugs of India*. In para 265, the Committee says that in different parts of India, as many as 900 indigenous drugs (vegetable, mineral and metallic) and over 1000 preparations made from these drugs are used by the Ayurvedic physicians, and " there seems to be little doubt that out of the large number of drugs used by the Hindu physicians for centuries past and still in use, there are some that deserve the reputation they have earned as cures." In para 266, the Committee points out the difficulties in the way of assessment of the proper value of indigenous drugs. These difficulties are of two kinds ; firstly, the modern scientists are not acquainted with the exact connotation of terms of Indian pharmacology, and secondly, whereas western medicine tries to explain the action of a drug in terms of its chemical components, such as alkaloids, glucosides, essential oils, antibiotics, hormones etc., Indian medicine takes into account the action of the drug in its entirety, as they hold that the action of the whole drug is often different from that of any one of its constituents considered separately. The Committee further says that there is a good deal of truth in this assertion. In para 268, dealing with *compound preparations*, the Committee mentions another difficulty that usually confronts pharmacologists in the problem of investigating the value of compound medicines which are more frequently used than single drugs. It further points out that " the investigation of the pharmacological properties and therapeutic value is considered to be more in the particular combination than that of any one of the drug taken separately. They therefore urge on the need for an investigation into the combination as a whole. But, for this, no modern methods are yet available.

These observations of the Chopra Committee will show that the claim made in the counter-affidavit filed on behalf of the State of Uttar Pradesh based on the

so-called settled laws of biochemistry cannot be accepted—at any rate with respect to compound preparations like the three under consideration, for research on Ayurvedic medicines has been so far very little. Reference may also be made to the report of a Committee known as Udupa Committee with respect to the Ayurvedic system of medicines. At page 132, the Committee observes on the question of the enactment of a Drugs Act for Indian medicines that the Central Government do not have any technical person who has detailed knowledge of Ayurvedic drugs, though there are a large number of Ayurvedic scholars on the pharmacy side whose help can be taken in drafting the necessary bill. In this connection, the Committee suggested that an adviser on Ayurvedic drugs should be appointed for this purpose immediately, who should have under him an Ayurvedic Drugs Advisory Committee and this will facilitate the drafting of the legislation the Committee had in mind and also help the Government to decide disputed points about Ayurvedic drugs and medicines which were now cropping up frequently. This Committee was constituted in July, 1958 and it does not appear that any action on the lines suggested by the Committee was taken by the Government of India. In these circumstances we have on the one side the three standard Ayurvedic text books according to which these preparations are prepared; we have also the affidavits of a large number of Ayurvedic practitioners of obvious repute to the effect that these preparations are medicinal preparations which are used to alleviate human suffering in certain conditions. On the other hand, there is no affidavit from an Ayurvedic expert on behalf of the respondents. We may, however, in this connection refer to an affidavit of the Assistant Chemical Examiner to the Government of West Bengal who is experienced in examining and analysing alcoholic liquors. According to him, the chief basis of these three preparations is molasses and *gur*, which is a fact as we have already pointed out from the recipe in the Ayurvedic text books. He further says that in these three preparations there are several steam volatile products, namely, furfural, aldehydes, ketones and acids but the presence of the same does not destroy or minimise the effect of alcoholic intoxication of these preparations. He further says that the taste or smell of these preparations does not make them unfit for drinking in a large dose and they can be used as an alcoholic beverage. Even this affidavit does not say these are not medicinal preparations. All that it says is that these preparations contain about 42 per centum of alcohol and can be used as ordinary alcoholic beverages. So if these preparations are medicinal preparations but are also capable of being used as ordinary alcoholic beverages, they will fall under the Act and will be liable to duty under item No. 1 of the Schedule at the rate of Rs. 17.50 nP. per gallon of the strength of London proof spirit. On a consideration of the material that has been placed before us, therefore, the only conclusion to which we can come is that these preparations are medicinal preparations according to the standard Ayurvedic text books referred to already, though they are also capable of being used as ordinary alcoholic beverages. They will therefore clearly fall within the definition of “medicinal preparation” and would be liable to duty under item 1 of the Schedule to the Act. So far as the decision of the Standing Committee is concerned which resulted in the omission of these three preparations from the list attached to the Rules, that is not conclusive on the question whether these are medicinal preparations or not. Further the fact that these preparations are omitted from the list attached to the Rules would make no difference to their being medicinal preparations within the meaning of the Act, liable to duty under item 1 of the Schedule, if they are in fact medicinal preparations as we hold them to be. They will therefore be liable to duty under item 1 of the Schedule to the Act as they undoubtedly fall under that item and are capable of being consumed as ordinary alcoholic beverages. They cannot however be taxed under the various Excise Acts in force in the concerned States in view of their being medicinal preparations which are governed by the Act.

Lastly, it was urged on behalf of the respondents that these preparations are not prepared according to the formulae in the Ayurvedic text books referred to above. That is a question of fact which it is not possible for us to decide on the

materials placed before us. The averment in this connection on behalf of the respondents is also not categorical ; for example, it has been stated on behalf of the Union of India that it is not admitted that these preparations are prepared according to the specifications by utilising the proper ingredients and are manufactured according to the recipe and direction given in the Ayurvedic text books referred to above. Nothing has been brought on the record to show that these preparations were analysed and the analysis showed that the ingredients mentioned in the Ayurvedic text books were not present in the preparations. Besides, as it appears from the West Bengal Rules (ref. West Bengal Excise Compilation, Pt. 2) which we have quoted above, these preparations are prepared in bond and there are various restrictions before the issue of the preparations by the manufacturer. Nothing has been said to show that these preparations are not in fact made in accordance with the direction contained in the Ayurvedic text books. If this was not so, the excise staff would be there to check their preparation. As a matter of fact the first rule with respect to the manufacture of these preparations in the West Bengal Excise Compilation lays down that they will be prepared according to the recipe and direction in *Arka Prakash*, *Ayurved Sangraha* and *Bhaisajya-Ratnabali* ; and if that rule is being disobeyed we should have expected someone to swear that though the rule says that the preparations should be made according to the directions in these text books, they are in fact not so made. Further if the rule is being contravened, there must be power in the State Government to take action against those who contravene the rule. But nothing has been brought to our notice to show that any action has been taken. In these circumstances we are not prepared to hold that these preparations are not prepared according to the Ayurvedic text books ; and in any case our decision holding these three preparations as medicinal preparations is based on these preparations being made in accordance with the directions contained in the Ayurvedic text books and also in accordance with the Rules in the West Bengal Excise Compilation. We presume that the same must be the state of affairs in other States where these preparations are manufactured, though it appears that the petitioners in the present case are mostly from Calcutta and the manufacture in these cases must be going on in Calcutta.

We, therefore, allow the petitions and direct that these three medicinal preparations should not be taxed under the various Excise Acts in force in various States and can only be taxed in accordance with the provisions of the Medicinal and Toilet Preparations (Excise Duties) Act. We pass no order as to the claim for refund for that is a matter which the petitioners can take up with the State Governments concerned according to law. The petitioners will get their costs from the respondents—one set of hearing fee.

K.L.B.

*Petitions allowed.*

## THE SUPREME COURT OF INDIA.

PRESENT :—S. K. DAS, A. K. SARKAR AND M. HIDAYATULLAH, JJ.

Champaran Cane Concern (dissolved) (in all the Appeals) .. *Appellant\**

v.

The State of Bihar and another (in all the Appeals) .. *Respondents.*

*The Bihar Agricultural Income-tax Act (1948) (Bihar Act XXXII of 1948), sections 2 (k) and 13—Assessee—Status—Partnership or co-ownership?—Distinct name for the concern—Co-owners, but not from same family—Joint cultivation under same manager—Sharing of profits—No metes and bounds division of land—No agency inter se—No agreement to constitute firm—Partnership Act, 1932 (Central Act IX of 1932), section 4.*

Two persons belonging to different families held certain agricultural lands in common deriving income therefrom, which they shared in the proportion of 12 annas and 4 annas. The lands were not

partitioned by meies and bounds, but jointly cultivated under supervision by a common manager. There was no agreement between the two to constitute a firm, nor was there any relation of agency, express or implied, between them. In the return of agricultural income filed under the Bihar Agricultural Income-tax Act, 1948, the status of the concern was described as a firm, but it was contended that separate assessments should be made on the manager in respect of the individual share of each co-owner. The contention was overruled, and the Officer made a single assessment of the entire agricultural income in the status of a partnership firm. The appeals against the assessment having failed, the assessee filed a reference application, but in the question of law framed therein the assessee was wrongly referred to as partners. The High Court, while correcting the mistake and reframing the question, held, however, that the assessee constituted a firm. On appeal, by Special Leave,—

*Held*, that no facts and circumstances have been found in the case from which the taxing authorities properly instructed in law could have come to the conclusion that the assessee was a partnership firm within the meaning of section 2 (k) of the Bihar Agricultural Income-tax Act, 1948.

Partnership or no partnership is ordinarily a question of fact, but it would be a mixed question of fact and law. Where the authorities who have to ascertain questions of fact apply a wrong principle of law in instructing themselves as to what they have to find, in which event their finding of fact is not conclusive because they have made it according to wrong principles.

A mistake in the framing of the question of law by the assessee in the reference application, which was later corrected by the High Court, cannot change the real position in law.

The retention by the assessee of the word "firm" in the form of return, while striking out the other alternative words, did not amount to an admission that the assessee was a partnership firm. In the printed form of return, there is no alternative as to a co-ownership concern, and, in a popular sense, a co-ownership concern may describe itself as a firm.

Appeals by Special Leave from the Judgment and Decree, dated 29th September, 1959, of the Patna High Court in Miscellaneous Judicial Cases Nos. 227 to 229 of 1957.

*H. N. Sanyal*, Solicitor-General of India (*P. K. Chatterjee*, Advocate, with him), for Appellant (In all the Appeals).

*S. P. Varma*, Advocate, for Respondents (In all the Appeals).

The Judgment of the Court was delivered by

*S. K. Das, J.*—The Champaran Cane Concern, appellant before us, was assessed to agricultural income-tax under the Bihar Agricultural Income-tax Act (Bihar Act XXXII of 1948), referred to as the Act in this judgment, by the Agricultural Income-tax Officer, Motihari, for three years 1356-F., 1357-F. and 1358-F. corresponding to 1948-49, 1950-51 and 1951-52 respectively. It was assessed as a partnership firm for all the three years, though the assessee claimed that it was a co-ownership concern belonging to two persons, Padampat Singhania having Re. 0-4-0 share and Lala Bishundayal Jhunjhunwala having Re. 0-12-0 share. The concern, it was stated, carried on agricultural operations in six farms consisting of a little over Ac. 2,000-00 of land out of which about Ac. 1,600-00 were purchased jointly by Padampat Singhania and Bishundayal Jhunjhunwala and Ac. 483-00 were purchased in the name of mill, namely, Motilal Padampat Sugar Mill of which the aforesaid two persons were the owners. Later on, by a resolution of the Mill-Company the farms were separated from the Mill and the lands in their entirety were cultivated by the concern. As nothing now depends upon the distinction between the lands purchased in the name of the mill and those acquired otherwise, we shall ignore the distinction for the purpose of these cases.

The assessee claimed that the concern was a co-ownership concern belonging to the two persons abovenamed in the shares already indicated, and as they were residents of Uttar Pradesh at a very long distance from the farms in Champaran, they appointed one S. K. Kanodia as common manager for facility of cultivation and management. This common manager looked after and managed the agricultural operations during the years in question. The further case of the assessee was that the lands were undivided between the two co-owners and the total net profits arising out of the joint cultivation were divided between the two co-owners. On these statements, the assessee pleaded that section 13 of the Act applied and the common manager should have been assessed in respect of the agricultural income-tax payable by each of the two co-owners in respect of their shares only. This plea of the assessee was rejected by the Income-tax Officer. Appeals were then preferred against the assessments made to the Deputy Commissioner of Agricultural Income-tax. These appeals were



dismissed with certain modifications with which we are not now concerned. Then three applications in revision were filed to the Board of Revenue. The Board reduced the assessment under Schedule C but did not accept the plea of the assessee that the assessments should have been made under section 13 of the Act. The assessee then moved the Board of Revenue for making a reference to the High Court on the following question of law which it stated arose out of the order of the Board :

"Whether on the facts and circumstances of the case the common manager is to be assessed under section 13 of the Bihar Agricultural Income-tax Act (Bihar Act XXXII of 1948) in respect of the Agricultural income payable by each of the partners?"

It is to be noticed that the underlined \*words in the question appeared to assume that the concern was a partnership firm. The Board, however, refused to make a reference.

The High Court of Patna was then moved under section 28 (3) of the Act, and it called for a reference from the Board on a differently worded question which expressed the real issue between the parties :

"Whether in the facts and circumstances of the case, the common manager should be assessed under section 13 of the Bihar Agricultural Income-tax Act in respect of the agricultural income-tax payable by the persons jointly liable?"

The question framed by the High Court did not assume that the co-owners of the concern were partners thereof. Strangely enough, when the Board submitted a statement of the case in pursuance of the order of the High Court, it again reverted to the old form of the question. The High Court, however, took the question to be the one which it had asked the Board to refer to it and on that footing answered it against the assessee. The High Court said that the question whether the assessee was a co-ownership concern or a partnership firm was a question of fact, and even otherwise, there were facts and circumstances from which it was open to the taxing authorities to come to the conclusion that the firm was a partnership firm. On this footing the High Court answered the question against the assessee.

The assessee then moved this Court for Special Leave, and having obtained such leave, has brought the present appeals to this Court from the decision of the High Court, dated 29th September, 1959.

We may now refer to some of the provisions of the Act which bear upon the question before us. Section 2 of the Act is the definition section. According to the definition given in that section, "agricultural income" means *inter alia* any income derived from land which was used for agricultural purposes. It was not disputed before us that the income which the assessee in these cases derived was from land which was used for agricultural purposes, namely, the cultivation of sugarcane, etc. The definition section further stated that the word "firm" had the same meaning as in the Indian Partnership Act, 1932, and the word "person" meant any individual, association of individuals, owning or holding property for himself or for any other or partly for his own benefit and partly for another either as owner, trustee, receiver, common manager, administrator or executor or in any capacity recognised by law and included an individual, Hindu family, firm or company. The charging section is section 3 which says that agricultural income-tax shall be charged for each financial year in accordance with and subject to the provisions of the Act on the total agricultural income of the previous year of every person. Agricultural income-tax means the tax payable under the Act.

It would appear from what we have stated above that by reason of the definition of the words "firm" and "person", the assessee, if it is a partnership firm, would be liable to tax as a firm on its agricultural income by reason of the charging section, namely, section 3. In section 3 of the Indian Income-tax Act, 1922, which is similar in terms, the words "of every firm or association of persons or the partners" of the "firm" were subsequently added in 1924, and the Indian Income-tax Act makes a distinction in the matter of assessment between a registered and an unregistered firm. We are referring to these provisions, because at one stage it was

argued on behalf of the assessee that section 13 of the Act, which we shall presently quote, applied to the present cases even if the assessee were a partnership firm. Appearing on behalf of the assessee, the learned Solicitor-General has, however, conceded before us that he is not in a position to argue that section 13 of the Act will apply even if the assessee is a partnership firm.

We may now read section 13 :

"Where any person holds land, from which agricultural income is derived, as a common manager appointed under any law for the time being in force or under any agreement or as receiver, administrator or the like on behalf of persons jointly interested in such land or in the agricultural income derived therefrom, the aggregate of the sums payable as agricultural income-tax by each person on the agricultural income derived from such land and received by him shall be assessed on such common manager, receiver, administrator or the like, and he shall be deemed to be the assessee in respect of the agricultural income-tax so payable by each such person and shall be liable to pay the same.

It is quite clear from the section that where a common manager appointed under any law or under any agreement holds land from which agricultural income is derived, on behalf of persons jointly interested in the land or in the agricultural income derived therefrom, the aggregate of the sums payable as agricultural income-tax by each person on the agricultural income derived from such land and received by him shall be assessed on the common manager in respect of the agricultural income-tax so payable by each such person and the common manager shall be liable to pay the same. We have already stated that the learned Solicitor-General has not now argued before us that section 13 will apply in the case of partnership firm. He has however very strongly argued that section 13 in terms will apply if the assessee in the present cases is a co-ownership concern (as distinguished from a partnership firm) and the common manager thereof must be assessed in respect of the aggregate of the sums payable as agricultural income-tax by each such co-owner. Mr. S. P. Verma appearing for the respondent (State of Bihar) has indeed conceded that if the assessee in the present cases is a co-ownership concern, then section 13 will apply and the question referred to the High Court must be answered in favour of the assessee. He has however argued that the High Court was right in holding that the assessee was a partnership firm and, on that footing, answering the question against the assessee.

Thus, the entire controversy before us narrows down to this : on the facts and circumstances stated in the cases, was the assessee a partnership firm or a co-ownership concern ? We shall presently come to the distinction between these two, but we think that in a question of this sort both form and substance must be considered. Now, partnership or no partnership is ordinarily a question of fact, but we agree with the learned counsel for the assessee that it is a mixed question of fact and law in the sense that if the authorities who have to ascertain questions of fact apply a wrong principle of law in instructing themselves as to what they have to find, then their finding of fact is not conclusive because they have done it according to wrong principles; (see *Morden Rigg & Co., and R. B. Eskrigge & Co. v. Monks*<sup>1</sup>. Looked at from the aforesaid standpoint, the question before the taxing authorities in the present cases was whether on the facts and circumstances established in the cases an inference of a partnership firm within the meaning of the Indian Partnership Act, 1932, followed and section 13 was not attracted thereto. That, we take it, must be a question of law. That was the question which was referred to the High Court and the High Court answered it on the footing that the proper inference was that the assessee was a partnership firm within the meaning of the Indian Partnership Act, 1932. The assessee contends that the proper inference is that the assessee was a co-ownership concern and not a partnership firm and on that footing the common manager is entitled to be assessed under section 13 of the Act.

Let us first see what are the facts and circumstances which have been established in the case. First of all, we have the name of the assessee as the Champaran Cane Concern, a name which may apply to a partnership firm as well as to a co-ownership concern. Secondly, the finding of the Deputy Commissioner of Agricultural

Income-tax, a finding which is part of the statement of the case, is that the two co-owners appointed Kanodia as the common manager for facility of management. Now, the appointment letter showed that the two co-owners joined together in appointing Kanodia as common manager for supervision of cultivation and for management of the agricultural properties in the district of Champaran. "Partnership" within the meaning of the Indian Partnership Act of 1932 is a relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. The appointment of Kanodia by the two co-owners acting together is consistent with either view and does not clinch the issue in favour of a partnership. The High Court appears to have taken the appointment of Kanodia by the two co-owners as a circumstance establishing a partnership. The High Court has further pointed out that the two co-owners lived in Uttar Pradesh and belonged to two different families. We do not see how that circumstance gives any indication in law of a partnership. As to the division of the profits and losses, the finding of the Deputy Commissioner of Agricultural Income-tax was that the two proprietors had no definite shares in the agricultural lands, by which he must have meant that the lands of the six farms had not been partitioned amongst the two co-owners by metes and bounds. The cultivation was made jointly on behalf of the two co-owners by the common manager and the profits arising therefrom were distributed to them in proportion of their respective shares of Re. 0-4-0 and Re. 0-12-0. This circumstance has again been taken by the High Court as a circumstance from which an inference of partnership necessarily follows. Again, we do not agree with the High Court. Two co-owners may appoint a common manager for facility of cultivation and management without entering into a partnership and the fact that the profits or even the losses are distributed in accordance with the shares of the two owners does not necessarily establish a partnership within the meaning of the Partnership Act, 1932. In Lindley on Partnership (Twelfth Edition, page 57) the main differences between co-ownership and co-partnership have been compared. One of the principal differences is that co-ownership is not necessarily the result of agreement, whereas partnership is. In the cases before us there is nothing in the record to show that there was any agreement between the two proprietors to form a partnership firm. The second difference is that co-ownership does not necessarily involve community of profit or of loss, but partnership does. In the cases before us there is a finding that there is community of profit. A third difference is that one co-owner can without the consent of the other, transfer his interest etc. to a stranger. A partner cannot do this. About this point there is no evidence nor any finding that the two proprietors Padampat Singhania and Bishundayal Jhujhunwala, could not transfer their interests in the concern without the consent of each other. The greatest difficulty which faces the respondent in the present cases is that it cannot point to any fact or circumstance from which it can be inferred that one proprietor was the agent, real or implied, of the other. In a partnership each partner acts for all. In a co-ownership one co-owner is not as such the agent, real or implied, of the other. There is a complete absence of any fact or circumstance establishing a relation of agency between the two proprietors in the present case; nor have the taxing authorities come to any finding that there was such a relation.

The High Court made a reference to the returns filed on behalf of the assessee for the three years in question as also the frame of the question which the assessee itself wished to be referred to the High Court. As to the frame of the question we have stated earlier that the Board of Revenue really made a mistake and it may even be that on behalf of the assessee the question was not properly framed. The assessee's contention all along was that it was a co-ownership concern and not a partnership, but in framing the question the word 'partners' was used. We do not think that a mistake in the framing of the question, which was later corrected by the High Court, will change the real position in law. As to the returns which were filed they were not printed in the paper book. Learned Counsel for the respondent gave us copies of the returns. These returns showed that in all the three years the assessee indicated its status as a co-ownership concern and the name of the assessee was shown as the manager, Champaran Cane Concern or common manager Cham-

paran Cane Concern. The body of the return contained four alternatives as to whether the return was being submitted by an individual, firm, a joint family or an association of individuals. The intention of putting four alternatives in the printed form of the return is to cut out the alternatives which do not apply. In the cases before us the alternatives relating to individual, family and association of individuals were cut out and the alternative "firm" remained. The High Court seems to have thought that the retention of the word 'firm' in the return amounted to an admission that the assessee was a partnership firm. We do not agree. In the printed form of the return there was no alternative as to a co-ownership concern and in a popular sense, a co-ownership concern may describe itself as a firm. That does not necessarily mean that it is a partnership firm within the meaning of section 4 of the Indian Partnership Act as indicated in section 2 (k) of the Act. In our view no facts and circumstances have been found in these cases from which the taxing authorities properly instructed in law could have come to the conclusion that the assessee was a partnership firm within the meaning of section 2 (k) of the Act. On the contrary the facts and circumstances found by the taxing authorities were all consistent with the claim of the assessee that it was a co-ownership concern the common manager whereof was liable to assessment under section 13 of the Act.

A number of decisions were cited at the Bar as to the distinction between co-ownership and partnership. We have already referred to the main differences between the two. The legal position as to this distinction seems to us to be so clear and well-settled that we consider it unnecessary to refer to the case-law on the subject. We do not think that any useful purpose will be served by referring to the decisions cited at the Bar.

For the reasons given above we have come to the conclusion that the answer which the High Court gave to the question was not correct. We accordingly allow the appeals and set aside the Judgment and Orders of the High Court, dated 29th September, 1959 and answer the question in favour of the assessee. The assessee will be entitled to the costs throughout.

*Appeals allowed ;  
Answered in favour of assessee.*

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## [SUPREME COURT.]

*K. Subba Rao, Raghubar Dayal and  
J. R. Mudholkar, JJ.*  
17th April, 1963.

The State of U.P. v.  
Bhagawant Kishore Joshi.  
Cr. A. No. 171 of 1961.

*Prevention of Corruption Act (II of 1947), sections 5 (1) (c) read with section 5 (2)—Investigation under section 4 (2)—Sanction—Absence of—Effect.*

Notwithstanding the clear and express provisions of the statute, in the present case the Sub-Inspector made the investigation of the offence alleged to have been committed by a public servant without obtaining the order of a Magistrate First Class. We hope and trust that investigations under the Act will be conducted in strict compliance with the provisions of the Act.

In this case, as we have earlier pointed out, not only the trial was fair and the evidence convincing but even the earlier defect was rectified by having practically a *de novo* investigation in strict compliance with the provisions of the Code of Criminal Procedure. We cannot, therefore, hold that the accused has been prejudiced by the illegality committed by the Police in the first stage of the investigation.

*R. L. Mehta, G. C. Mathur and G. P. Lal, Advocates, for Appellant.*

*T. R. Bhasin, Advocate, for Respondent.*

G.R.

*Appeal allowed.*

## [SUPREME COURT.]

*P. B. Gajendragadkar, K. N. Wanchoo and  
K. C. Das Gupta, JJ.*  
18th April, 1963.

Management of Express  
Newspapers Ltd. v. B. Somayajulu.  
C.A. No. 202 of 1963.

*Working Journalists Industrial Disputes Act (1 of 1955), section 2 (b) and Working Journalists (Conditions of Service) and Miscellaneous Provisions Act (XLV of 1955), section 2 (f)—Interpretation.*

Normally, employment contemplated by section 2 (b) Working Journalists Industrial Disputes Act (of section 2 (f) of Act XLV of 1955), would be full time employment; but part-time employment is not excluded from section 2 (b) either. Most of the employees falling under the first clause of section 2 (b) or even under the artificial extension prescribed by the later clause of section 2 (b) would be full time employees. But it is theoretically possible that a news-photographer, for instance, or a cartoonist may not necessarily be a full time employee. The modern trend of newspaper establishments appears to be to have on their rolls full time employees alone as working journalists; but on a fair construction of section 2 (b), we do not think it would be possible to hold that a part time employee who satisfies the test prescribed by section 2 (b) can be excluded from its purview merely because his employment is part time.

We, therefore, allow the appeal, set aside the order passed by the High Court and remand the case to the Labour Court with a direction that it should deal with the dispute between the parties in accordance with law in the light of this judgment. There would be no order as to costs.

*A.V. Viswanatha Sastri, Senior Advocate, (Jayaram and R. Gantapathi Iyer, Advocates, with him), for Appellant.*

*V.K. Krishna Menon, Senior Advocate, (M.K. Ramamurthi, R.K. Garg, S.C. Agarwala and D.P. Singh, Advocates of M/s. Ramamurthi and Co., with him), for Respondent No. 1.*

*K.R. Chaudhuri and P. D. Menon, Advocates, for Respondent No. 2.*

G.R.

*Appeal allowed.*

## [SUPREME COURT.]

P.B. Gajendragadkar, K.N. Wanchoo,  
K.C. Das Gupta, J.C. Shah and  
N. Rajagopala Ayyangar, JJ.  
19th April, 1963.

Central Bank of India Ltd. v.  
P.S. Rajagopalan.  
C.As.Nos. 823-826 of 1962.

*Industrial Disputes Act (XIV of 1947), section 33-C (2)—Industrial Disputes (Appellate Tribunal Act, 1950)—Industrial Disputes (Amendment and Misc. Provisions Act, 1956).*

It is clear that if for computing in terms of money the value of the benefit claimed by the workman, an enquiry is required to be held and evidence has to be taken, the Labour Court may do that itself or may delegate that work to a commissioner appointed by it. This position must be taken to be well settled after the decision of this Court in *The Punjab National Bank Ltd. v. K.L. Kharbanada*, 1962 (1) L.L.J., 234.

In this connection, we may incidentally state that the observations made by this Court in the case of *Punjab National Bank Ltd.*, that section 33-C is a provision in the nature of execution should not be interpreted to mean that the scope of section 33-C (2) is exactly the same as section 33-C (1) (Page-238). Cases considered : (1958) S.C.J. 844 : (1958) 2 M.L.J. (S.C.) 130 : (1958) 2 An.W.R. (S.C.) 130 : (1958) M.L.J. (Cr.) 635 ; (1959) S.C.R. 1 ; (1961) 1 M.L.J. (S.C.) 198 : (1961) 1 An.W.R. (S.C.) 198 : (1961) 1 S.C.J. 643 ; (1961) 3 S.C.R. 220 ; and 65 B.L.R. 91.

M.C. Setalvad, Senior Advocate, (N.V. Phadke and J.P. Thacker, Advocates and J.B. Dadachanji, O.C. Mathur and Ravinder Narain, Advocates of M/s. J.B. Dadachanji and Co., with him), for Appellant (In all the appeals).

A.V. Viswanatha Sastri, Senior Advocate, (M.K. Ramamurthi, R.K. Garg, D. P. Singh and S.C. Agarwal, Advocates of M/s. Ramamurthi and Co., with him), for Respondent (In all the appeals).

G.R.

Appeals allowed.

## [SUPREME COURT.]

B. P. Sinha, C.J., J. C. Shah and  
N. Rajagopala Ayyangar, JJ.  
19th April, 1963.

Union of India v.  
A. L. Rallia Ram.  
C.A. No. 414 of 1961.

*Government of India Act, (1935), section 175 (3).*

Applying its decision in *Seth Bikhraj Jaipuria v. Union of India*, (1962) 2 S.C.J. 479 : (1962) 2 S.C.R. 880, the Court held in dealing with the validity of a contract which did not conform to the requirements of section 175 (3) of the Government of India Act, that the provisions of section 175 (3) were mandatory and not directory and if the contract did not conform to the requirements prescribed by section 175 (3) no obligation enforceable at law flowed therefrom.

But it is now firmly established that an award is bad on the ground of error of law on the face of it, when in the award itself or in a document actually incorporated in it, there is found some legal proposition which is the basis of the award and which is erroneous. An error in law on the face of the award means : " you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party, that opens the door to setting first what that contention is, and then going to the contract on which the parties rights depend to see if that contention is sound ". *Champsey Bhara and Company v. Jivraj Balloo Spinning and Weaving Company Ltd.*, (1923) L.R. 50 I.A. 324 : 44 M.L.J. 706. But this rule does not apply where questions of law are specifically referred to the arbitrator for his decision ; the award of the arbitrator on those questions is binding upon the parties, for by referring the specific questions the parties

desire to have a decision from the arbitrator on those questions rather than from the Court, and the Court will not, unless it is satisfied that the arbitrator had proceeded illegally, interfere with the decision.

The judgment of their Lordships of the Privy Council in *Bengal Nagpur Railway Company Ltd. v. Ruttanji Ramji and others*, L.R. 65 I.A. 66 : (1938) 1 M.L.J. 640 was relied upon in *Seth Thawerdas Pherumal v. The Union of India*, (1955) 2 M.L.J. (S.C.) 23 : (1955) S.C.J. 445 : (1955) 2 S.C.R. 48, in negating a claim for interest.

*Bishan Narain*, Senior Advocate, (*Naunit Lal* and *R. N. Sachthey*, Advocates, with him), for Appellant.

*G. S. Pathak* and *Anant Ram Whig*, Senior Advocates, (*B. Datta* and *Gyan Singh Vohra*, Advocates, with them), for Respondents.

G.R.

*Appeal partially allowed.*

[SUPREME COURT.]

*P.B. Gajendragadkar*, *K.N. Wanchoo*, and  
*K.C. Das Gupta*, JJ.  
22nd April, 1963.

*The Canara Bank Ltd. v.*  
*Anant Narayan Surkund.*  
C.As. Nos. 787, 731 to 752 of 1962.

*Industrial Disputes Act (XIV of 1947)*, section 33-C—*Industrial Dispute (Banking Companies) Decision Act*, 1955, section 6.

The question whether such an application under section 33-C (2) of the Act was entertainable by the Labour Court and whether that Court had jurisdiction to decide it has been considered by this Court in *Central Bank of India Limited v. P.S. Rajagopalan*, C.A. Nos. 823-826 of 1962 decided on 19th April, 1963. It has been held there that an application of this kind is maintainable and therefore the contention of the banks in this behalf must fail.

We are further of opinion that there is no force in the second contention of the banks either. It is true that para. 164 (b) (7) of the Sastry Award speaks of cashiers in-charge of cash at pay offices. We recognise that strictly speaking a branch of the bank is not the same thing as a pay office ; but the question whether the provision of para. 164 (b) (7) would apply to a branch was referred to *Shri Jeejeebhoy* for clarification under section 6 of the Industrial Disputes (Banking Companies) Decision Act, 1955, (XLI of 1955) and *Shri Jeejeebhoy* held in 1959 that the use of the words "pay office" was not intended to have a restricted meaning referring only to those units which actually had the designation of pay office and would also apply to a branch in proper circumstances. *Shri Jeejeebhoy* who made this clarification was the Chairman of the Tribunal which heard the appeals from the Sastry Award and gave the decision which is known as the Labour Appellate Tribunal Decision (Bank Disputes). In these circumstances the clarification as it comes from such a Tribunal should be accepted, particularly as it has stood unchallenged since it was given in 1959. The contention of the banks therefore that para. 164 (b) (7) would not apply in these cases because these are cases of branches and not of pay offices must fail.

*N.V. Phadke*, Advocate and *S.N. Andley*, *Rameshwar Nath* and *P.L. Vohra*, Advocates of *M/s. Rajinder Narain and Co.*, for Appellant (In C.A.No. 787 of 1962).

*S.N. Andley*, Advocate of *M/s. Rajinder Narain and Co.*, for Appellant (In C.As. Nos. 731 to 752 of 1962).

*V.K. Krishna Menon*, Senior Advocate, (*M.K. Ramamurthi*, *R.K. Garg*, *D. P. Singh* and *S.C. Agarwal*, Advocates of *M/s. Ramamurthi and Co.*, with him), for Respondent (In C.A.No. 787 of 1962).

*A. V. Viswanatha Sastri* and *V. K. Krishna Menon*, Senior Advocates, (*M. K. Ramamurthi*, *R.K. Garg*, *D.P. Singh* and *S.C. Agarwal*, Advocates of *M/s. Ramamurthi and Co.*, with them), for Respondents, (In C.As. Nos. 731-752 of 1962).

G.R.

*Appeal dismissed*

## [SUPREME COURT.]

*P. B. Gajendragadkar, K. N. Wanchoo and  
K. C. Das Gupta, JJ.*  
22nd April, 1963.

Canara Banking Corpora-  
tion Ltd. v. U. Vittal.  
C.A. No. 755 of 1962.

*Industrial Disputes Act (XIV of 1947), section 33-A—Banking companies—Shastri Award—Transfer of subordinate staff.*

We are satisfied the Labour Court was in error in holding that transfers outside the State or the language area can be made only with the consent of the employees. What that clause means is that with consent such transfers can of course be made, otherwise they should be avoided as far as possible.

We have therefore come to the conclusion that the Labour Court has erred in holding that the transfer was not made in accordance with the "standing orders" regarding transfers as contained in the Sastry Award.

*N. V. Phadke, Advocate and S. N. Andley, Rameshwar Nath and P. L. Vohra, Advocates of M/s. Rajinder Narain and Co., for Appellant.*

*M. K. Ramamurthy, Advocate of M/s. Ramamurthi and Co., for Respondent.*

G.R.

*Appeal allowed.*

## [SUPREME COURT.]

*P. B. Gajendragadkar, K. N. Wanchoo and  
K. C. Das Gupta, JJ.*  
22nd April, 1963.

Chittaranjan Das v.  
State of West Bengal.  
Cr.A. No. 175 of 1960.

*Penal Code (XLV of 1860), section 376—Sections 22, 535 and 537 Criminal Procedure Code—Section 145, Indian Evidence Act—Misdirections to the Jury.*

Mr. Chari contends that having regard to the general tone of the charge delivered by the learned Judge to the jury, the learned Judge should have treated the verdict as perverse and not acted upon it. We do not think that this contention can be accepted. In his charge, the learned Judge, no doubt indicated that the evidence of the girl was not satisfactory, that it was not corroborated and that there were other circumstances which showed that the prosecution case might be improbable, but having done his duty, the learned Judge had to leave it to the jury to consider whether the prosecution had established its charge against the appellant beyond reasonable doubt or not. The jury apparently considered the matter for an hour and half and returned the unanimous verdict of guilty. In the circumstances of this case, we cannot accede to Mr. Chari's argument that the Sessions Judge was required by law to treat the said verdict as perverse. In a jury trial where questions of fact are left to the verdict of the jury, sometimes the verdicts returned by the jury may cause a disagreeable surprise to the Judge, but that itself can be no justification for characterising the verdict as perverse.

*A. S. R. Chari and N. S. Bindra, Senior Advocates, (D. N. Mukherjee, Advocate with them), for Appellant.*

*B. Sen, Senior Advocate, (S. G. Mazumdar, Advocate for P. K. Bose, Advocate, with him), for Respondent.*

G.R.

*Appeal dismissed.*

## [SUPREME COURT.]

*K. Subba Rao, Raghubar Dayal and  
J. R. Mudholkar, JJ.*  
23rd April, 1963.

The State of Andhra Pradesh v.  
Gheemalapati Ganeswara Rao.  
Cr.A. No. 39 of 1961.

*Penal Code (XLV of 1860), sections 120-D, 409, 477-A and 471 read with 467—Section 73, Evidence Act—Pardon tendered to the approval.*

A pardon granted *bona fide* is fully protected by the provisions of section 529, Criminal Procedure Code.



The High Court has not considered any of the provisions to which we have referred but held that as the offence was being enquired into by the District Magistrate, the Additional District Magistrate could not usurp the functions of the former and grant a pardon. Had it done so, it would not have come to this conclusion. We are, therefore, unable to accept it.

The decision in *Sarwan Singh v. The State of Punjab*, (1957) S.C.R. 953, on which reliance has been placed by the High Court has been explained by this Court in the case of *Maj. E. G. Barsay v. The State of Bombay*, (1962) 1 S.C.J. 131 : (1962) M.L.J. (Cri.) 153 : (1962) 2 S.C.R. 195. This Court has pointed out in the latter decision that while it must be shown that the approver is a witness of truth, the evidence adduced in a case cannot be considered in compartments and that even for judging the credibility of the approver the evidence led to corroborate him in material particulars would be relevant for consideration. The High Court should bear this in mind for deciding whether the evidence of the approver should be acted upon or not. Then again it would not be sufficient for the High Court to deal with the evidence in a general way. It would be necessary for it to consider for itself the evidence adduced by the prosecution on the specific charges and then to conclude whether those charges have been established or not. The prosecution would be well advised if, instead of placing the evidence on each and every one of those large number of charges against the respondents, it chooses to select a few charges under each head other than the head of conspiracy and concentrates on establishing those charges, this would save public time and also serve the purpose of the prosecution. With these observations we set aside the acquittal of the respondents and remit the appeal to the High Court for decision on merits in the light of our observations.

*A. S. R. Chari*, Senior Advocate, (*K. R. Chaudhuri* and *P. D. Menon*, Advocates, with him), for Appellant.

*Bhimasankaram*, Senior Advocate, (*R. Thiagarajan*, Advocate, with him), for Respondent No. 1.

*R. Mahalingier*, Advocate, for Respondent No. 2.

G.R.

Acquittal set aside and case remitted.

[SUPREME COURT].

*K. Subba Rao*, *Raghubar Dayal* and  
*J. R. Mudholkar*, JJ.  
23rd April, 1963.

*Ajendranath v.*  
State of Madhya Pradesh.  
Cr.A. No. 226 of 1960.

*Penal Code (XLV of 1860), sections 120-B, 379 and 414.*

The mere fact that the learned Additional Sessions Judge acquitted the other accused on the ground that the property recovered was not proved to be stolen property did not preclude the State from appealing against the acquittal of the appellant against whom there is better evidence for establishing that he was in possession of the stolen property than the evidence was against the other co-accused. The State could challenge the correctness of the findings of the learned Additional Sessions Judge about the property being stolen property and, consequently, the High Court can record its own finding on that question.

It is not necessary for a person to be convicted under section 414, Indian Penal Code that another person must be traced out and convicted of an offence of committing theft. The prosecution has simply to establish that the property recovered is stolen property and that the appellant provided help in its concealment and disposal. The circumstances of the recovery sufficiently make out that the property was deliberately divided into different packets and was separately kept. May be that the property falling to the share of a particular thief was kept separately.

*A. R. Choubay* and *Naunit Lal*, Advocates, for Appellant.

*I. N. Shroof*, Advocate, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT].

P. B. Gajendragadkar, K. N. Wanchoo and  
K. C. Das Gupta, JJ.  
25th April, 1963.

State of Bihar v.  
Kundan Singh.  
C.A. No. 219 of 1962.

Land Acquisition Act (I of 1894), sections 4, 11, 18, 23 and 49.

Section 49 (3) merely dispenses with the necessity of issuing a further fresh declaration or adopting other proceedings under sections 6 to 10 in regard to cases falling under section 49 (2).

Thus, it would be seen that the scheme of section 49 is that the owner has to express his desire that the whole of his house should be acquired before the award is made, and once such a desire is expressed, the procedure prescribed by section 49 has to be followed. This procedure is distinct and separate from the procedure which has to be followed in making a reference under section 18 of the Act. In the present case, the respondents have taken no steps to express their desire that the whole of their house should be acquired, and so, it was not open to the High Court to allow them to raise this point in appeal which arose from the order passed by the District Judge on a reference under section 18. That being our view, we do not think necessary to consider the respondent's contention that what is acquired in the present proceedings attracts the provisions of section 49 (1). Cases considered: (1932) I.L.R. 55 Mad. 391 : approved, 16 C.W.N. 327, not approved. (1930) L.R. 57 I.A. 100 : 58 M.L.J. 223, referred.

B. Sen, Senior Advocate, J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Appellants.

B. R. L. Iyengar, S. K. Mehta and K. L. Mehta, Advocates, for Respondents.

G.R.

Appeal allowed.

[SUPREME COURT.]

P. B. Gajendragadkar, K. N. Wanchoo,  
K. C. Das Gupta, J. C. Shah and  
N. Rajagopala Ayyangar, JJ.  
25th April, 1963.

Ram Ran Bijai Singh v.  
Behari Singh alias Bagaudha.  
C.A. No. 195 of 1961.

Bihar Land Reforms Act (XXX of 1950), Order 20, Rule 12, Civil Procedure Code—  
("khas possession")—Article 144, Limitation Act.

We do not, however, consider it necessary to discuss these submissions further or to record any opinion thereon since on the facts of the present case the learning involved in them is not very relevant. For it was not disputed that even a mortgagee (and *a fortiori* so, a person other than mortgagee, even though his possession originated through the possession of a mortgagee) could, by overt act and open claims, hold the property not on behalf of the mortgagor but in his own right and adversely to the mortgagor. Mr. Sarjoo Prasad however, relied on certain observations in the judgment of the Full Bench of the Patna High Court in *Sukdeo Das v. Kashi Prasad*, where the learned Judges appear to consider the possession even of a trespasser who has not perfected his title by adverse possession for the time requisite under the Indian Limitation Act as the khas possession of the true owner. We consider that this equation of the right to possession with "khas possession" is not justified by principle or authority. Besides this is also inconsistent with the reasoning of the Full Bench by which constructive possession is treated as within the concept of khas possession.

These very authorities however show that if the mortgagee by some overt act renounces his character as mortgagee and sets up title in himself, to the knowledge of the mortgagor, his possession would not thereafter continue as mortgagee but as a trespasser and the suit for recovery of the property from him would be governed by Article 144 the starting point of limitation being the date at which by the overt manifestation of intention the possession became adverse. It is *a fortiori* so in cases where what the Court is concerned with is not the possession of the mortgagee but of some-

one else, such as in this case, the tenants claiming occupancy rights. When the mortgage was redeemed they resisted the mortgagor's claim to possession and asserted their right to remain in possession as kasht tenants. It was on the basis of their possession being wrongful that a claim was made against them for mesne profits and it was on the footing of their being trespassers that they were sued and possession sought to be recovered from them. In these circumstances we consider that it is not possible for the appellants to contend that these tenants were in possession of the property on behalf of the mortgagor and in the character of their rights being derived from the mortgagor. Section 6 (1) (c) cannot, in terms, therefore apply since the mortgagor-mortgagee relationship did not subsist on 1st January, 1955, even if the construction which learned Counsel for the appellant pressed upon us was accepted.

*Sarjoo Prasad*, Senior Advocate, (*Mohan Behari Lal*, Advocate, with him), for Appellants.

*A. V. Viswanatha Sastri*, Senior Advocate, (*D. Goburdhan*, Advocate, with him), for Respondents Nos. 1 to 3 and 5.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

*P. B. Gajendragadkar*, *K. N. Wanchoo* and  
*K. C. Das Gupta*, JJ.  
25th April, 1963.

*Darya Singh v.*  
*State of Punjab.*  
Cr.A. No. 27 of 1962.

*Criminal Procedure Code (V of 1898), sections 172, 540.*

It is well-known that in villages where murders are committed as a result of factions existing in the village or in consequence of family feuds, independent villagers are generally reluctant to give evidence because they are afraid that giving evidence might invite the wrath of the assailants and might expose them to very serious risks. It is quite true that it is the duty of a citizen to assist the prosecution by giving evidence and helping the administration of criminal law to bring the offender to book, but it would be wholly unrealistic to suggest that if the prosecution is not able to bring independent witnesses to the Court because they are afraid to give evidence, that itself should be treated as an infirmity in the prosecution case so as to justify the defence contention that the evidence actually adduced should be disbelieved on that ground alone without examining its merits. In the present case, we see no justification for the assumption that any eye-witness has been kept back from the Court, and so, we feel no hesitation in rejecting the argument that the case should be sent back on the hypothetical ground that the scrutiny of the police diary may disclose the presence of an independent eye-witnesses; such an argument is wholly misconceived and can be characterised as fantastic.

*T. R. Bhasin*, Advocate, for Appellants.

*Gopal Singh* and *P. D. Menon*, Advocates, for Respondent.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

*K. Subba Rao*, *Raghubar Dayal* and  
*J. R. Mudholkar*, JJ.  
25th April, 1963.

*Bachchoo Lal v.*  
*State of U. P.*  
Cr.A. No. 126 of 1962.

*U. P. District Boards Act (X of 1922), sections 107, 182—Sections 504 and 506,*  
*Indian Penal Code—Section 417, Criminal Procedure Code.*

We need not express an opinion on the second contention as we do not know the terms of the lease executed by the District Board in favour of the Raja of Shankargarh and as we are not concerned with the civil rights with respect to the manner of collecting the dues which he could collect under the lease. We are, however, of opinion

that section 107 does not make obstruction or molestation of an employee of the person under contract with the Board an offence.

We did not hear the learned counsel on the merits of the case under section 504 of the Code and accept the finding of the Courts below.

In view of the considerations mentioned, no interference is possible with the acquittal of the respondent No. 2 on merits. It is, therefore, not necessary to decide the first question raised for the appellant.

O. P. Rana, Advocate, for Appellant.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

P. B. Gajendragadkar, K. N. Wanchoo and  
K. C. Das Gupta, JJ.  
26th April, 1963.

Nandeshwar Pt. v.  
U. P. Government.  
C.As. Nos. 166-167 of 1962.

Kanpur Urban Area Development Act, (VI of 1945)—U.P. Town Improvement Act (III of 1920)—Land Acquisition Act (I of 1894), sections 4, 5-A, 6, 9, 11, 17.

We are therefore of opinion that it was not open to the State Government to say in the notification under section 4 Land Acquisition Act that proceedings under section 5-A shall not take place. This part of the notification under section 4 is therefore beyond the powers of the State Government. In consequence the notification under section 6 also as it was issued without taking action under section 5-A must fall. The appeals must therefore be allowed and the notification under section 6 and that part of the notification under section 4 which says that the Governor was pleased to direct that under sub-section (4) of section 17, the provisions of section 5-A shall not apply, are bad and are hereby set aside.

J. P. Goyal, Advocate, for Appellants (In C.A. No. 166 of 1962).

C. B. Agarwala, Senior Advocate, (P. C. Agarwala Advocate, with him), for Appellants (In C.A. No. 167 of 1962).

K. S. Hajela, Senior Advocate, (C. P. Lal, Advocate, with him), for Respondent No. 1 (In both the Appeals).

C. P. Lal, Advocate, for Respondents Nos. 2 and 3 (In both Appeals).

G.R.

*Appeals allowed.*

[SUPREME COURT.]

B. P. Sinha, C.J., J. G. Shah and  
N. Rajagopala Ayyangar, JJ.  
26th April, 1963.

Smt. Santa Sila Devi v.  
Dhirandara Nath Sen.  
C.A. No. 197 of 1961.

Arbitration Act (X of 1940), section 20.

Before dealing with this point it is necessary to emphasise certain basic positions: The first of them is that a Court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal (See *Salby v. Whitbread & Co.* (1917) 1 K.B. 736, at page 748). Besides it is obvious that unless the reference to arbitration specifically so requires the arbitrator is not bound to deal with each claim or matter separately, but can deliver a consolidated award. The legal position is clear that unless so specifically required an award need not formally express the decision of the arbitrator on each matter of difference. (*Vide Re : Brown and the Croydon Canal Co.* 9 Ad. & Ell. 522 : 112 E.R. 1309 and *Jewell v. Christie*, L.R. 2 C.P. 296. Further, as Parke, B. himself put it during the course of arguments in *Harrison v. Creswick*, 138 E.R. (Common Pleas) 1254.

When those alleged agreements were set aside and declared not to be binding on the parties, the law would step in and the provisions of the Indian Companies Act as regards the management of the business and affairs of the company would come into operation, and the arbitrator may well have considered that the provisions con-

tained in the law of the land sufficient to safeguard the interests of the shareholders. The silence of the arbitrator in this regard and his failure to make any specific provision therefor in regard to the management did not therefore leave any *lacuna* as regards the rights of the parties to manage but must be taken to have left the right of the parties to be determined by the relevant general law applicable to the management of the company. If the arbitrator considered that these provisions sufficiently secured the rights of the parties and did not consider that any special provision as regards this matter was needed the award would be silent on that point and that might be the explanation for the state of affairs.

G. S. Pathak, Senior Advocate, (A. N. Sinha and P. K. Mukherjee, Advocates, with him), for Appellants.

A. V. Viswanatha Sastri, Senior Advocate (B. R. L. Iyengar and S. N. Mukherjee, Advocates, with him), for Respondents.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

B. P. Sinha, C.J., K. Subba Rao,  
J. C. Shah, Raghubar Dayal and  
J. R. Mudholkar, JJ.  
29th April, 1963.

Sree Mohan Chowdhury v.  
Chief Commissioner Union  
Territory of Tripura.

*Habeas Corpus* Petition No. 15 of 1963.

*Constitution of India (1950) Articles 32, 123 and 352—Defence of India Ordinance IV of 1962—Defence of India Act (LI of 1962), section 48—General Clauses Act, 1897, section 8—Meaning of "Instruments".*

We have no doubt in our mind that the expression "instrument" in section 8 of the General Clauses Act was meant to include reference to the Order made by the President in exercise of his constitutional powers. So construed, the President's Order would, even after the repeal of the Ordinance aforesaid continue to govern cases of detention made under rule 30 aforesaid under the Ordinances. It must, therefore, be held that there is no substance in the contention that the petitioner's detention originally made under the rule under the Ordinance would not be deemed to have continued under the Act (LI of 1962). Equally clearly, there is no substance in the contention that the same Order should have been repeated by the President after the enactment of the Act. It would have been a sheer act of supererogation and the legal fiction laid down in section 8 is meant to avoid such unnecessary duplication of the use of the constitutional machinery. A proper construction of the provisions of section 48 of the Act, which has replaced the Ordinances aforesaid, read in the light of the provisions of section 8 of the General Clauses Act leaves no room for doubt that the detention order passed against the petitioner was intended to be continued even after the repeal of the Ordinances which were incorporated in the Act (LI of 1962). That being so, the Order of the President must have the effect of suspending the petitioner's right to move this Court for a writ of *Habeas Corpus* under Article 32 of the Constitution. After the petitioner had been deprived, for the time being, of his right to move this Court, it is manifest that he cannot raise any questions as regards the vires of the Ordinances or the Rules and Orders made thereunder. In the result, the application is held to be not maintainable, and, is therefore, dismissed.

R. K. Garg, Advocate (*amicus curiae*), for Petitioner.

S. V. Gupte, Additional Solicitor General of India, and D. R. Prem, Senior Advocate, (R. H. Dhebar and R. N. Sachthy, Advocates, with them), for Respondent.

S. C. Agarwal, R. K. Garg, M. K. Ramamurthi and P. Singh, Advocates of M/s. Ramamurthi and Co., for Intervener.

G.R.

*Application dismissed.*

## [SUPREME COURT.]

P. B. Gajendragadkar, K. N. Wanchoo and  
K. C. Das Gupta, JJ.  
29th April, 1963.

Workmen of Joint Steamer Companies v. Joint Steamer Companies  
C.As. Nos. 811-812 of 1962.

*Industrial Disputes Act (XIV of 1947)—Bonus to workmen—Full Bench Formula—Company having Branches in different countries.*

Some of the difficulties in the way of such apportionment have been indicated by us above. We must not however be understood to say that the task is wholly impossible of achievement. It may be that in another case the workmen may be able to adduce such evidence by examining expert witnesses, like actuaries, accountants or others that the tribunals may feel justified in computing, in respect of the Indian business, reasonably accurate figures for the different items of the Full Bench Formula. All we wish to say is that on the materials on the present record we are not in a position to apply the Full Bench Formula to a part only of the total operations of the companies in India and Pakistan.

We have therefore come to the conclusion that the Labour Appellate Tribunal has rightly rejected the workmen's claim for bonus for the year, 1949, 1950, 1951 and 1952.

N. C. Chatterjee, Senior Advocate, (P. K. Mukherjee, Advocate, with him), for Appellants.

A. V. Viswanath Sastri, Senior Advocate, (S. C. Mazumdar and B. N. Ghosh, Advocates with him), for Respondents Nos. 1 and 2.

G.R.

*Appeals dismissed.*

## [SUPREME COURT.]

K. Subba Rao, Raghubar Dayal and  
J. R. Mudholkar, JJ.  
30th April, 1963.

Union of India v.  
Ram Charan.  
C.A. No. 115 of 1962.

*Civil Procedure Code (V of 1908)—Order 22, Rules 3, 4, 9, and 11, section 151—Order 13, Rule 2, Supreme Court Rules—Limitation Act section 5 and Articles 171 and 176.*

The most damaging thing for the appellant is that the application came up for hearing before the learned Single Judge and at that time the stand taken by it was that limitation for such an application starts not from the date of death of the respondent but from the date of the appellant's knowledge, of the death of the respondent. The appellant's case seems to have been that no abatement had actually taken place as the limitation started from 3rd February, 1958, when the appellant's officer knew of the death of the respondent and the application was made within 3 months of that date. It appears to be due to such an attitude of the appellant that the application, dated 17th March, 1958 purported to be simply under rule 4 of Order 22 and did not purport to be under rule 9 of the said Order as well and that no specific prayer was made for setting aside the abatement. The limitation for an application to set aside abatement of a suit does start on the death of the deceased respondent. Article 171, First Schedule to the Limitation Act provides that. It does not provide the limitation to start from the date of the appellant's knowledge thereof. The stand taken by the appellant was absolutely unjustified and betrayed complete lack of knowledge of the simple provision of the Limitation Act. In these circumstances, the High Court cannot be said to have taken an erroneous view about the appellant's not establishing sufficient ground for not making an application to bring on record the representatives of the deceased respondent within time or for not making an application to set aside the abatement within time. We, therefore, see no force in this appeal and dismiss it with costs.

D. R. Prem, Senior Advocate, (P. D. Menon, Advocate, with him), for Appellant.

Veda Vyasa, Senior Advocate (K. K. Jain, Advocate for P. C. Khanna, Advocate, with him), for Respondent.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

P. B. Gajendragadkar, K. N. Wanchoo and  
Das Gupta, JJ.  
2nd May, 1963.

M/s. Khardah & Co., Ltd. v.  
The Workmen.  
C.A. No. 705 of 1962.

*Industrial Dispute Act (XIV of 1947)—Dismissal—Mala fide—Domestic Tribunal.*

Therefore, we would discourage the idea of recording statements of witnesses *ex parte* and then producing the witnesses before the employee concerned for cross-examination after serving him with such previously recorded statements even though the witnesses concerned make a general statement on the latter occasion that their statements already recorded correctly represent what they stated. In our opinion, unless there are compelling reasons to do so, the normal procedure should be followed and all evidence should be recorded in the presence of the workman who stands charged with the commission of acts constituting misconduct.

The question of motive is hardly relevant in enquiries held against public servants, vide *Union Territory of Tripur and another v. Gopal Chandra Dutta Choudhuri*, A.I.R. 1958 S.C. 601. That is another reason why domestic enquiries in industrial matters should be held with scrupulous regard for the requirements of natural justice. Care must always be taken to see that these enquiries are not reduced to an empty formality.

H. N. Sanyal, Solicitor-General of India (P. K. Chatterjee, Advocate, with him) for Appellant.

W. L. Sen Gupta and Janardhan Sharma, Advocate, for Respondents.

G.R.

*Appeal dismissed.*

[SUPREME COURT.]

P. B. Gajendragadkar, K. N. Wanchoo and  
K. C. Das Gupta, JJ.  
2nd May, 1963.

Raghunath Keshava Kharker v  
Ganesh.  
C.A. No. 98 of 1962.

*Provincial Insolvency Act (V of 1920)—Right of debtor to remaining property on his discharge.*

We have no doubt that the Act did not contemplate such a situation. We have already indicated the reason why section 44 does not provide for revesting of property in the insolvent in contrast to the provision therefor in section 37. Generally speaking it is not expected that there would be any property left to revest in the insolvent after the administration in insolvency is over. We have therefore to look to section 67 which provides that the insolvent is entitled to any surplus remaining after payment in full of his creditors and after meeting the expenses of the proceedings taken under the Act; and it is that section which gives title to the insolvent in the property which remains undisposed of for any reason before his discharge subject to the conditions of that section being fulfilled even after the discharge.

All that justice requires is that in case the conditions of section 67 have not been fulfilled such property should be subject to those conditions, namely, that he should be liable to discharge his creditors in full with interests and to meet the expenses of all proceedings taken under the Act. Subject to these conditions the insolvent in our opinion would be entitled to undisposed of property on discharge and would be free to deal with it as any other person and if necessary, to file a suit to recover it.

S. S. Shukla, Advocate, for Appellant.

*A. V. Viswanatha Sastri*, Senior Advocate (*G. B. Pai*, Advocate and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji and Co.*, with him); for Respondents Nos. 1, 3 and 7:

*Sardar Bahadur*, Advocate, for Respondent No. 2.

G.R.

*Case remanded.*

[SUPREME COURT.]

*K. Subba Rao*, *Raghubar Dayal* and  
*J. R. Mudholkar*, JJ.  
2nd May, 1963.

Manindra Land and Building Corpora-  
tion Ltd. v. Bhutnath Banerjee.  
C.A. No. 524 of 1962.

*Civil Procedure Code (V of 1908), Order 22, Rules 3, 4, 9, section 47—Limitation Act Articles 171 and 176 and section 5—Bengal Money Lenders Act.*

It is not necessary for the purpose of this appeal to state the reasons which were urged as a justifiable excuse for the inability of the appellant to take the necessary steps earlier. It is not open to the High Court to question the findings of fact recorded by a subordinate Court in the exercise of its revisional jurisdiction under section 115 of the Code which, it is well-settled, applies to cases involving questions of jurisdiction, i.e. questions regarding the irregular exercise or non-exercise of jurisdiction or the illegal assumption of jurisdiction by a Court and is not directed against conclusion of law or fact in which questions of jurisdiction are not involved: See *Bala Krishna Udayar v. Vasudeva Aiyar*, L.R. 44 I.A. 261, 267: I.L.R. 40 Mad. 793: 33 M.L.J. 69. *A. Batchamian Sahib & Co. v. A. N. Channiah*, C.As. Nos. 452 and 487 of 1962 decided on 19th October, 1962. This legal position is not disputed for the respondents.

We are therefore of opinion that the High Court fell in error in interfering with the finding of fact arrived at by the Subordinate Judge with respect to the appellants having sufficient cause for not making an application for bringing the respondents on record within time and for not applying for the setting aside of the abatement within time. We allow the appeal with costs throughout, set aside the order of the Court below and restore that of the trial Court. It will now proceed according to law with the further execution of the decree on the second application presented by the appellant for the purpose.

*N. C. Chatterjee*, Senior Advocate, (*E. Udayaratnam* and *D. N. Mukherjee*, Advocates, with him), for Appellant.

*B. Sen*, Senior Advocate, (*S. Ghosh*, Advocate, with him), for Respondents Nos. 1 to 3.

G.R.

*Appeal allowed.*



## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B.P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR AND RAGHUBAR DAYAL, JJ.

The Lodna Colliery Co. (1920), Ltd.

.. Appellant\*.

v.  
Bhola Nath Roy (deceased) and after him his legal representatives and others

.. Respondents.

*Land Tenures—Person with whom resumed invalid lakhraj (Revenue free) land was settled permanently—Right to sub-soil minerals.*

A person with whom the resumed invalid Lakhraj (Revenue free) land was permanently settled has rights to sub-soil minerals. The provisions of the Regulations enacted by the Governor-General in Council support the claim to the sub-soil in such land held by him.

Appeal from the Judgment and Decree, dated the 11th September, 1952, of the Calcutta High Court in Appeal from Original Decree No. 162 of 1949.

*M. C. Setalvad*, Attorney-General for India and *B. Sen*, Senior Advocate (*S.N. Mukerji* and *B.N. Ghosh*, Advocates, with them), for Appellant.*N.C. Chatterjee*, Senior Advocate (*J.C. Ghose*, *S.P. Ghose* and *P.K. Chatterjee*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

*Raghubar Dayal, J.*—This appeal, on a certificate granted by the High Court at Calcutta, raises the question whether the person with whom a resumed invalid Lakhraj (revenue free) land was permanently settled has rights in the sub-soil minerals or not. The necessary facts are briefly these :

The plaintiffs are the proprietors of the land in suit in C.S. Khatian No. 611 and Sub-Khatians Nos. 612 and 613 of village Sripur in Touzi No. 2597 of the Burdwan Collectorate.

The Maharaja of Burdwan is the proprietor of the lands in village Sripur appertaining to Touzi No. 12 of Burdwan Collectorate. He let out those lands to the Pals and Goswamis of Sripur in Putni right. The Putnidars also took coal mining lease of those lands from the Maharaja and, thereafter, both the Maharaja and the Putnidars granted the coal mining lease of those lands to one P.K. Chatterji of Ikrah who, in his turn, granted a sub-lease of the same to Messrs. Lodna Colliery Co., Ltd., the predecessor-in-interest of the defendant company, the Lodna Colliery Co. (1920), Ltd.

A portion of the lands in suit subsided and on enquiry the plaintiffs found that the defendant company had cut away a large quantity of the underground coal from the lands in suit. It is on account of such unjustified conduct of the defendant company that the plaintiffs, on the basis of their proprietary right, sued for the recovery of damages for coal wrongfully taken away by the defendant from the land in suit and for other wrongs. The defendant company contested the suit and denied the plaintiff's alleged rights on the ground, *inter alia*, that the plaintiffs had no title to the sub-soil of the land in suit and consequently to the coal. The contention really is that the land in suit had been permanently settled with the plaintiffs after it had been resumed as invalid Lakhraj land and that such settlement conferred no better rights than what they originally possessed on account of the land in suit being granted to their predecessors-in-interest under Brahmottar and Debutter grants, the grantees under which had no rights in the sub-soil of the land granted.

The trial Court held that the invalid Lakhraj tenure in the land in suit in favour of the predecessors-in-interest of the plaintiff was resumed by the Government under the provisions of Regulation II of 1819 and, thereafter, was permanently

settled with them at the fixed revenue and that therefore the plaintiffs had right to the minerals under the soil of the land settled with them. It accordingly decreed the suit in part and the decree was confirmed by the High Court.

It is contended for the appellant that the person with whom resumed invalid Lakhraj land had been settled has no rights in the sub-soil. The respondents rely on the provisions of the Regulations enacted by the Governor-General in Council in support of their claim to the sub-soil in such land held by them.

The Governor-General in Council passed a number of Regulations on 1st May, 1793. We shall first consider Regulation XIX of 1793.

Regulation XIX of 1793 was made for re-enacting with modifications the Rules passed by the Governor-General in Council on 1st December, 1790, for trying the validity of the titles of persons holding, or claiming a right to hold, lands exempted from the payment of revenue to Government, under grants and for determining the amount of the annual assessment to be imposed on lands so held which might be adjudged or become liable to the payment of public revenue. The preamble makes it clear that the Regulation was creating an agency for determining the title of the proprietors of land who claimed to hold it free from the liability to pay revenue on account of certain grants, that from time to time the British Government had declared all grants for holding land exempt from the payment of revenue without their sanction since the date of the accession of the East India Company to the Diwani on 12th August, 1765, illegal and void and that no such exempted land was to be made subject to the payment of revenue until the titles of the proprietors had been adjudged invalid by a final judicial decree. It is to be noticed that the persons who laid claims to hold the land exempt from the payment of revenue were referred to as proprietors.

Section II, Clause First, deals with the grants of alienated land made previous to the 12th August, 1765, the date of the accession of the East India Company to the Diwani, and lays down that such grants would be deemed valid provided the grantee actually and *bona fide* obtained possession of the land so granted and the land had not been subsequently rendered subject to the payment of revenue.

Section III, Clause First, declares invalid all grants for holding land exempt from the payment of revenue made between the 12th August, 1765 and the 1st December, 1790 by any authority other than that of Government and which had not been confirmed by Government or by any officer empowered to confirm them.

Section IV is significant for our purpose and reads :

"This Regulation, as far as regards lands alienated previous to the 1st December, 1790, respects only the question whether they are liable to the payment of revenue or otherwise. Every dispute or claim regarding the proprietary right in lands alienated previous to that date, and which, in conformity to this Regulation, may become subject to the payment of revenue, is to be considered as a matter of a private nature to be determined by the Courts of Diwani Adalat in the event of any dispute or claim arising respecting it between the grantee and the grantor or their respective heirs or successors. The grantees, or the present possessors, until dispossessed by a decree of the Diwani Adalat, are to be considered as the proprietors of the lands with the same right of property therein as is declared to be vested in proprietors of estates or dependent taluks, (according as the land may exceed or be less than one hundred bighas, specified in sections 6, 7 and 21), subject to the payment of revenue, and they are to execute engagements for the revenue, with which their lands may be declared chargeable, either to the Government or to the proprietor or farmer of the estate in which the lands may be situated, or to the officer of Government, (according as the revenue of the estate in which the land may be situated may be payable by the proprietor or a farmer, or collected khas), under the rules for the decennial settlements. If by the decision of the Diwani Adalat the proprietary right in the land shall be transferred, the persons succeeding thereto is in like manner to be responsible for the payment of the revenue assessed or chargeable thereon."

It is clear from this section that the Regulation simply dealt with the question about the liability of certain lands to the payment of revenue and provided that any dispute about proprietary right between the grantees and the grantors would be a matter of a private nature to be decided by the Courts of Diwan Adalat.

however, definitely provides that the grantees or the then possessors of land, until dispossessed by a decree of the Diwani Adalat, are to be considered as the proprietors of the lands with the same right of property therein as is declared to be vested in proprietors of estates or dependent taluks according as the land may exceed or be less than one hundred bighas subject to the payment of revenue. Such proprietors of land were to execute engagements for revenue with which their lands may be declared chargeable, either to the Government or to the proprietor or farmer of the estates in which the lands be situated.

The grantees of invalid Lakhraj lands therefore had the same right of property in that land, subject to the payment of revenue, as had been declared to be vested in the proprietors of estates. If the zamindars, the proprietor of estates, have rights not only over the surface of the land but in the sub-soil as well, the persons whose grants had been held to be invalid and who were held to be liable to pay land revenue also possessed right in the sub-soil of the land settled with them.

Now, Regulation VIII of 1793, also passed on 1st May, 1793, re-enacted with modifications and amendment the Rules for the Decennial Settlement of the public revenue payable from the lands of the zamindars, independent talukdars, and other actual proprietors of land in Bengal, Bihar and Orissa, passed for those Provinces respectively on 18th September, 1789, 25th November, 1789, and 10th February, 1790, and subsequent dates. Section IV provided that the settlement, under certain restrictions and exceptions specified in the Regulation, shall be concluded with the actual proprietors of the soil, of whatever denomination, whether zamindars, talukdars or chaudhris. It follows that the zamindars with whom settlement took place, were recognized as the actual proprietors of the soil. The settlement of revenue so made was made permanent by section IV of Regulation I of 1793.

Regulation I of 1793 enacted into a Regulation certain Articles of a Proclamation dated 22nd March, 1793. Section I of this Regulation states that the various articles of the Proclamation were enacted into a Regulation and that those articles related to the limitation of public demand upon the lands, addressed by the Governor-General in Council to the zamindars, independent talukdars and other actual proprietors of land paying revenue to Government in the Provinces of Bengal, Bihar and Orissa.

By section IV it was declared to the zamindars, independent talukdars and other actual proprietors of land, with or on behalf of whom a settlement had been concluded under the Regulations mentioned earlier, that at the expiration of the term of settlement no alteration would be made in the assessment which they had respectively engaged to pay, but that they and their heirs and lawful successors would be allowed to hold their estates at such assessment for ever.

The Preamble to Regulation II of 1793, which abolished the Courts of Mal Adalat or Revenue Courts and transferred the trial of suits cognizable in those Courts to the Courts of Diwani Adalat, stated, in connection with the proposed improvements in agriculture :

"As being the two fundamental measures essential to the attainment of it, the property in the soil has been declared to be vested in the landholders, and the revenue payable to Government from each estate has been fixed for ever. . . . . The property in the soil was never before formally declared to be vested in the landholders, nor were they allowed to transfer such rights as they did possess, or raise money upon the credit of their tenures, without the previous sanction of Government."

It is thus clear from the above declarations that the zamindars, the proprietors of estates, were recognised to be the proprietors of the soil. Such a view was expressed by the Privy Council also in *Ranjit Singh v. Kali Dasi Debi*<sup>1</sup>. It was said at page 122 :

"Passing to the Settlement of 1793, it appears to their Lordships to be beyond controversy that whatever doubts be entertained as to whether before the British occupation the Zamindars had any pro-

proprietary interest in the lands comprised within their respective districts, the settlement itself recognizes and proceeds on the footing that they are the actual proprietors of the land for which they undertake to pay the Government revenue. The settlement is expressly made with the 'zamindars independent talukdars and other actual proprietors of the soil': See Regulation I, section 3 and Regulation VIII, section 4. It is clear that since the settlement the zamindars have had at least a *prima facie* title to all lands for which they pay revenue, such lands being commonly referred to as *malguzari lands*."

The right of the zamindars to the sub-soil minerals under their land follows from their being proprietors of the soil and has been recognized in a number of cases between the zamindars and persons holding land under a tenure from them. It has been held in those cases that, in the absence of the right to sub-soil minerals being conferred on the tenure holder under the terms of the tenure held by him, he does not get any right to them.

The first such case is *Hari Narayan Singh v. Sriram Chakravarti*<sup>1</sup>. The same view was expressed in *Durga Prasad Singh v. Braja Nath Bose*<sup>2</sup>.

In *Sashi Bhushan Misra v. Jyoti Prashad Singh Dco*<sup>3</sup>, Lord Buckmaster said at page 53, with regard to the above two cases :

"These decisions, therefore, have laid down a principle which applies to and concludes the present dispute. They establish that when a grant is made by a zamindar of a tenure at a fixed rent, although the tenure may be permanent, heritable, and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect."

The fact that the tenure was rent free, makes no difference to this principle, as held in *Raghunath Roy Marwari v. Raja of Jheria*.<sup>4</sup>

We are therefore of opinion that the right of property of the persons with whom resumed invalid Lakhraj land had been settled, being the same as of the zamindars, extends to the sub-soil minerals of the land held by them.

Further, the plaintiffs trace their rights to the documents Exhibits 10, 2 and 6 (a). Before dealing with them, we may refer to two other Regulations not so far mentioned.

Regulation II of 1819 modified the then existing Regulations regarding the resumption of revenue of lands held free of assessment under illegal or invalid tenures. Its Section III declared that lands specified therein were liable to assessment in the same manner as other unsettled mahals and that the revenue assessed on all such lands would belong to Government. It laid down the procedure for enquiry about the claim of Government to assess such land and for assessment of revenue. Regulation III of 1828 made certain changes in the procedure, but contains nothing particular which would affect the determination of the question before us.

Exhibit 10 is the Robakari of the Deputy Collector of Burdwan, dated 15th April, 1841, with respect to Touzi No. 2597. It is in pursuance of this order that permanent settlement was made with Madhusudan Roy and Sitaram Roy, predecessors-in-interest of the plaintiffs with respect to the land in suit. It appears from this Robakari that in proceedings between the Government as plaintiff and Manik Chandra Roy, Madhusudan Roy, Sitaram Roy and others as defendants, the claim of the Government, in accordance with the provisions of Regulation II of 1819 and Regulation III of 1828, in respect of the invalid revenue free land consisting of Brahmottar land measuring 156 bighas 10 cattahs and the Debutter land measuring 18 bighas 10 cattahs, in all 175 bighas, situated in village Pariharpur and other villages within Pergana Shergarh, was decreed in April, 1837, with the result that that land was resumed and assessed to land revenue. Madhusudhan Roy and Sitaram Roy and other defendants claimed right to get settlement because it was the Lakhraj property obtained by their ancestors. The settlement was however made with Manik Chandra Roy on 19th April, 1838, as the other defendants did not turn up. Subsequently, Madhusudhan Roy applied for settlement jointly with Manik Chandra Roy and others. As a result of the enquiry made, permanent settlement was separately made with Manik Chandra Roy and others

1. (1910) L.R. 37 I.A. 136 : 20 M.L.J. 569.

2. (1912) L.R. 39 I.A. 133 : 23 M.L.J. 26,

3. (1917) L.R. 44 I.A. 46: 32 M.L.J. 245.

4. (1919) L.R. 46 I.A. 158 : 36 M.L.J. 660.

with respect to certain area and with Madhusudhan Roy and Sitaram Roy with respect to the rest. On 15th April, 1841, Amalnama, Exhibit 2, was issued by the Deputy Collector, Burdwan, to Mukhyas and others. It directed them to pay their respective rents to the persons with whom settlement was made.

Exhibit 6 (a) is certified copy of settlement khatian No. 611 in respect of village Sripur, relating to Touzi No. 2597, R.S. No. 2416. - It describes the interest in the land in suit to be Bajapti (resumed) Lakhraj Pariharpur and others. It mentions five persons including the son of Madhusudhan Roy and the sons of Sitanath Roy, to be the proprietors in possession of that interest. It also shows the King Emperor of India as possessing the entire superior interest. It is thus clear that the possessors of the Bajapti (resumed) Lakhraj land in suit held it as proprietors under the King Emperor of India. They must consequently have the same rights which other proprietors like zamindars had.

It is however urged for the appellants that the records prior to the resumption proceedings showed the lands in suit to be the Brahmottar and Debutter lands of the predecessors of the plaintiffs and that therefore, in view of the principle of law laid down by the Privy Council in *Hari Narayan Singh's Case*<sup>1</sup>, and the later decisions, they cannot be held to possess rights in the sub-soil in the absence of definite evidence that such rights were conveyed under those grants. We do not agree with this contention. The predecessors-in-interest of the plaintiffs held the land from the Government and not on a subordinate tenure from the zamindars and therefore the principle of law as stated in *Hari Narayan Singh's Case*<sup>1</sup> and later confirmed in several decisions by the Privy Council, does not apply to the present case.

We are therefore of opinion that the plaintiffs had rightly been held to own and possess the rights to the minerals under the land in suit and that the decree in their favour is correct. We therefore dismiss the appeal with costs.

V.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, A. K. SARKAR, K. SUBBA RAO, K. N. WANCHOO AND N. RAJAGOPALA AYYANGAR, JJ.

The Board of High School and Intermediate Education, .. *Appellant\**  
U.P., Allahabad

v.

Ghanshyam Das Gupta and others .. *Respondents.*

*U.P. Intermediate Education Act (II of 1921), Regulation, Chapter VI, Rule 1 (1)—Committee cancelling result and debarring examinee from appearing for examination—Committee, if acts judicially or administratively—Quasi-judicial act—What constitutes—Procedure to be adopted by a quasi-judicial body.*

The statute is not likely to provide in so many words that the authority passing the order is required to act judicially ; that can only be inferred from the express provisions of the statute in the first instance in each case and no one circumstance alone will be determinative of the question whether the authority set up by the statute has the duty to act judicially or not. The inference whether the authority acting under a statute where it is silent has the duty to act judicially will depend on the express provisions of the statute read along with the nature of the rights affected, the manner of the disposal provided, the objective criterion if any to be adopted, the effect of the decision on the person affected and other indicia afforded by the statute. A duty to act judicially may arise in widely different circumstances which it will be impossible and indeed inadvisable to attempt to define exhaustively ;

There is nothing express in the Act from which it can be said that the Committee is not under a duty to act judicially. It is true that there is no procedure provided as to how the Committee will act in exercising its powers under rule 1 (1) and it is further true that there is no express provision in that rule requiring the Committee to call for an explanation from the examinees concerned and to hear the examinees whose cases it is required to consider. The mere fact that the Act or the Regulations do

not make it obligatory on the Committee to call for an explanation and to hear the examinee is not conclusive on the question whether the Committee acts as a quasi-judicial body in exercising its powers under rule 1 (1). Even though calling for an explanation and hearing the examinee may not have been made expressly obligatory by the Act or the Regulations, it is obvious that the Committee when it proceeds to decide matters covered by rule 1 (1) will have to depend upon materials placed before it, in coming to its decision. Before the Committee decides to award any penalty it has to come to an objective determination on certain facts and only when it comes to the conclusion that those facts are established that it can proceed to punish the examinee concerned.

The Committee when it exercises its powers under rule 1 (1) is acting quasi-judicially and the principles of natural justice which require that the other party, (namely, the examinee in this case) must be heard, will apply to the proceedings before the Committee.

As to the manner in which it should give an opportunity to the examinee concerned to be heard, that is a matter which can be provided by Regulations or Bye-laws if necessary. All that is required is that the other party should have an opportunity of adequately presenting his case. But what the procedure should be in detail will depend on the nature of the Tribunal. There is no doubt that many of the powers of the Committee under Chapter VI are of administrative nature; but where quasi-judicial duties are entrusted to an administrative body like this it becomes a quasi-judicial body for performing these duties and it can prescribe its own procedure so long as the principles of natural justice are followed and adequate opportunity of presenting his case is given to the examinee.

Appeal from the Judgment and decree dated the 23rd March, 1956, of the Allahabad High Court in special Appeal No 291 of 1955.

*Veda Vyasa*, Senior Advocate, (*C.P. Lal*, Advocate, with him), for Appellant.

*J. P. Goyal*, Advocate, for Respondents.

The Judgment of the Court was delivered by

*Wanchoo, J.*—This is an appeal on a certificate granted by the Allahabad High Court. The brief facts necessary for present purposes are these. The three respondents were students of G.S. Hindu Intermediate College at Sikandrarao and appeared at the Intermediate (Commerce) Examination conducted by the appellant in the year 1954. On 12th June, 1954, the result of the examination was published in newspapers and the three respondents passed in the second division. Thereafter they prosecuted further studies. But in December, 1954, their fathers and guardians received information from the Principal of the G.S. Hindu Intermediate College that the Examinations' Committee of the appellant (hereinafter referred to as the Committee) had cancelled the results of the respondents for the examination of 1954 and further that they had been debarred from appearing at the examination of 1955. Thereupon the respondents filed a writ petition in the High Court contending that the Committee had never afforded any opportunity to them to rebut the allegations made against them and that they were never informed about the nature of the unfair means used by them in the said examination and the first thing they came to know was the resolution of the Committee cancelling their results and debarring them from appearing in the examination of 1955. They therefore contended that they were entitled to an opportunity being afforded to them to meet the case against them of using unfair means at the examination before the appellant took action against them by cancelling their results and debarring them from appearing at the examination of 1955. The procedure thus adopted by the appellant was said to be in violation of the principles of natural justice inasmuch as they were given no opportunity whatsoever to defend themselves and to show cause against the action contemplated against them. It was further contended that the procedure adopted by the appellant violated the provisions of the U.P. Intermediate Education Act, No. II of 1921 (hereinafter referred to as the Act) and the U.P. Education Code, and therefore, the resolution cancelling their results and debarring them from appearing in the later examination was without jurisdiction and illegal. They therefore prayed for a proper writ or order cancelling the resolution of the appellant.

The appellant opposed the application and its case was that the respondents had used unfair means at the examination and their cases were reported to the Committee under the Regulations and the Committee had acted under the powers conferred on it under the Act and the Regulations framed thereunder after a thorough inquiry. It was not disputed, however, that no opportunity had been afforded to the respondents to rebut the allegations against them in the inquiry made by the

Committee which resulted in the resolution cancelling the results of the examination.

A large number of contentions appear to have been urged in the High Court ; but we are here only concerned with one of them, namely, whether the respondents were entitled to a hearing before the appellant decided to cancel the results. The contention on behalf of the respondents before the learned Single Judge was that the appellant was under a duty to act judicially and therefore the respondents should have been given a hearing before any order was passed against them. The learned Single Judge held that no duty was cast on the Committee to act judicially and there was no statutory obligation on the Committee to give an opportunity to every examinee to be heard ; therefore he rejected the petition.

The respondents then went in appeal which was heard by Dayal and Brijmohan Lall, JJ., who however differed. Brijmohan Lall, J., was of opinion that the Committee was not required to act judicially or quasi-judicially when it considered cases of this kind and was acting merely administratively ; he nevertheless was of the opinion that one of the rules of natural justice contained in the maxim *audi alteram partem* would apply in this case, even though the Committee was acting administratively. He was therefore in favour of allowing the appeal. Dayal, J., agreed with the view of Brijmohan Lall, J., that in the present case no duty was cast on the Committee to act judicially and that the action of the Committee was merely administrative. He however did not agree that the Committee acted in violation of the principles of natural justice inasmuch as it did not give a hearing to the respondents. He was of the view that as the Committee was acting merely administratively it was not bound to give a hearing, as the maxim *audi alteram partem* applied only to judicial or quasi-judicial tribunals. The two learned Judges also differed on two other points with which we are not concerned. Eventually they referred three questions to be answered by another learned Judge and one of these questions was whether the failure of the Committee to provide an opportunity to the respondents of being heard vitiated its order, which was of an administrative nature.

The matter then came before a third learned Judge, Agarwala, J. He was doubtful whether the view of the Bench that there was no duty cast on the Committee to act judicially in the present case was correct ; but as on that matter the two learned Judges were in agreement, he dealt with the case on the basis that the Committee was acting merely administratively. Even so, he came to the conclusion that the respondents were entitled to a hearing and agreed with the view of Brijmohan Lall, J. Consequently, the appeal was placed before the Bench again and in accordance with the opinion of the third Judge it was allowed. Then followed an application by the appellant for leave to appeal to this Court, which was granted ; and that is how the matter has come up before us.

The main contention on behalf of the appellant is that the High Court was wrong in the view it took that any opportunity for hearing was necessary in this case even though the Committee acted merely administratively. It is contended that where a body is acting merely administratively, it is not necessary that it should give a hearing to a party who might be affected by its decision and that the principles of natural justice, including the maxim, *audi alteram partem*, apply only to judicial or quasi-judicial bodies, *i.e.*, bodies on whom a duty is cast to act judicially. It is submitted that where no such duty is cast on a body and it is acting merely administratively there is no necessity for it to hear the person who might be affected by its order. The respondents on the other hand contend that though the final decision of the High Court is correct, the High Court was not right in holding that the Committee was acting merely administratively in a matter of this kind ; they contend that considering the entire circumstances which operate in cases of this kind, the High Court should have held that there was a duty to act judicially and therefore it was necessary to give an opportunity to the respondents to be heard before action was taken against them. It is submitted that the mere fact that there was nothing express in the Act or the Regulations framed thereunder which might make

it obligatory for the Committee to call for an explanation and to hear the examinees whose cases it was required to inquire into was not wholly determinative of the question whether a duty was cast on the Committee in cases like this to act judicially.

The first question therefore which falls for consideration is whether any duty is cast on the Committee under the Act and Regulations to act judicially and therefore it is a quasi-judicial body. What constitutes "a quasi-judicial act" was discussed in the *Province of Bombay v. Kusaldas S. Advani*<sup>1</sup>. The principles have been summarised by Das, J. (as he was then) at page 725 in these words :—

"The principles, as I apprehend them are :

(i) that if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a *lis* and *prima facie* and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act ; and

(ii) that if a statutory authority has power to do any act which will prejudicially affect the subject then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially.

In other words, while the presence of two parties besides the deciding authority will *prima facie* and in the absence of any other factor impose upon the authority the duty to act judicially, the absence of two such parties is not decisive in taking the act of the authority out of the category of quasi-judicial act if the authority is nevertheless required by the statute to act judicially."

These principles have been acted upon by this Court in later cases : see *Nagendra Nath Bora v. The Commissioner of Hills Division, Assam*<sup>2</sup>; *Shri Radheshyam Khare v. The State of Madhya Pradesh*<sup>3</sup>, *Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation*<sup>4</sup> and *Shivji Nathubhai v. Union of India*<sup>5</sup>. Now it may be mentioned that the statute is not likely to provide in so many words that the authority passing the order is required to act judicially ; that can only be inferred from the express provisions of the statute in the first instance in each case and no one circumstance alone will be determinative of the question whether the authority set up by the statute has the duty to act judicially or not. The inference whether the authority acting under a statute where it is silent has the duty to act judicially will depend on the express provisions of the statute read along with the nature of the right affected, the manner of the disposal provided, the objective criterion if any to be adopted, the effect of the decision on the person affected and other indicia afforded by the statute. A duty to act judicially may arise in widely different circumstances which it will be impossible and indeed inadvisable to attempt to define exhaustively : (vide observations of Parker, J., in *R. v. Manchester Legal Aid Committee*<sup>6</sup>).

We must therefore proceed to examine the provisions of the Act and the Regulations framed thereunder in connection with matters of this kind to determine whether the Committee can be said to have the duty to act judicially when it deals with cases of examinees using unfair means in examination halls. Under section 7 of the Act, the Board constituted thereunder has *inter alia* powers to prescribe courses of instruction, to grant diplomas and certificates, to conduct examinations to admit candidates to its examinations, to publish the results of its examinations, and to do all such things as may be requisite in order to further the objects of the Board as a body constituted for regulating and supervising High School and Intermediate Education. Under section 13, the Board has power to appoint and constitute various committees, including the examinations committee, and under section 14, the Board can delegate its powers by Regulations to such committees. Section 15 gives power to the Board to make Regulations with respect to the constitution,

1. (1950) S.C.J. 451 : (1950) 2 M.L.J. 703 : (1950) S.C.R. 621, 725.

2. (1958) S.C.J. 798 : (1958) S.C.R. 1240.

3. (1959) S.C.J. 6 : (1959) 1 M.L.J. (S.C.) 5 : (1959) 1 An.W.R. (S.C.) 5 : (1959) S.C.R. 1440.

4. (1959) S.C.J. 967 : (1959) 2 M.L.J. (S.C.) 156 : 1959 2 An.W.R. (S.C.) 156 : (1959) 1 S.C.R. (Suppl.) 319.

5. (1960) S.C.J. 579 : (1960) 2 S.C.R. 775.

6. L.R. (1952) 2 Q.B. 413.



powers and duties of committees, the conduct of examinations, and all matters which by the Act may be provided for by Regulations. Section 20 gives power to the Board and its committees to make bye-laws consistent with the Act and the Regulations.

It will be clear from the above that the Act makes no express provisions as to the powers of the committees and the procedure to be adopted by them in carrying out their duties, which are left to be provided by Regulations, and we have therefore to look to the Regulations framed under section 15 to see what powers and duties have been conferred on various committees constituted under the Regulations. Section 13 (1) makes it incumbent on the Board to appoint the Committee and Chapter VI of the Regulations deals with the powers and duties of the Committee. Rule 1 (1) of Chapter VI with which we are particularly concerned reads as follows :

“ It shall be the duty of the Examinations' Committee, subject to sanction and control of the Board

(1) to consider cases where examinees have concealed any fact or made a false statement in their application forms or a breach of rules and regulations to secure undue admission to an examination or used unfair means or committed fraud (including impersonation) at the examination or are guilty of a moral offence or indiscipline and to award penalty which may be one or more of the following :

- (1) Withdrawal of certificate of having passed the examination ;
- (2) cancellation of the examination ;
- (3) exclusion from the examination ;”

There is however no provision in Chapter VI as to how the Committee will carry out the duty imposed on it by rule 1 (1). Further, there is no express provision in the Act or the Regulations casting a duty on the Committee to act judicially when exercising its powers under rule 1 (1) ; and the question whether the Committee has to act judicially when exercising these powers will have to be decided on an examination of all the circumstances relevant in the matter. At the same time, there is nothing express in the Act from which it can be said that the Committee is not under a duty to act judicially. It is true that there is no procedure provided as to how the Committee will act in exercising its powers under rule 1 (1) and it is further true that there is no express provision in that rule requiring the Committee to call for an explanation from the examinees concerned and to hear the examinees whose cases it is required to consider. But we are of opinion that the mere fact that the Act or the Regulations do not make it obligatory on the Committee to call for an explanation and to hear the examinee is not conclusive on the question whether the Committee acts as a quasi-judicial body in exercising its powers under rule 1 (1). Even though calling for an explanation and hearing the examinee may not have been made expressly obligatory by the Act or the Regulations, it is obvious that the Committee when it proceeds to decide matters covered by rule 1 (1) will have to depend upon materials placed before it, in coming to its decision. Before the Committee decides to award any penalty it has to come to an objective determination on certain facts and only when it comes to the conclusion that those facts are established that it can proceed to punish the examinee concerned. The facts which the Committee has to find before it takes action are :—

- (i) Whether the examinee has concealed any fact or made a false statement in his application form ; or
- (ii) Whether the examinee has made a breach of the Rules and Regulations to secure undue admission to an examination ; or
- (iii) Whether the examinee has used unfair means at the examination ; or
- (iv) Whether the examinee has committed fraud (including impersonation) at the examination ; or
- (v) Whether the examinee is guilty of moral offence or indiscipline.

Until one or other of these five facts is established before the Committee, it cannot proceed to take action under rule 1 (1). In order to come to the conclusion that one or other of these facts is established, the Committee will have to depend upon materials placed before it, for in the very nature of things it has no personal know-

ledge in the matter. Therefore, though the Act or the Regulations do not make it obligatory on the Committee to call for an explanation and hear the examinee, it is implicit in the provisions of rule 1 (1) that the Committee must satisfy itself on materials placed before it that one or other of the facts is established to enable it to take action in the matter. It will not be possible for the Committee to proceed at all unless materials are placed before it to determine whether the examinee concerned has committed some misconduct or the other which is the basis of the action to be taken under rule 1 (1). It is clear therefore that consideration of materials placed before it is necessary before the Committee can come to any decision in the exercise of its powers under rule 1 (1) and this can be the only manner in which the Committee can carry out the duties imposed on it.

We thus see that the Committee can only carry out its duties under rule 1 (1) by judging the materials, placed before it. It is true that there is no *lis* in the present case, in the sense that there are not two contesting parties before the Committee and the matter rests between the Committee and the examinee; at the same time considering that materials will have to be placed before the Committee to enable it to decide whether action should be taken under rule (1), it seems to us only fair that the examinee against whom the Committee is proceeding should also be heard. The effect of the decision of the Committee may in an extreme case blast the career of a young student for life and in any case will put a serious stigma on the examinee concerned which may damage him in later life. The nature of misconduct which the Committee has to find under rule 1 (1) in some cases is of a serious nature for example, impersonation, commission of fraud, and perjury; and the Committee's decision in matters of such seriousness may even lead in some cases to the prosecution of the examinee in Courts. Considering therefore the serious effects following the decision of the Committee and the serious nature of the misconduct which may be found in some cases under rule 1 (1), it seems to us that the Committee must be held to act judicially in circumstances as these. Though therefore there is nothing express one way or the other in the Act or the Regulations casting a duty on the Committee to act judicially, the manner of the disposal, based as it must be on materials placed before it, and the serious effects of the decision of the Committee on the examinee concerned, must lead to the conclusion that a duty is cast on the Committee to act judicially in this matter particularly as it has to decide objectively certain facts which may seriously affect the rights and careers of examinees, before it can take any action in the exercise of its power under rule 1 (1). We are therefore of opinion that the Committee when it exercises its powers under rule 1 (1) is acting quasi-judicially and the principles of natural justice which require that the other party, (namely, the examinee in this case) must be heard, will apply to the proceedings before the Committee. This view was taken by the Calcutta High Court in *Dipa Pal v. University of Calcutta*<sup>1</sup> and *B. C. Das Gupta v. Bijoyranjan Rakshit*<sup>2</sup>, in similar circumstances and is in our opinion correct.

It is urged on behalf of the appellant that there are a large number of cases which come up before the Committee under rule 1 (1), and if the Committee is held to act judicially as a quasi-judicial tribunal in the matter it will find it impossible to carry on its task. This in our opinion is no criterion for deciding whether a duty is cast to act judicially in view of all the circumstances of the case. There is no doubt in our mind that considering the totality of circumstances the Committee has to act judicially when taking action under rule 1 (1). As to the manner in which it should give an opportunity to the examinee concerned to be heard, that is a matter which can be provided by Regulations or Bye-laws if necessary. As was pointed out in *Local Government Board v. Alridge*<sup>3</sup> all that is required is that the other party should have an opportunity of adequately presenting his case. But what the procedure should be in detail will depend on the nature of the tribunal. There is no doubt that many of the powers of the Committee under Chapter VI are of

1. A.I.R. 1952 Cal. 594.

2. A.I.R. 1953 Cal. 212.

3. L.R. (1915) A.C. 120.

administrative nature; but where quasi-judicial duties are entrusted to an administrative body like this it becomes a quasi-judicial body for performing these duties and it can prescribe its own procedure so long as the principles of natural justice are followed and adequate opportunity of presenting his case is given to the examinee. It is not however necessary to pursue this matter further, for it is not in dispute that no opportunity whatsoever was given to the respondents in this case to give an explanation and present their case before the Committee. We are therefore of opinion that though the view of the High Court that the Committee was acting merely administratively when proceeding under rule 1 (1) is not correct, its final decision allowing the writ petition on the ground that no opportunity was given to the respondents to put forward their cases before the Committee is correct. We therefore dismiss the appeal. No order as to costs in the circumstances.

K.S.

*Appeal dismissed\**

## THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT.—B. P. SINHA, *Chief Justice*, S. K. DAS, P. B. GAJENDRAGADKAR, A. K. SARKAR, K. N. WANCHOO, M. HIDAYATULLAH, K. C. DAS GUPTA, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

The State Trading Corporation of India, Ltd. (In all the Petitions) .. *Petitioner\**  
v.

The Commercial Tax Officer and others (In Petitions Nos. 202 and 203 of 1961) and  
The Assistant Superintendent of Commercial Taxes, Bihar and others (In Petition No. 204 of 1961) } *Respondents.*

1. The Advocate-General for the State of Madras (In all the Petitions)
2. The Advocate-General for the State of Punjab,
3. The Advocate-General for the State of West Bengal,
4. The Advocate-General for the State of Gujarat and
5. The Advocate-General for the State of Rajasthan (In Petition No. 202 of 1961) .. *Interveners.*

*Company—Incorporated under the law—State Trading Corporation of India—Not a ‘citizen’ within the meaning of Article 19 of the Constitution of India—Not entitled to enforce fundamental rights guaranteed under Article 19 of the Constitution—Nationality and citizenship—Distinction—State Trading Corporation of India—If organ or agent of Government of India—Relevant factors—(Companies Act (Central Act I of 1956). Constitution of India, 1950, Articles 12, 19 Citizenship Act (Central Act LVII of 1955)).*

The State Trading Corporation of India sought relief against the State of Andhra Pradesh and the State of Bihar by the issuance of writ of *certiorari* or other appropriate writ or direction for quashing the orders of Commercial Tax Officers of the States concerned assessing the Corporation to sales tax and also for quashing the notice of demand issued to them for payment of the sum assessed. The Corporation sought to enforce the Fundamental Rights envisaged under Article 19 of the Constitution of India on the ground that it was a citizen.

*Per Sinha C.J., for the Majority.*—The State Trading Corporation of India, a company registered under the Indian companies Act of 1956 is not a ‘citizen’ within the meaning of Article 19 of the Constitution and cannot ask for the enforcement of the fundamental rights guaranteed under that Article.

It is clear on a consideration of the provisions of Part III of the Constitution that the makers of the Constitution deliberately and advisedly made a clear distinction between Fundamental Rights available to ‘any person’ and those guaranteed to ‘all citizens’. In other words all citizens are persons but all persons are not citizens, under the Constitution. When the Constitution laid down the freedoms contained in Article 19 (1) (a)—(g), as available to “all citizens”, it deliberately kept out all non-citizens. In that context, non-citizens would include aliens and artificial persons. The rights of citizenship envisaged in Article 19 are not wholly appropriate to a corporate body. The word “citizens” used in Article 19 of the Constitution is not used in a different sense from that in which it is used in Part II of the Constitution.

Neither the provisions of the Constitution Part II, nor of the Citizenship Act confer the right of citizenship on, or recognise as citizen, any person other than a natural person. These two provisions are completely exhaustive of the citizens of this country and they can only be natural persons.

A corporation may claim a nationality which ordinarily is determined by the place of its incorporation. "Nationality" and "citizenship" are not interchangeable terms. "Nationality" has reference to the jural relationship which may arise for consideration under the international law. On the other hand "citizenship" has reference to the jural relationship under the municipal law. In other words, nationality determined the civil rights of persons, natural or artificial, particularly with reference to international law, whereas citizenship is intimately connected with civic rights under municipal law. Hence, all citizens are nationals of a particular State, but all nationals may not be citizens of the State.

The fact that corporations may be nationals of the country for purposes of international law will not make them citizens of this country for purposes of municipal law or the Constitution.

*Per Hidayatullah, J.*—It is not possible to pierce the veil of incorporation in our country to determine the citizenship of the members and then to give the corporation the benefit of Article 19 of the Constitution. If the veil is pierced and the corporation seen as identical with Government there would be difficulty in giving relief unless it is held that the State can be its own citizen. Nor is it possible to raise an irrebuttable presumption about the citizenship of the members.

*Per Das Gupta J., Contra*—The intention of the framers of the Constitution must be, having regard to the legal position in the United States of America, that the word citizen in Article 19, intended that at least a corporation of which all the members were citizens would get the benefit of the Fundamental Rights enshrined in that Article.

Whether the Constitution-makers also intended that a corporation of which the major portion of the interest was held by citizens of India would also get the benefits of the rights, it is unnecessary for the purpose of this case to investigate.

It is proper to mention in this connection that in the 13 years that have rolled by since the Constitution came into force there have been many cases in which this Court as also the High Courts have given companies of which the members were Indian citizens the benefit of Fundamental Rights special to citizens.

The State Trading Corporation, so long as it consists wholly of citizens of India, can ask for enforcement of the Fundamental Rights granted to citizens under Article 19 (1) (f) and (g) of the Constitution.

*Per Shah, J. Contra*—A brief review of the legislative history is sufficient to destroy the assumption that the status of citizenship was not recognized under the common law operative in India prior to January 26, 1960, for, British subjects of Indian origin held for all purposes the status in British India of citizens. That status arose by birth and could also be conferred by naturalization.

If a natural person could be a citizen prior to 26th November, 1949 (the day on which by Article 394, Articles 5 to 9 came into force), there is no reason to suppose that artificial persons who were nationals of the British Empire and who could claim the protection abroad could not claim rights of citizenship within the territory of India, when they were in fact exercising all the rights and privileges which natural persons who were citizens exercised, except those which by their incorporation they could not exercise. There was before the Constitution no statute which indicated even indirectly that a Corporation aggregate could not be a citizen.

Having regard to the privileges and duties of nationals competent by the municipal law to exercise full political and civil Rights, and also having regard to the fact that Companies are invested with important Fundamental rights like equality before law, protection against taking of property without authority of law, protection against acquisition of property without payment of compensation or without public purpose, protection from imposition of taxes for sectional purposes, and also having regard to the fact that the companies are persons by their constitution and by the recognition afforded to them are competent to hold property and to dispose of property and to carry on trade, business, vocation or occupation and are protected from levy of taxes without authority of law and are guaranteed the freedom of trade, commerce and intercourse it would be difficult to hold that the expression "Citizen" used in Article 19 was intended to have a restricted meaning of one who is a natural person.

The question whether the corporation either sole or aggregate is an agent or servant of the State must depend upon the facts of each case. In the absence of any statutory provision a commercial corporation acting on its own behalf even if it is controlled wholly or partially by a Government Department, will be presumed not to be a servant or an agent of the State. The fact that a Minister appoints the members of the Corporation and is entitled to call for information and to supervise the conduct of the business, does not make the Corporation an agent of the Government. Where however, the Corporation is performing in substance Governmental, and not commercial functions an inference that it is an agent of the Government may readily be made.

The State Trading Corporation of India Ltd., is a commercial body, incorporated, as the Memorandum of Association indicates to organise and undertake trade generally with State Trading Coun-

tries as well as other countries in commodities entrusted to it for such purpose by the Union Government from time to time and to undertake purchase, sale and transport of such commodities in India or any where else in the world and to do various acts for that purpose. The Articles of Association make minute provisions for sale and transfer of shares, calling of general meetings, procedure for the general meeting, voting by members, Board of Directors and their powers, the issue of dividend, maintenance of accounts and capitalisation of profits. The State Trading Corporation has been constituted not by any special statute or charter but under the Indian Companies Act as a Private Limited Company. It may be wound up by order of a competent Court. Though it functions under the supervision of the Government of India and its Directors, it is not concerned with performance of any Government functions. Its functions being commercial, it cannot be regarded as either a department or an organ of the Government of India. It is a circumstance of accident that on the date of its incorporation and thereafter its entire shareholding was held by the President and the two Secretaries to the Government of India.

Assuming that the State Trading Corporation is a department or organ of the Government of India, still it is not seeking to enforce any Fundamental Rights against the Union of India; it is seeking to enforce its rights against the State of Andhra Pradesh. By Article 12 of the Constitution the Union as well as the State of Andhra Pradesh are States. Assuming that the State Trading Corporation be regarded as 'the State' within the meaning of Article 12 if it be regarded as a citizen there is nothing in Article 19 which prohibits enforcement by the citizen the Fundamental Rights vested in it. If the two conditions for the application of Art. 19 are satisfied *i.e.*, that the claimant to the protection of the right must be a citizen and that the right infringed must be one of the Fundamental freedoms mentioned in Article 19, the citizen would be entitled to, subject to the restrictions imposed by the Article, to enforce the rights against their infringement by action executive or legislative by any Government or the Legislature or the Union or the State and all local or other authorities within the territory or under the control of the Government of India. There is no warrant for restricting the enforcement of those rights on some implication that an agent or servant of the State if he or it be a citizen cannot enforce the fundamental rights against another body which can be regarded also as a State within the meaning of Article 12 of the Constitution.

The State Trading Corporation of India a company registered under the Indian Companies Act of 1956 is a citizen within the meaning of Article 19 of the Constitution and can ask for the enforcement of Fundamental Rights granted to citizens under the said Article. It is not a department and organ of the Government of India. Even if the Corporation be regarded as a department or organ of the Government of India, it will, if it be a citizen competent to enforce fundamental rights under Part III of the Constitution against the State as defined in Article 12 of the Constitution.

Petitions under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

*M. C. Setalvad* and *G. S. Pathak*, Senior Advocates (*B. Parthasarathy* and *B. Dutta*, Advocates and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.* with them), for Petitioners in all the Petitions.

*D. Narasaraju*, Advocate-General for the State of Andhra Pradesh (*T. V. R. Tatachari*, Advocate, with him), for Respondents (in Petitions Nos. 202 and 203 of 1961).

*V. K. Krishna Menon*, Senior Advocate (*Anil Kumar Gupta*, Advocate and *R. K. Garg*, *D. P. Singh*, *M. K. Ramamurthi* and *S. C. Agarwala*, Advocates of *M/s. Ramamurthi & Co.*, with him), for Respondents (in Petition No. 204 of 1961).

*A. Ranganadham Chetty*, Senior Advocate (*A. V. Rangan*, Advocate, with him), for Intervener No. 1.

*S. M. Sikri*, Advocate-General, for the State of Punjab (*Gopal Singh*, Advocate, with him), for Intervener No. 2.

*B. Sen*, Senior Advocate (*M. K. Bannerji* and *P. K. Bose*, Advocates, with him), for Intervener No. 3.

*J. M. Thakore*, Advocate-General, for the State of Gujarat (*K. L. Hathli*, Advocate, with him), for Intervener No. 4.

*G. C. Kasliwal*, Advocate-General for the State of Rajasthan (*S. K. Kapur* and *K. K. Jain*, Advocate, with him), for Intervener No. 5.

The following Order of the Constitution Bench was made by

*S. K. Das, J.*—In these three writ petitions the State Trading Corporation of India Ltd., and *K. B. Lal* who, at the time of the filing of the petitions was Additional Secretary, Ministry of Commerce and Industry, Government of India, but is no

longer holding such office now, are the petitioners who seek relief against the State of Andhra Pradesh in two of the petitions and the State of Bihar in the third petition by the issuance of a writ of *certiorari* or other appropriate writ or direction for quashing the orders of a Commercial Tax Officer of the State concerned assessing the Corporation to sales-tax and also for quashing the notice of demand issued to them for payment of the sum assessed.

When the learned Attorney-General opened the case for the petitioners in Writ Petition No. 202 of 1961, learned counsel appearing for the respondents asked for our permission to raise certain preliminary objections to the maintainability of the Writ Petitions Nos. 202 and 203 of 1961. Learned counsel for the respondents in Writ Petition No. 204 of 1961 intimated to us that his clients have already raised certain preliminary objections to the maintainability of the writ petition and they also wish to take objections similar to those taken on behalf of the respondents in Writ Petitions Nos. 202 and 203 of 1961.

We asked learned counsel for the respondents in Writ Petitions Nos. 202 and 203 of 1961, that he should formulate his preliminary objections to the maintainability of the writ petitions and file the same in Court. Learned counsel has now filed a petition asking for permission to urge certain preliminary objections to the maintainability of the writ petitions. We have granted such permission to learned counsel.

Two of these preliminary objections are :

"(1) whether the State Trading Corporation, a company registered under the Indian Companies Act, 1956, is a citizen within the meaning of Article 19 of the Constitution and can ask for the enforcement of Fundamental Rights granted to citizens under the said article and (2) whether the State Trading Corporation is, notwithstanding the formality of incorporation under the Indian Companies Act, 1956 in substance a department and organ of the Government of India with the entirety of its capital contributed by Government and can it claim to enforce Fundamental Rights under Part III of the Constitution against the State as defined in Article 12 thereof ?"

These two questions which have been raised by way of preliminary objections to the maintainability of the writ petitions are common to all the three petitions. In our view these two questions are of great constitutional importance and no decision of the Court finally deciding these two questions has been brought to our notice. We consider that by reason of the great constitutional importance of the questions raised, these three writ petitions should be placed before a larger Bench for decision. We accordingly direct that these three writ petitions be placed before the learned Chief Justice for necessary orders.

### OPINION.

The following Opinions of the Court were delivered :—

*Sinha, C.J.* (on behalf of the Majority).—The following two questions have been referred to the Special Bench by the Constitution Bench before which these cases came up for hearing.

"(1) Whether the State Trading Corporation, a company registered under the Indian Companies Act, 1956, is a citizen within the meaning of Article 19 of the Constitution and can ask for the enforcement of Fundamental Rights granted to citizens under the said article ; and

(2) whether the State Trading Corporation is, notwithstanding the formality of incorporation under the Indian Companies Act, 1956, in substance a department and organ of the Government of India with the entirety of its capital contributed by Government ; and can it claim to enforce Fundamental Rights under Part III of the Constitution against the State as defined in Article 12 thereof."

The questions were raised by way of preliminary objections to the maintainability of the Writ Petitions under Article 32 of the Constitution.

As the whole case is not before us, it is necessary to state only the following facts in order to appreciate how the controversy arises. The State Trading Corporation of India Ltd., and K. B. Lal, the then Additional Secretary, Ministry of Commerce and Industries, Government of India, moved this Court under Article 32 of the Constitution for quashing by a writ of *certiorari* or any other appropriate writ,

direction or order, certain proceedings instituted by or under the authority of the respondents,—(1) The Commercial Tax Officer, Visakhapatnam ; (2) the State of Andhra Pradesh ; and (3) the Deputy Commissioner of Commercial Taxes, Kakinada. Those proceedings related to assessments of sales-tax under the provisions of the Andhra Pradesh Sales Tax Act. Writ Petitions 202 and 203 of 1961 are between the parties aforesaid. In Writ Petition 204 of 1961, the parties are the petitioners aforesaid against (1) the Assistant Superintendent of Commercial Taxes, 1/c Chaibasa Sub-Circle, Bihar State ; (2) the Deputy Commissioner of Sales Tax, Bihar, Ranchi; and (3) the State of Bihar. Thus, the petitioners are the same in all the three cases, but the respondents are the State of Andhra Pradesh and its two officers in the first two cases and the State of Bihar and its two officers in the third case.

The first petitioner is a private limited company registered under the Indian Companies Act, 1956, with its head office at New Delhi, in May, 1956. The second petitioner is a shareholder in the first petitioner company. The two petitioners claim to be Indian citizens as all its shareholders are Indian citizens. Proceedings were taken for assessment of sales-tax, and in due course of those proceedings demand notices were issued. It is not necessary for the purposes of deciding the two points referred to us to set out the details of the assessments or the grounds of attack raised by petitioners. It is enough to say that the petitioners claim to be Indian citizens and contend that their Fundamental Rights under Article 19 of the Constitution had been infringed as a result of the proceedings taken and the demands for sales-tax made by the appropriate authorities. When the case was opened on behalf of the petitioners in this Court, before the Constitution Bench, counsel for the respondents raised the preliminary objections which have taken the form now indicated in the two questions, already set out. The Bench rightly pointed out that those two questions were of great constitutional importance and should, therefore be placed before a larger Bench for determination. Accordingly they referred the matter to the Chief Justice and this larger Bench has been constituted to determine those questions.

At the very outset of the arguments, we indicated that we shall give our decision only on the preliminary questions and that the decision of the controversies on their merits will be left to the Constitution Bench.

Before dealing with the argument at the Bar, it is convenient to set out the relevant provisions of the Constitution. Part III of the Constitution deals with Fundamental Rights. Some Fundamental Rights are available to "any person", whereas other Fundamental Rights can be available only to "all citizens". "Equality before the law" or "equal protection of the laws," within the territory of India is available to any person (Art. 14). The protection against the enforcement of *ex-post facto* laws or against double-jeopardy or against compulsion of self-incrimination is available to all persons (Article 20), so is the protection of life and personal liberty under Article 21 and protection against arrest and detention in certain cases, under Article 22. Similarly, freedom of conscience and free profession, practice and propagation of religion is guaranteed to all persons. Under Article 27, no person shall be compelled to pay any taxes for the promotion and maintenance of any particular religious denomination. All persons have been guaranteed the freedom to attend or not to attend religious instructions or religious worship in certain educational institutions (Article 28). And, finally, no person shall be deprived of his property save by authority of law and no property shall be compulsorily acquired or requisitioned except in accordance with law, as contemplated by Article 31. These in general terms, without going into the details of the limitations and restrictions provided for by the Constitution, are the Fundamental Rights which are available to any person irrespective of whether he is a citizen of India or an alien or whether a natural or an artificial person. On the other hand, certain other Fundamental Rights have been guaranteed by the Constitution only to citizens and certain disabilities imposed upon the State with respect to citizens only. Article 15 prohibits the State from discriminating against any citizen on grounds only of religion, race, caste,

etc., or from imposing any disability in respect of certain matters referred to in the Article. By Article 16, equality of opportunity in matters of public employment has been guaranteed to all citizens, subject to reservations in favour of backward classes. There is an absolute prohibition against all citizens of India from accepting any title from any foreign State, under Article 18 (2), and no person who is not a citizen of India shall accept any such title without the consent of the President, while he holds any office of profit or trust under the State (Article 18 (3)). And then we come to Article 19 with which we are directly concerned in the present controversy. Under this Article, all citizens have been guaranteed the rights :

- “(a) to freedom of speech and expression ;
- (b) to assemble peaceably and without arms ;
- (c) to form associations or unions ;
- (d) to move freely throughout the territory of India ;
- (e) to reside and settle in any part of the territory of India ;
- (f) to acquire, hold and dispose of property ; and
- (g) to practise any profession, or to carry on any occupation, trade or business.”

Each one of these guaranteed rights under clauses (a) to (g) is subject to the limitations or restrictions indicated in clauses (2) to (6) of the Article. Of the rights guaranteed to all citizens, those under clauses (a) to (e) aforesaid are particularly apposite to natural persons whereas the freedoms under clauses (f) and (g) aforesaid may be equally enjoyed by natural persons or by juristic persons. Article 29 (2) provides that no citizen shall be denied admission into any educational institution maintained by the State or State-aid on grounds only of religion, race, caste, language or any of them. This short resume of the fundamental rights dealt with by Part III of the Constitution and guaranteed either to ‘any person’ or to ‘all citizens’ leaves out of account other rights or prohibitions which concern groups, classes or associations of persons, with which we are not immediately concerned. But irrespective of whether a person is a citizen or a non-citizen or whether he is a natural person or a juristic person, the right to move the Supreme Court by appropriate proceedings for the enforcement of their respective rights has been guaranteed by Article 32.

It is clear on a consideration of the provisions of Part III of the Constitution that the makers of the Constitution deliberately and advisedly made a clear distinction between Fundamental Rights available to ‘any person’ and those guaranteed to ‘all citizens’. In other words, all citizens are persons but all persons are not citizens, under the Constitution.

The question next arises :—What is the legal significance of the term “ citizen ” ? It has not been defined by the Constitution. Part II of the Constitution deals with ‘Citizenship’, at the commencement of the Constitution. Part II, in general terms, lays down that citizenship shall be by birth, by descent, by migration and by registration. Every person who has his domicile in the territory of India shall be a citizen of India, if he was born in the territory of India or either of whose parents were so born or who has been ordinarily resident in the territory of India for not less than five years immediately preceding the commencement of the Constitution (Article 5). Secondly, any person who has migrated to the territory of India from the territory included in Pakistan shall be deemed to be a citizen of India, if he satisfied the conditions laid down in Article 6 (a) and 6 (b) (1). Any person who does not come within the purview of Article 6 (a) and 6 (b) (1), but who has migrated to India and has been registered, as laid down in Article 6 (b) (II), shall also be deemed to be a citizen of India. Similarly, a person of Indian origin, residing outside India, shall be deemed to be a citizen of India if he has been registered as such by an accredited diplomatic or consular representative of India in the country where he has been residing (Article 8). Persons coming within the purview of Articles 5, 6 and 8, as aforesaid, may still not be citizens of India if they have migrated from India to Pakistan, as laid down in Article 7, or if they have voluntarily acquired the citizenship of any foreign State (Article 9). Those, in short, are the provisions of the Constitution in Part II relating to ‘Citizenship’, and they are clearly inapplicable to juristic



persons. By Article 11, the Constitution has vested Parliament with the power to regulate, by legislation, the rights to citizenship. It was in exercise of the said power that Parliament has enacted the Citizenship Act (LVII of 1955). It is absolutely clear on a reference to the provisions of this statute that a juristic person is outside the purview of the Act. This is an Act providing for acquisition and termination of Indian citizenship. The Constitution in Part II, as already indicated, has determined who are Indian citizens at the commencement of the Constitution. As the Constitution does not lay down any provisions with respect to acquisition of citizenship or its termination or other matters relating to citizenship, after the commencement of the Constitution, this law had to be enacted by way of legislation supplementary to the provisions of the Constitution as summarised above. The definition of the word "person" in section 2 (1) (f) of this Act says that the word "person" in the Act "does not include any Company or association or body of individuals, whether incorporated or not". Hence, all the subsequent provisions of the Act relating to citizenship by birth (section 3), citizenship by descent (section 4), citizenship by registration (section 5), citizenship by naturalisation (section 6) and citizenship by incorporation of territory (section 7) have nothing to do with a juristic person.

It is thus absolutely clear that neither the provisions of the Constitution, Part II nor of the Citizenship Act aforesaid, either confer the right of citizenship on, or recognise as citizen, any person other than a natural person. That appears to be the legal position, on an examination of the relevant provisions of the Constitution and the Citizenship Act. But it was contended that this Court had expressed itself to the contrary in certain decisions, and some of the High Courts have also taken a contrary view, which we may now proceed to consider. In, what is now known as the First Sholapur case, *Chiranjit Lal Chowdhuri v. The Union of India*<sup>1</sup>, Mukherjea, J., speaking for the majority of the Court, made the following observations at page 898, which seem to countenance the contention raised on behalf of the petitioners that fundamental rights are available to juristic persons also, as to citizens :

"The fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well except where the language of the provision or the nature of the right compels the inference that they are applicable only to natural persons. An incorporated company, therefore, can come up to this Court for enforcement of its fundamental rights....."

Though the observations quoted above would seem to lend countenance to the contention raised on behalf of the petitioners, they really do not determine the controversy one way or the other. In that case, a shareholder of the Sholapur Spinning and Weaving Company made an application under Article 32 of the Constitution for a declaration that the Act impugned in that case was void, as also for the enforcement of his fundamental rights by a writ of *mandamus* against the Government and the directors of the company, restraining them from exercising any power under the Act. It is not necessary to refer to the details of the controversy in that case because it is plain that it was not the company which was seeking the enforcement of its fundamental rights, if any, but only a shareholder. As a matter of fact, the company opposed the petition under Article 32 of the Constitution. It is manifest that the observations quoted above were purely *obiter* and did not directly arise for decision of the Court.

Then we come to the second Sholapur case, reported as *Dwarkanadas Shrinivas of Bombay v. The Sholapur Spinning and Weaving Co., Ltd.*<sup>2</sup>. In the first Sholapur case, this Court had been moved under Article 32 of the Constitution by an individual shareholder, as aforesaid for enforcement of his alleged fundamental rights. That petition, by majority judgment, stood dismissed. The second case arose out of a suit instituted by a preference shareholder, in a representative capacity on behalf of himself and other preferential shareholders, for a declaration that the law which had been impugned in the previous case was *ultra vires*. This Court held that the law impugned had authorised, in effect, the deprivation of the property of the com-

1. (1951) S.C.J. 29 : 1950 S.C.R. 869.

1954 S.C.R. 674.

2. (1954) 1 M.L.J. 355 : (1954) S.C.J. 175 :

pany within the meaning of Article 31 of the Constitution, without compensation, and had thus violated the fundamental rights of the company under Article 31 (2) of the Constitution. It will thus appear that the decision of this Court proceeded on an examination of the provisions of Article 31, which is not confined to citizens only and has reference also to the property of "any person". But there are observations made in the course of the judgment which would support the view propounded on behalf of the respondents. At page 694, Mahajan, J., while discussing the scope and effect of the provisions of the Constitution in Part III, with particular reference to Articles 19 and 31, made the following observations :

"In considering Article 31 it is significant to note that it deals with private property of persons residing in the Union of India, while Article 19 only deals with citizens defined in Article 5 of the Constitution. It is thus obvious that the scope of these two articles cannot be the same as they cover different fields. It cannot be seriously argued that so far as citizens are concerned, freedoms regarding enjoyment of property have been granted in two articles of the Constitution, while the protection to property *qua* all other persons has been dealt with in Article 31 alone. If both articles covered the same ground, it was unnecessary to have two articles on the same subject."

These observations would appear to support the view that Article 31 has reference to property of "persons" and Article 19 deals with fundamental rights of "citizens" as described in Part II of the Constitution.

Bose, J., in the course of his judgment, at page 732, observed as follows :

"Article 19 (1) (f) confers a certain fundamental freedom on all citizens of India, namely, the freedom to acquire, hold and dispose of property. Article 31 (1) is a sort of corollary, namely, that after the property has been acquired it cannot be taken away save by authority of law. Article 31 is wider than Article 19 because it applies to everyone and is not restricted to citizens. But what Article 19 (1) (f) means is that whereas a law can be passed to prevent persons who are not citizens of India from acquiring and holding property in this country no such restriction can be placed on citizens. But in the absence of such a law non-citizens can also acquire property in India and if they do then they cannot be deprived of it any more than citizens, save by authority of law."

But it has got to be said that those observations, though they may appear to support the contention raised on behalf of the respondents, were not made directly with reference to the question now before us, namely, whether a corporation could claim the status of a citizen. That question did not arise in that case also because the company, as such was not seeking any relief. Even if the company were interested in seeking relief under Article 31 of the Constitution, it could do so without having the status of a citizen.

In the case of *The Bengal Immunity Co., Ltd. v. The State of Bihar*<sup>1</sup>, the appellant company had moved the High Court under Article 226 of the Constitution for certain reliefs against the provisions of the Bihar Sales Tax Act, but this Court (per S. R. Das, Acting C.J., at page 618 and per Venkatarama Aiyar, J., at pages 765-766) left the question open and granted relief to the company without deciding that question. This case only serves the purpose of showing that the question now before us was still an open one and that this Court had not given its considered judgment on the issue now before us.

It is, therefore, not necessary to refer to certain decisions of the Madras, Bombay and Calcutta High Courts as they cannot be decisive one way or the other in the absence of a clear decision of this Court. We have, therefore, to examine the legal position afresh on the footing that it is still an open question.

On an examination of the relevant provisions of the Constitution and the Citizenship Act aforesaid, we have, as already indicated, reached the conclusion that they do not contemplate corporation as a citizen. But Mr. Setalvad appearing on behalf of the petitioners contended that Part II of the Constitution relating to citizenship is not relevant for our purposes because it does not define "a citizen" nor does it deal with the totality of "citizenship". It was further submitted that the same is the position with reference to the provisions of the Citizenship Act. It is common ground, therefore, that the constitutional and the statutory provisions discussed above have no reference to juristic persons. But even so, it was contended,

we have to review the legal position in the light of the pre-existing law, *i.e.*, the Common Law, which, it was claimed, was preserved by Article 372 of the Constitution. In this connection, reference was made to Halsbury's Laws of England, Vol. 6, 3rd edition, pages 113, 114, para. 235, which lays down that, on incorporation, a company is a legal entity the nationality or domicile of which is determined by its place of registration. Reference was also made to Vol. 9 of Halsbury's Laws of England, page 19, paragraphs 29-30, which say that the concept of nationality is applicable to corporations and it depends upon the country of its incorporation. A corporation incorporated in England has a British nationality, irrespective of the nationality of its members. So far as domicile is concerned, the place of incorporation fixes its domicile, which clings to it throughout its existence. In this connection, reference was made to the case of *Janson v. Driefontain Consolidated Mines*<sup>1</sup>, for the proposition that a company may be regarded as a national of the country where it was incorporated, notwithstanding the nationality of its shareholders. It is not necessary to refer to other decisions, because the position is absolutely clear that a corporation may claim a nationality which ordinarily is determined by the place of its incorporation. But the question still remains whether "nationality" and "citizenship" are interchangeable terms. "Nationality" has reference to the jural relationship which may arise for consideration under international law. On the other hand "citizenship" has reference to the jural relationship under municipal law. In other words, nationality determines the civil rights of a person, natural or artificial, particularly with reference to international law, whereas citizenship is intimately connected with civic rights under municipal law. Hence, all citizens are nationals of a particular State, but all nationals may not be citizens of the State. In other words, citizens are those persons who have full political rights as distinguished from nationals, who may not enjoy full political rights and are still domiciled in that country (*vide* P. Weis-Nationality and Statelessness in International Law, pp. 4-6; and Oppenheim's International Law, Vol. 1, pp. 642-644).

In our opinion, it is not correct to say, as was contended on behalf of the petitioners, that the expression "citizen" in Article 5 is not as wide as the same expression used in Article 19 of the Constitution. One could understand the argument that both the Constitution and the Citizenship Act have not dealt with juristic persons at all, but it is more difficult to accept the argument that the expression "citizen" in Part II of the Constitution is not continuous with the same expression in Part III of the Constitution. Part II of the Constitution, supplemented by the provisions of the Citizenship Act (LVII of 1955) deals with "citizens" and it is not correct to say that citizenship in relation to juristic persons was deliberately left out of account so far as the Constitution and the Citizenship Act were concerned. On the other hand, the more reasonable view to take of the provisions of the Constitution is to say that whenever any particular right was to be enjoyed by a citizen of India, the Constitution takes care to use the expression "any citizen" or "all citizens", in clear contradistinction to those rights which were to be enjoyed by all, irrespective of whether they were citizens or aliens, or whether they were natural persons or juristic persons. On the analogy of the Constitution of the United States of America, the equality clause in Article 14 was made available to "any person". On the other hand, the protection against discrimination on denominational grounds (Article 15) and the equality of opportunity in matters of public employment (Article 16) were deliberately made available only to citizens. In this connection, reference may be made to the Constitution of the United States of America (Official Interpretation) at pages 965 and 981 :

"Corporations.—Citizens of the United States within the meaning of this article must be natural and not artificial persons; a corporate body is not a citizen of the United States." (page 965).

"Persons" Defined

"Notwithstanding the historical controversy that has been waged as to whether the framers of the Fourteenth Amendment intended the word, 'persons' to mean only natural persons, or whether the word, 'person' was substituted for the word 'citizen' with a view to protecting corporations from oppressive State legislation, the Supreme Court, as early as the *Granger cases*

decided in 1877, upheld on the merits various State laws without raising any question as to the status of railway corporation-plaintiffs to advance due process contentions. There is no doubt that a corporation may not be deprived of its property without the process of law, and although prior decisions have held that the 'liberty' guaranteed by the Fourteenth Amendment is the liberty of natural, not artificial, persons, nevertheless a newspaper corporation was sustained, in 1936 in its objection that a State law deprived it of liberty of press. As to the natural persons protected by the due process clause, these include all human beings regardless of race, color or citizenship." (page 981).

We have already referred, in general terms, to those provisions of the Constitution, Part III, which guarantee certain rights to "all persons" and the other provisions of the same part of the Constitution relating to fundamental rights available to "citizen" only, and, therefore, it is not necessary to recount all those provisions. It is enough to say that the makers of the Constitution were fully alive to the distinction between the expressions "any person" and "any citizen", and when the Constitution laid down the freedoms contained in Article 19 (1) (a)-(g), as available to "all citizens", it deliberately kept out all non-citizens. In that context, non-citizens would include aliens and artificial persons. In this connection, the following statement in Private International Law by Martin Wolff, is quite apposite :

"It is usual to speak of the nationality of legal persons, and thus to import something that we predicate of natural persons into an area in which it can be applied by analogy only. Most of the effects of being an 'alien' or a 'citizen' of the State are inapplicable in the field of corporations ; duties of allegiance or military service, the franchise and other political rights do not exist." (page 308).

This apart, it is necessary to refer to another aspect of the controversy. It was argued on behalf of the petitioners that the distinction made by the Constitution between "persons" and "citizens" is not the same thing as a distinction between natural and juristic persons, and that as "persons" would include all citizens and non-citizens, natural and artificial persons, the makers of the Constitution deliberately left artificial persons out of consideration because it may be that the pre-existing law was left untouched. It is very difficult to accept the contention that when the makers of the Constitution were at pains to lay down in exact terms the fundamental rights to be enjoyed by "citizens" and those available to all "persons", they did not think it necessary or advisable clearly to indicate the classes of persons who would be included within the expression "citizen". On the other hand, there is clear indication in the provisions of Part III of the Constitution itself that they were fully cognizant of the provisions of the Constitution of the United States of America, where the Fourteenth Amendment (section 1) clearly brings out the antithesis between the privileges or immunities of citizens of the United States and life, liberty or property of any person, besides laying down who are the citizens of the United States. Section 1 aforesaid is in these terms and brings out the distinction very clearly :—

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ; nor shall any State deprive any person of life, liberty, or property, without due process of law ; nor deny to any person within its jurisdiction the equal protection of the laws."

The question may be looked at from another point of view. Article 19 lays down that "all citizens" shall have the right to freedoms enumerated in clauses (a) to (g). Those freedoms, each and all of them, are available to "all citizens". The Article does not say that those freedoms, or only such of them as may be appropriate to particular classes of citizens, shall be available to them. If the Court were to hold that a corporation is a citizen within the meaning of Article 19, then all the rights contained in clauses (a) to (g) should be available to a corporation. But clearly some of them, particularly those contained in clauses (b), (d) and (e) cannot possibly have any application to a corporation. It is thus clear that the rights of citizenship envisaged in Article 19 are not wholly appropriate to a corporate body. In other words, the rights of citizenship and the rights flowing from the nationality or domicile of a corporation are not conterminous. It would thus appear that the makers of the Constitution had altogether left out of consideration juristic persons when they enacted Part II of the Constitution relating to "citizenship", and made a clear distinction between "persons" and "citizens" in Part III of the

Constitution. Part III, which proclaims fundamental rights, was very accurately drafted, delimiting those rights like freedoms of speech and expression, the right to assemble peaceably, the right to practise any profession, etc., as belonging to "citizens" only and those more general rights like the right to equality before the law, as belonging to "all persons".

In view of what has been said above, it is not necessary to refer to the controversy as to whether there were any citizens of India before the advent of the Constitution. It seems to us, in view of what we have said already as to the distinction between citizenship and nationality, that corporations may have nationality in accordance with the country of their incorporation; but that does not necessarily confer citizenship on them. There is also no doubt in our mind that Part II of the Constitution when it deals with citizenship refers to natural persons only. This is further made absolutely clear by the Citizenship Act which deals with citizenship after the Constitution came into force and confines it only to natural persons. We cannot accept the argument that there can be citizens of this country who are neither to be found within the four corners of Part II of the Constitution or within the four corners of the Citizenship Act. We are of opinion that these two provisions must be exhaustive of the citizens of this country, Part II dealing with citizens on the date the Constitution came into force and the Citizenship Act dealing with citizens thereafter. We must, therefore, hold that these two provisions are completely exhaustive of the citizens of this country and these citizens can only be natural persons. The fact that corporations may be nationals of the country for purposes of international law will not make them citizens of this country for purposes of municipal law or the Constitution. Nor do we think that the word "citizen" used in Article 19 of the Constitution was used in a different sense from that in which it was used in Part II of the Constitution. The first question, therefore, must be answered in the negative.

In view of this answer, we do not consider it necessary to answer the second question as that would have arisen only if the first question had been answered in the affirmative.

Let the cases go back to the Bench for hearing on merits with this opinion. Costs of the hearing before the Special Bench will be dealt with by the Bench which ultimately hears and determines the controversy.

*Hidayatullah, J.*—Two questions have been referred to this Bench for opinion. They are :

(1) Whether the State Trading Corporation, a Company registered under the Indian Companies Act, 1956, is a citizen within the meaning of Article 19 of the Constitution and can ask for the enforcement of fundamental rights granted to citizens under the said Article ; and

(2) Whether the State Trading Corporation is, notwithstanding the formality of incorporation under the Indian Companies (*Sic*) Act, 1956, in substance a department and organ of the Government of India with the entirety of its capital contributed by Government ; and can it claim to enforce fundamental rights under Part III of the Constitution against the State as defined in Article 12 thereof?

The State Trading Corporation has been assessed to sales-tax by the Commercial Tax Officer, Vishakhapatnam and a demand has been made upon it. By this petition under Article 32 of the Constitution it challenges the demand on the ground *inter alia* that the impugned order and the demand for the tax infringe its fundamental rights which are guaranteed to citizens by Article 19, sub-clauses (f) and (g). These sub-clauses read :

Article 19 (1).—All citizens shall have the right—

(f) to acquire, hold and dispose of property ;

(g) to practise any profession, or to carry on any occupation, trade or business.

The State Trading Corporation claims to be a citizen for the application of these sub-clauses, which fact being disputed on the other side, has given rise to the two questions above set out. As the questions amply indicate, the share capital of the State Trading Corporation is entirely contributed by the Central Government. The shares are held by the President of India and two Secretaries to Government. The State of Andhra Pradesh, therefore, denies that the State Trading Corporation being

an artificial person is a citizen and consequently contends that Article 19 is inapplicable because the word 'citizen' in the article refers to natural persons. Additionally it contends that being a department of Government, the State Trading Corporation cannot claim protection of Article 19 against an action of the State.

Mr. Setalvad in formulating the grounds on which he rests the claim of the State Trading Corporation to citizenship, points out that the Constitution does not define the word 'citizen', that Part II of the Constitution which deals with citizenship is not material inasmuch as it is concerned with natural 'persons only and is not exhaustive and that the Citizenship Act (LVII of 1955) which provides for certain matters relating to citizenship but defines the word 'person' so as to exclude artificial persons like corporations aggregate, cannot also be regarded as exhaustive. He thus contends that corporations aggregate which, according to him, were citizens before the Constitution and the Citizenship Act, continue to enjoy the privileges of citizens, one of which is the guarantee in Article 19. In support of his submission that corporations were and continue to be citizens, he relies upon the fact that corporations possess a nationality and claims that in this connection 'nationality' and 'citizenship' bear the same meaning. He relies upon the observations of Mukherjea, J., (as he then was) in *Chiranjit Lal Chowdhuri v. The Union of India and others*<sup>1</sup>, where the learned Judge observed *obiter* :

"The fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well except where the language of the provision or the nature of the right compels the inference that they are applicable only to natural persons. An incorporated company, therefore, can come up to this Court for enforcement of its fundamental rights and so may the individual shareholders to enforce their own; but it would not be open to an individual shareholder to complain of an Act which affects the fundamental rights of the company except to the extent that it constitutes an infraction of his own rights as well."

Mr. Setalvad also refers to other cases in which, though the point was not decided, several corporations claimed the protection of Article 19 and no objection was raised. Lastly he contends that the word 'citizen' should be liberally construed to include a corporation aggregate which consists of Indian citizens only. On the second question he contends that a company has an existence which is independent of its members and the State Trading Corporation cannot be equated with the shareholders or the Government since the corporate veil cannot be allowed to be pierced. He points out that there are several States in our Republic and there is a great danger of one Government stifling the trading activities of another Government either by law or executive action against which Article 19 is the only effective safeguard. He submits that it could not have been intended that while every individual citizen should be protected, a group of citizens, should by mere incorporation, lose the benefits of the guarantee in Article 19.

We are dealing here with an incorporated company. The nature of the personality of an incorporated company which arises from a fiction of law, must be clearly understood before we proceed to determine whether the word 'citizen' used in the Constitution generally or in Article 19 specially, covers an incorporated company. Unlike an unincorporated company, which has no separate existence and which the law does not distinguish from its members, an incorporated company has a separate existence and the law recognises it as a legal person separate and distinct from its members. This new legal personality emerges from the moment of incorporation and from that date the persons subscribing to the memorandum of association and other persons joining as members are regarded as a body corporate or a corporation aggregate and the new person begins to function as an entity. But the members who form the incorporated company do not pool their status or their personality. If all of them are citizens of India the company does not become a citizen of India any more than if all are married the company would be a married person. The personality of the members has little to do with the *persona* of the incorporated company. The *persona* that comes into being is not the aggregate of the *personal* either in law or in metaphor. The corporation really has no physical existence ;

1. (1951) S.C.J. 29 : 1950 S.C.R. 869 at 898.

it is a mere 'abstraction of law' as Lord Selborne described it in *G. E. Rly. v. Turner*<sup>1</sup>, or as Lord Macnaghten said in the well-known case of *Salomon v. Salomon & Co.*<sup>2</sup>, it is "at law a different person altogether from the subscribers to the memorandum of association". This distinction is brought home if one remembers that a company cannot commit crimes like perjury, bigamy or capital murder. This *persona ficta* being a creature of a fiction, is protected by natural limitations as pointed out by Palmer in his *Company Law* (20th Edn.), p. 130 and which were tersely summed up by Counsel in *R. v. City of London*<sup>3</sup>, when he asked "Can you hang its common seal?" It is true that sometimes the law permits the corporate veil to be lifted, but of that later.

There is a rule of English Law that a company or an incorporated corporation has a nationality and this nationality is determined by the law of the country in which it is incorporated. Mr. Setalvad thus begins his contention by citing certain *obiter* statements from *Janson v. Driefontein Consolidated Mines, Ltd.*<sup>4</sup>, such as :

"I assume that the corporation.....was to all intents and purposes in the position of a natural born subject of the late South African Republic." (Lord Macnaghten—p. 497).

"I think it must be taken that the respondent company was technically an alien and became on the breaking out, of hostilities between this country and South African Republic an alien enemy." (Lord Davey—p. 498).

"The company must clearly be treated as a subject of the Republic notwithstanding the nationality of its shareholders." (Lord Brampton—p. 501).

He contends that there is no difference between 'nationality' and 'citizenship' and the two words are synonymous and relies upon the following passage from Weis on Nationality and Statelessness in International Law (1956), pp. 4-6—

"One of the terms frequently used synonymously with nationality is *citizenship*. Historically, this is correct for States with the Roman conception of nationality, but not for States with the feudal conception of nationality, where citizenship is used to denote not political status but membership of a local community. It has, however, become usual to employ the term citizen instead of subject in republican States—including common law countries such as the United States : "he who before was a 'subject of the King' is now a 'citizen of the States'"—and in that sense and in those States the terms 'nationality' and 'citizenship' must be regarded as synonymous."

It is, therefore, contended somewhat syllogistically that all incorporated corporations have the nationality of the State under the laws of which they are incorporated, that nationality is synonymous with citizenship and therefore incorporated companies are citizens. From this it is but a mere step, which is also taken, that incorporated companies in India were and still are citizens and that the Constitution and the Citizenship Act have nowhere deprived them of this citizenship or of the right to protect themselves by invoking Article 19 (1) (f) (g). Alternatively it is contended that if all the members of the Corporation are Indian citizens then the Corporation as a whole must be a citizen, for the whole cannot be different from its parts.

Both the arguments involve fallacies. The first assumes that 'nationality' of corporations and citizenship of natural persons are the same concepts and caps it with the fallacy of *ignorantio elenchi* which in English is called the fallacy of irrelevant conclusion because instead of proving that corporations are citizens, it is sought to be shown that they ought to be citizens for the remedy is so good and effective. The second involves the fallacy of *petitio principii* because it tends to beg the question and founds a conclusion on a basis that as much needs to be proved as the conclusion itself. In my opinion, the State Trading Corporation cannot be said to be a citizen either by itself or by taking it as the aggregate of citizens, that nationality of a corporation is a different concept not to be confused with citizenship of natural persons, that the word 'citizen' in Article 19 (1), sub-clauses (f) and (g) refers to a natural person, that State Trading Corporation is really a Department of Government behind the corporate veil and that for all these reasons the two questions must be answered in favour of the objectors. I shall now make good these conclusions with reasons.

1. (1872) L.R. 8 Ch. App. 152.

2. L.R. (1897) A.C. 22 at 51.

3. (1632) 8 SV. Tr. 1087 at 1138.

4. L.R. (1902) A.C. 484.

Article 19 uses the word 'citizen' while the word 'person' is used in some other articles in Part III notably Article 14 (creating equality before the law), Article 21 (protection of life and personal liberty). By Article 367, (unless the context otherwise requires) the General Clauses Act, 1897, applies to the interpretation of the Constitution. The word 'citizen' is not defined in the Constitution or the General Clauses Act but the word 'person' is defined in the latter to include 'any company or association or body of individuals whether incorporated or not'. The word 'person' therefore, conceivably bears this extended meaning at least in some places in Part III of the Constitution. But it is not necessary to determine where in the Constitution the word 'person' includes a company, etc., because that word has not been used in Article 19. The claim of corporations aggregate, like the petitioner, to the benefits which Article 19 gives, must depend on whether the word 'citizen' which is actually used can bear a similar enlarged meaning. Mr. Setalvad is right in contending that use of the word 'person' with an enlarged meaning in some places and of the word 'citizen' in other places does not by itself prove that artificial persons are outside the meaning of the word 'citizen'. The contrast may not be between natural and artificial persons, so much as between citizens and non-citizens, and it is possible that where the benefit is intended to go to non-citizens, a word of wide meaning is used and where the benefit is meant for citizens only the word 'citizen' is used. It is true that the word 'citizen' cannot include an enemy or an alien while the more general word 'person' may but that does not answer the question whether the word 'citizen' can include a company or association or body of individuals, to borrow the words of the definition. The answer to that question must depend, as already pointed out, on the connotation of the word 'citizen' which must be found out.

In attempting to determine whether the word 'citizen' in Article 19 denotes only a natural person or includes a company, etc., we must turn first to the Constitution to see if the use of the word 'citizen' or 'citizenship' in any other place bears the extended meaning or throws any light on this problem. The word 'citizen' is used in 29 places and the word 'citizenship' in 6 places. These words are also used in headings to Chapters and marginal notes but these may be ignored. It is worth inquiring if there is any place at all other than Article 19 where not only a natural person but also an artificial person is meant. The word first occurs in the preamble thus :

"We the people of India having solemnly resolved.....to secure to all its *citizens* :  
Justice, social, economic and political ; Liberty of thought, expression, belief, faith and worship ;  
Equality of status and of opportunity ; and to promote among them all  
Fraternity assuring the dignity of the individual and the Nation, etc."

"Liberty of thought, expression, belief, faith and worship, equality of status' and 'dignity of the individual' are expressions appropriate to natural persons and not to companies, associations and other corporations aggregate and the word 'citizen' in the preamble refers to individuals for whom the Constitution was being made. In this connection, it must be remembered that a Constitution is a bond between the citizens and the administration and regulates their respective actions. It is as Ahrens defined it :

*"L'ensemble des institutions et des lois fondamentales, destinee a regler l'action de l'administration et de tous les citoyens."*

(Ahrens : Cours de Droit Natural & C. iii, p. 380).

(The body of institutions and fundamental law designed to regulate the action of the Administration and all the citizens).

The preamble in solemn words sums up what is later provided in the Constitution. 'Citizens' in the preamble mean those individuals who under the Constitution are guaranteed civic rights in the body politic that is India and who can hold public offices and elect their representatives to the Parliament and Assemblies of the people. They are persons who were declared citizens on the inauguration of the Constitution and those on whom the rights of citizens were conferred



and on whom they may be conferred by law. Of course the Constitution also confers some rights on aliens and assists and protects them but the guarantee in the preamble is to the citizens alone that is individuals who enjoy full civic rights in the body politic.

Then follows a special chapter entitled "Citizenship". That part contains seven articles. Article 5 spoke at the commencement of the Constitution. That article uses the word 'person' but the context shows that only natural persons were meant. Citizenship was conferred on every person who had his domicile in the territory of India and

(a) who was born in the territory of India ; or

(b) either of whose parents was born in the territory of India or

(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement.

The reference to the birth of the person or of his parents clearly shows that only natural persons were meant because corporations though born in a metaphorical sense do not have parents. By the same token Article 6 also refers to natural persons. Articles 7, 8, 9 and 10 so clearly speak of a natural person as to need no elaboration. That leaves Article 11 which gives Parliament the power to make laws for the acquisition and termination of citizenship, and all other matters relating to citizenship. That article reaffirms the power which is given to Parliament by Entry 17 of List I of Schedule VII of the Constitution. As we shall see presently, the Citizenship Act of 1955 expressly excludes companies, etc., from its provisions. The power conferred by Article 11 or entry No. 17 may give rise hereafter to the question whether Parliament can invest corporations, institutions, trusts, funds, ships or aeroplanes with citizenship but till Parliament does so there is nothing in Part II to indicate that the words 'citizen' and 'citizenship' were used to include any of them.

In the fourth part which is entitled 'Directive Principles' the word 'citizen' is used twice. In Article 39 it is qualified by the words 'men and women' which addition tells its own story. In Article 44 the State is asked to endeavour to secure a uniform Civil Code for all citizens and the word plainly means men and women because it is impossible to think that the Constitution is thinking of a uniform Civil Code for corporations. In the other parts of the Constitution 'Citizenship' is a condition precedent for some office, post or privilege. The President, the Vice-President, the Governors, the Members of Parliament and the Legislative Assemblies, the Judges of the Supreme Court and High Court must be citizens. Members of Parliament and Legislatures cease to be members if they cease to be citizens of India or acquire the citizenship of other countries. The words 'citizen' and 'citizenship' thus refer to natural persons because these offices cannot be held by corporations aggregate. Article 326 says that every citizen 21 years in age has a vote. This means only a natural person.

There remains only Part III entitled 'Fundamental Rights'. In Articles 15 and 16, the word clearly means a natural person. The words religion, race, caste, sex, descent, place of birth and residence mark out a human being. In Article 18, which mentions titles, a natural person is again meant because titles are ordinarily conferred on individuals. In Article 29 (1), where citizens residing in the territory of India having distinct language, scripture or culture of their own have been given a right to preserve the same, the word definitely refers to natural persons. In Article 20 (2) entrance to educational institutions is guaranteed to citizens and the entrant can only be natural person and not a corporation.

The above analysis shows that in 34 places, the words 'citizen' and 'citizenship' refer to natural and not artificial persons. The question is whether in the thirty-fifth place the word is meant to include corporations aggregate. For this purpose we must ascertain if there is anything special which points to a different use of the word. Sub-clauses (a) to (e) of Article 19 contemplate natural persons. The claim is that the word 'citizen' must bear a different meaning in respect of clauses (f) and (g) because corporations acquire, hold and dispose of property and carry on

trade or business. It is argued that if several citizens carry on business together as an incorporated company they cannot lose the guarantee which is given to citizens, and we are invited to give a meaning to the word which is wide enough to include companies. It has been shown above that the way in which the words 'citizen' and 'citizenship' have been used in the Constitution goes to show that such was not the intention at least in 34 other places. It may however be conceded that this is not decisive and if corporations can possess citizenship there is no reason for not interpreting the Constitution liberally to give them the benefits of clauses (f) and (g) of Article 19 (1). For this purpose it is necessary to find out what is meant by 'citizen, and citizenship' generally and to trace historically the concept of citizenship to see if that concept included at any time artificial persons like corporations so that the word can be said to be intended to bear such a meaning.

The word 'citizen' which is used in Article 19 of the Constitution has not been defined. Its meaning in the context of Article 19 must be found out. If it bore the same meaning as in the other parts of the Constitution, it would mean a member, born or naturalised, of the State, on which the Constitution or a law of Parliament confers citizenship. Is there in law a citizenship of a group of persons who may be all citizens or some of whom may be non-citizens? The answer is that the word in its normal meaning does not admit "bulk citizenship" which is the only way to describe it. Salmond in an article on 'Citizenship and Allegiance' 1901/1902, Law Quarterly Review, Part I, pp. 270-82, says that the word is derived from the Latin '*civitas*' and '*civis*'. More directly, of course, the root is in the French words '*citoyen*' or '*cityeem*'. From the earliest times, the concept of citizenship concerned natural persons and not groups of persons. In ancient Greece, according to Aristotle, the population of Attica was divided into groups which were brotherhoods (*phratriai*) and of clans (*gene*). Groups of brotherhoods formed tribes (*phylai*). The entire citizen body was thus included in the tribes and brotherhoods but the wealthy formed the clans. When monarchy was abolished through the efforts of the clans, the citizenship of the membership of the brotherhoods was in name only because they had no civic rights. Draconian reforms created four classes according to wealth and Solon gave to the four classes the right to act in a political capacity (*ecclesia*) and also in a judicial capacity (*heliaia*) and thus earned the title 'the first champion of the people'. But even under him, the concept of citizenship was immature. The first recognition of citizenship came with Cleisthenes under whose reforms there was a distribution of the population on a geographical basis and an enfranchisement of persons of pure or partial Athenian descent. Resident foreigners had inter-married and though there was a partial recognition of foreigners permanently settled (domiciled) in Athens even from the days of Peisistratus there was no recognition of the offsprings of mixed marriages as citizens. These were added to the list of citizenship because citizenship no longer depend on membership of the *phratries*. This state of affairs continued till Pericles abrogated the enlightened measure. He limited citizenship to those of Athenian descent on both sides. Had he come earlier some famous men of Athens like Themistocles would have been barred from not only office but other civil rights. It is not necessary to follow the history of Athens further. It is reasonable to believe that all other States in Greece except Sparta followed this kind of citizenship. The Spartans had their own system of rule with two kings and an elected council (*gerusia*) elected by the citizens which was both advisory and judicial. There was also an assembly of all citizens over twenty called the *appella* which elected the magistrates and met monthly. The right of vote in the election of the *gerusia* and membership of the *appella* was open to those who were selected at the birth by the *spartiate*. All children were inspected at birth by the heads of the tribe and those who were sickly were exposed in a ravine of Mt. Taygetus and of the others those that lived all boys were taken away at the age of seven and trained as citizens. All the Hellenic States followed Athens but Crete perhaps was influenced by Sparta.

This is the earliest recognition of citizenship that we need consider in Europe. The next to consider is the conception of citizenship in Rome. The words '*civitas*' and '*civis*' were used in Roman Law to describe persons who had the freedom of the city

and who enjoyed all political and civic privileges of Government. In this way were distinguished a slave (*servus*), an enemy (*hostis*) who had none of these rights on the one hand and a foreigner (*peregrinus*) particularly from a country with which Rome was on terms of peaceful intercourse on the other, from citizens. Though by Justinian's time everyone became a citizen unless he was an unmanumitted slave, in the time of Gaius, citizenship was the privilege of Romans and carried with it the right to vote (*jus suffragii*) and the right to hold public office (*jus honorum*) the right to a Roman marriage (*jus conubium*) and the right to legal relations (*jus commercium*). The son of a Roman citizen was also a Roman citizen irrespective of where he was born. The *peregrinus* had no civic rights unless he belonged to a Latin country. There were different laws for a long time for the citizens and the *latini* and the *peregrini*. The first to be given the status of citizens were the *latini*. Later all free subjects were to be *civis*. The only *peregrines* who were left, were foreigners and barbarians and they had no civil rights just as members of certain treacherous communities (*dediticii*) and persons deprived of citizenship *deportati* had none.

Thus both in Greece and Rome the idea of citizenship was bound up with natural persons in whom certain civic rights were considered to inhere and which marked them out from others. Sometimes descent, sometimes the wealth, sometimes the status, military or other, determined the privilege but at no time was there a concept of citizenship of any but a natural person. In Roman Law citizenship was transmitted by birth to an offspring of a Roman citizen.

So far we have dealt with citizenship namely membership of body politic with full civic rights. In the middle ages this membership of the State began to carry a dual status, one status was political and the other civil. The double status came in Central Europe in the wake of Roman Law and was partly due to the growth of feudal vassalage by which what might have grown into nations composed of "clans" became divided into feudal Chieftainships. The feudal lord did not concern himself with descent as such as long as his follower held land or rendered service according to his laws. Such laws did not apply to foreigners but if the foreigner held lands or chattles or rendered service he was equally bound. But the main reason was the impact of international relations. An individual began to be viewed in two capacities. Firstly, he was regarded as the subject of a certain State (a political status) and secondly as one entitled to certain rights and privileges in his own State civil (a civil status). Both arose from the bond to a particular State or territory but it would be wrong to say that the word 'nationality' describes the civil status. The word 'nationality' whether denoting an ethnic group or political membership of a State is a word of much later origin. M. Cogordan (*La Nationalite* p. 2) has given the origin of the word and in the *Dictionnaire de, 1, Academic francaise* it appeared for the first time in 1835. Even the Code Napoleon dealt with rules concerning the status of Frenchmen abroad but did not provide for the status of foreigners in France. The recognition of nationality as a test of the law applicable to an individual followed the famous lecture by Mancini at the University of Turin in 1851. The impact of international relations added to the civic rights possessed by a citizen by investing him with a political status which he could claim abroad. The word 'nationality' itself has now come to acquire two distinct meanings a political one by which is indicated the membership of a State and the other an ethnic one denoting membership of a nation. All this time citizenship has also meant membership of a State but in a municipal aspect. In this sense, the word 'national' and 'citizen' are not interchangeable as has been sometimes supposed. In the United States Public Law 414 (82nd Congress) (2nd session) section 308 is entitled "Nationals but not citizens of the United States at birth". According to Weis "Nationality and Citizenship", p. 5 :

"that the term "American National" has a wider meaning than the "United States citizen" was recognised in Administrative Decision No. V of the Mixed Claims Commission between the United States and Germany (Decisions and Opinion Vol. 1, pp. 18-19, Hackworth Digest of International Law, Vol. III, p. 5, Annual Digest, 1923-24, Case No. 100)."

Weis has given other examples of the disparate use of the two words in the Constitutions of the Netherlands, Honduras, Nicaragua and Roumania. Even

came in the Constitution and in the Act of 1955. During the period between 1948 and 1950 Indian citizens were only potentially so. They however enjoyed Commonwealth citizenship which term was synonymous with British subject in effect but was more appropriate to certain countries in view of the attainment by them of full nationhood. Thus every Indian in British India by virtue of section 1 of the English Act of 1948 and every Indian in the Indian States as a protected person enjoyed Commonwealth citizenship. Of course this citizenship was to continue till India enacted its own citizenship laws and thereafter if there was a common clause preserving this citizenship and was to cease if there was an express abrogation of Commonwealth citizenship. Under the English Act of 1948 Indians became Commonwealth citizens or British subjects without citizenship and were regarded as potential citizens of India. The Indian Constitution made provisions for citizenship on the inauguration of the Constitution but it was not a law for the purpose of the British Nationality Act, 1948. It only provided that certain natural persons were to be regarded as citizens of India from January 26, 1950.

In so far as we are concerned this created a hiatus because the scheme of Indian citizenship was not completely worked out on January 26, 1950. The Constitution no doubt declared who were Indian citizens on that date but the status of a British subject without citizenship which was melliflously called Commonwealth Citizenship 'could not be liquidated' unless there was a citizenship law as contemplated by the English Act of 1948. As a result, in the words of Clive Parry,

"pending the completion of the scheme of Indian citizenship, persons who were potentially citizens of India but are not citizens thereof remained British subjects without citizenship in the eyes of the United Kingdom."

No doubt in 1955, the Citizenship Act was enacted by the Indian Parliament. Some writers think that even that is not the citizenship law contemplated by the English Act of 1948. Whether or not it fulfils the test, it is not necessary to decide here because it does not affect the status of corporations. Its provisions are applicable to 'persons' and the definition of the word 'person' in the Act expressly excludes "any company or association or body of individuals, whether incorporated or not."

I have attempted to establish that citizenship as viewed from country to country and from one period of time to another was concerned with natural persons. The manner of acquisition of citizenship and/or nationality described by me are admirably summed up by Mervyn Jones in his book "British Nationality Law" at page 9 in the form of a pedigree which may be seen. It is enough to read the various headings in the pedigree to realize that there is no room for artificial persons there. From the point of view of Mr. Setalvad's argument this raises an intriguing situation. If corporations possessed citizenship immediately before our Constitution they would be citizens under the English Act of 1948, that is to say, British subjects without citizenship or Commonwealth citizens and only potential citizens of India. The Indian Constitution dealt with natural persons and not artificial persons in its provisions dealing with citizenship and the status of corporations was not disturbed by those provisions. When the Citizenship Act was enacted in 1955, it began to speak from January 26, 1950 and it might have affected corporations but for the fact that it excluded them. Thus if there was any citizenship which the corporations enjoyed, it remained where it was. The corporations, if at all, would thus be Commonwealth citizens, not Indian citizens because no law has made them Indian citizens. But I do not accept the basic argument that corporations enjoyed citizenship even before, because in the sense in which I have explained citizenship, there is no room for artificial persons.

The argument here repelled is sought to be supported by referring to the rule of law under which corporations are said to possess nationality. Nationality in this context is not to be confused with the status of a citizen. What is meant by that nationality may next be seen. Ordinarily corporations are given recognition by law as persons who can sue or be sued. Corporations also own property, carry on business or trade. But it is not to be thought that corporations have an access to Courts as a matter of course. The Courts are open as a matter of course to

natural persons and not to intangible concepts, like corporations. Unless the law gives this right to corporations they cannot sue or be sued. What the law does is to invest corporations with a distinct personality and with a right to sue and with a disability to be sued. Ordinarily such rights and disabilities attach to 'persons' but that word is given an extended meaning to include corporations. In this way the law invests an intangible body with a unity and individuality and creates a legal person capable of suing or being sued. Foreign corporations enjoy the same privilege by a comity of nations and also sue and are sued. These privileges which corporations share with natural persons do not make them 'citizens' entitled to every other privilege which the municipal law gives to citizens. In other words corporations enjoy only such privileges under the municipal law which that law expressly confers on them.

It is, of course, undeniable that corporations have an existence in the eye of law. The law further regards that corporations have a domicile and a residence. The law also recognises that corporations have a nationality. What does the law mean by that? The concept of the nationality of a corporation is comparatively new and it was really developed during the first World War. Nationality of corporations becomes important when it is necessary to apply the 'nationality of claims' principle before an international tribunal or to give effect to law-making treaties applying to 'nations'. See *Starke (An Introduction to International Law, 4th Edn., p. 256)*. *Starke* has pointed out that there is no unanimity of opinion regarding the tests to be applied to ascertain the nationality of corporations. *Clive Parry* does not recognise this nationality and calls it quasi-nationality. I shall now explain in what sense the word 'nationality' is used in this connection.

There have been many theories about the nationality of corporations which were again reconsidered during the First World war. According to *Hilton Young, 22 Harvard Law Review, p. 2*, there were four main theories at first. The *first theory* viewed a corporation as the national of the State in which its members or the majority of them or owning the greater part of the capital, were nationals. This theory considered the word 'corporation' as 'a collective name for the corporators', the corporate veil being considered to be of such gossamer texture as to hide almost nothing. This theory of which the chief proponents were *Sommieres* and *Morawets* was criticised on all hands and particularly by *Maitland* and was abandoned as it made nationality a matter of accident and liable to change day in and day out. The *second theory* regarded nationality as determined by the nationality of the State under which it was created. The United States of America has adhered to it but England may be said to have adopted this theory modified by considerations of domicile. The Germans call this theory *Grundungs theorie* that is the theory of the place of birth. The theory has great names behind it—*Calvo, Fiore, Pineau, Weiss*, etc. This theory is inadequate to cover corporations which are not authorised by the State and has been modified in the United States by evolving a theory of 'implied consent to extra-territorial service'. The *third theory* considers that a corporation acquires the nationality of the place where its acts or any of its acts are performed. This theory is rejected universally by lawyers but it was adopted by businessmen in the Congress of Joint Stock Companies held at Paris in 1889. Under this theory nationality can be changed at will. Obviously enough difficulty is likely to be felt in the event of simultaneous actions in different countries. The *fourth theory* considers that corporations are domiciled where they have a permanent home. This theory was influenced by *Von Bar* who considered that though juristic persons could not be nationals either *jure sanguinis* or *jure soli*, they could be nationals by domicile. Chief Justice *Taney* summed up the thought by saying that "a corporation must dwell in the place of its creation and cannot migrate to another sovereignty". *The Bank of Augusta v. Erle*<sup>1</sup>. Domicile of a corporation has more foundations than one. It may be fixed by the territory of the sovereign which created it or by the charter or other constitutive documents or by the place where the corpora-

tion discharges its functions or by the *bona fide* centre of its administrative business. These different concepts have led to diverse theories.

English Law regarded nationality as dependent on domicile and was at first content to regard a corporation as the national of a State where it was incorporated. But a glance at the history of the law of corporations shows that there is a variation in this theme in later years. The conception of domicile was adopted in the English Common Law merely for purposes of jurisdiction and law. A corporation's domicile, it was held, depended upon where it came into being and this domicile was not changeable though Lord St. Leonards was of a contrary opinion in *Carron Iron Co. v. McLaren*<sup>1</sup>. Similarly it was held that a corporation had a residence though it could change its residence and even have more than one residence under certain laws. On what then did nationality depend? According to English Common Law a corporation incorporated under the English Law had British nationality and it did not matter if its members held a different nationality. A corporation which was not of British nationality was an alien corporation. According to the laws of many European countries particularly France, nationality depended upon the *siege social* by which is meant the seat or centre of control. Both these theories suffered during the First World War. As regards the English Common Law the leading case was *Janson v. Driefontein*<sup>2</sup>, from which I have already quoted certain extracts. In that case it was decided that a company possessed the nationality of the country under the laws of which it was incorporated and that the nationality of the shareholders was not determinative of the question. Once this nationality was determined then the corporation received the treatment as a national, as an alien or as an enemy as the case was in peace or in war. This view was revised in the First World War. In *Daimler Co., Ltd. v. Continental Tyre and Rubber Co. (Great Britain) Ltd.*<sup>3</sup>, all the shares of the respondent company (except one) were held by a German company and all directors were Germans though the company was incorporated in Great Britain. If the principle that nationality follows incorporation applied, the respondent company would have had a British nationality and it could not change it. But the House of Lords applied the principle of effective control to determine its nationality. In the Court of Appeal the case was heard by the full Court and the above principle was held applicable (Buckley, L.J., dissenting). The majority view was confirmed by the full judicial strength of the House of Lords by majority. Lords Shaw and Parmoor considered that enemy character depended on whether it was incorporated in an enemy country. The majority (Lords Halsbury, Mersey, Kinnear, Atkinson, Parker and Sumner) however, considered that it depended upon where the effective control lay. Lord Parker summarized the law in six propositions as under :

(1) A company incorporated in the United Kingdom is a legal entity, a creation of law with the status and capacity which the law confers. It is not a natural person with mind or conscience. To use the language of Buckley, L.J., "It can be neither loyal nor disloyal. It can be neither friend nor enemy."

(2) Such a company can only act through agents properly authorized, and so long as it is carrying on business in this country through agents so authorized and residing in this or a friendly country, it is *prima facie* to be regarded as a friend, and all His Majesty's lieges may deal with it as such.

(3) Such a company may, however, assume an enemy character. This will be the case if its agents or the persons in *de facto* control of its affairs, whether authorized or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies. A person knowingly dealing with the company in such a case is trading with the enemy.

(4) The character of individual shareholders cannot of itself affect the character of the company. This is admittedly so in times of peace, during which every shareholder is at liberty to exercise and enjoy such rights as are by law incident to his status as shareholder.

(5) In a similar way a company registered in the United Kingdom, but carrying on business in a neutral country through agents properly authorized and resident here or in the neutral country, is *prima facie* to be regarded as a friend, but may, through its agents or persons in *de facto* control of its affairs, assume an enemy character.

1. (1952) 5 H.L.C. 416.

2. L.R. 1902 A.C. 484.

3. L.R. (1916) 2 A.C. 307.

(6) A company registered in the United Kingdom but carrying on business in an enemy country is to be regarded as an enemy.

The House of Lords case is regarded as an instance of judicial legislation on the subject of 'enemy character' and it undoubtedly was so. It is not as if this theory has been universally accepted. It was criticised by Sir Arnold McNair in 1923-24 British Year Book of International Law, p. 44 and by Mr. Ralph A. Norem : American Journal of International Law, Vol. 24, p. 310.

We have seen that in the United States a corporation is a domestic corporation of the State which incorporates it or under the laws of which it is incorporated. Some of the States have even laws to this effect. While other countries were revising their attitude in Europe, the United States adhered to this theory and the Supreme Court observed that the Congress had definitely adopted the policy of disregarding stock ownership as a test of enemy character. In other words, in the United States there was no attempt to look behind the corporate veil. We have also seen that England drifted from the theory of domicile to the continental theory of *siege social*. But France, Germany, Italy and Belgium went a step further than before. The *Cour de Cassation* departed from the principle of *siege social* in *Societe Conserve Lenzburg* in which it was held that the Court was entitled "to go to the bottom of things and ascertain whether a corporation was really French or not". The French Minister of Justice issued a circular in 1916 which stated the French approach to the question thus :

*"Les formes juridique dont la societe est revetue, le lieu de son principal etablissement, tous les indices auxquels s'attache le droit prive pour determiner la nationalite d'une societe, sont inoperants, alors qu'il s'agit de fixer au point de vue du droit public le caractere reel de cette societe. Elle doit etre assimilee aux sujets de nationalite ennemie des que notoirement sa direction ou ses capitaux sont en totalite ou en majeure partie entre les mains de sujets ennemis car, en pareil cas, derriere la fiction du droit prive se dissimule vivante et agissante la personnalite ennemie elle-meme."*

(The juridical forms in which the society is dressed, the place of its principal office and all the indicia on which Private Law fastens to determine the nationality of a society, are inoperative when one tries to fix from the point of view of Public Law the real character of a society. The society must be counted among enemy nationals if manifestly its direction or its capital wholly or in major part is in enemy hands for in such a case behind the fiction of the Private Law lurks the active personality of an enemy.)

The *Cour de Cassation* justified the change by holding that the corporation was a '*personne interposee*' under the cover of which an enemy did business. The German attitude also changed to *Geschäftssitz* from *der Mittelpunkt des Geschäftes* i.e., to the "seat" of real control from the "centre of its enterprise". The corporation was said to have its seat where the "brain" was and not where it had its centre of exploitation. The Italians also adopted the same test. The Belgians framed a law which sums up the new theory in crisp legal language (Act 172-Mai 23, 1913):

*"Toute societe dont le principal etablissement est en Belgique est soumise a la loi belge bien que l'acte constitutif ait ete passe en pays etranger."*

(Every society of which the principal establishment is in Belgium is under the laws of Belgium, notwithstanding that the incorporation took place in a foreign country.)

In the Mixed Arbitral Tribunals which followed the First World War there were some cases which were decided on the theory of control but many others were decided on the theory of domicile depending upon the composition of the Tribunal. There are indeed many other tests which I have not mentioned such as the test of beneficial interest, or of substantial ownership or of responsibility which it is not necessary to describe here.

It would not be wrong to say that the control theory is also losing ground and there is a great support for the theory that the juridical life of the corporation must ultimately fix its nationality. It is also to be noticed that Herr Marburg and M. Mazeaud two noted thinkers have pointed out that all this law is not so much to fix the nationality of a corporation but its enemy character. Many writers (including Dicey, Cheshire, Foote and Farnsworth) have also pointed out that the conception of the nationality of a corporation is important only in war and it has significance not so much in Municipal Law as in Public International Law. During times of peace the domicile of a corporation which, as Lord Westbury pointed out, is an

idea of law creating a relationship between an individual and a particular country is allowed to operate a fiction. A corporation resembles a natural person in the matter of domicile except that an individual can choose his domicile but a corporation's domicile is tied to its place of birth. The law of the country of its birth gives it such rights as it considers practicable and foreign corporations share in those rights subject to any special provisions. In times of war these rules and the rule of corporate entity give way and public policy dictated by the consideration whether the resources of the corporation are likely to be used for enemy purposes determines the issue. Thus in the *Daimler case*<sup>1</sup> "the *fons et origo* of the control theory"—

"the acts of a company's organs, its directors, managers, secretary and so forth, functioning within the scope of their authority are regarded as the company's acts".

The operatives are regarded as the 'brain' of the corporation and where the brain functions the corporation is held to function. During times of peace a corporation may own property, do business because the Municipal law expressly permits that all this can be done and foreign corporations also obtain the benefit of such laws either because of provisions of the Municipal law or by a comity of nations. In times of war all this changes. The law of nationality is thus a law to determine the enemy character and not a law recognising nationality either in a political or municipal sense. There may be some analogy between an individual and a corporation but as Mr. Vaughan Williams said<sup>2</sup> in an article which has been of great assistance to me, it is not 'necessary to ride the analogy to death'. The English Law was summed up by Mervyn Jones (British Nationality Law, Revised Edn.) :

"A corporation is a juridical person, but could not be a subject at Common Law, because allegiance, being essentially a personal bond, was a conception limited in its application to individuals. Nor have corporations been recognised as statutory British subjects or as citizens of the United Kingdom and colonies."

Oppenheim also points out (International Law, Lauterpacht Edition), p. 642, n. 3—

"The nationality of corporations is mainly a matter of Private International Law, and considerations of public policy have a decisive influence upon the attitude of every State with regard to it."

Citizenship depends upon Municipal Law and the same learned author says (*ibid* p. 643) :

"It is not for International Law but for Municipal Law to determine, who is, and who is not, to be considered a subject."

Hyde in his International Law Vol. (2nd Edn.), p. 1066, also says :

"Citizenship as distinct from nationality, is a creature solely of domestic law. It refers to rights which a State sees fit to confer upon certain individuals who are also its nationals."

But perhaps the most practical argument against the recognition of corporations as citizens comes from M. Niboyet (who, as Mr. Vaughan Williams points out) observed in his Manual of Private International Law that in computing the total number of citizens of a country we do not add to the number of physical persons the number of corporations of that nationality. Indeed Lord Atkinson (and all who formed the majority except Lord Halsbury) was of opinion in the *Daimler case*<sup>1</sup>, that—

"The question of the residence of the company apart, I do not think that the legal entity, the company, can be so completely identified with its shareholders, or the majority of them, as to make their nationality its nationality."

We have only two laws on the subject of citizenship and none on the subject of the nationality of corporations. The fundamental law provides only for natural persons where it enacts rules for determining citizenship and the Citizenship Act excludes corporations. The chapter on Fundamental rights does not altogether ignore corporations as did the American Constitution. In places the word 'person' is used which attracts the definition in the General Clauses Act and in others the word 'citizen'. The word 'citizen' could have been defined specially for Article 19

(1) (f) and (g) but it is not. There is nothing which can justify us in giving a special

1. L.R. (1916) 2 A.C. 307.

2. 49 L.Q.R. 334.



meaning to the word "citizen" for purposes of clauses (f) and (g). The fact that corporations are regarded in some circumstances as possessing nationality does not make them citizens. As Mr. Menon rightly pointed out ships and aircraft also possess nationality in International Law but it cannot be claimed that they possess citizenship in Municipal Law.

Which corporations should be regarded as possessing Indian Nationality is a question to be answered when it arises. Whether the provisions of the Companies Act dealing with foreign companies furnish any assistance in this behalf must also be left unanswered. It is sufficient to say that even if it be established that a corporation possesses Indian Nationality this has not the result which is contended for namely that all or any of the citizenship rights arise. It may be admitted that the State Trading Corporation which is incorporated in India is not a foreign company under the Companies Act. If we were to lift the veil of incorporation it will be found that the entire capital is subscribed by the Government of India, that the shareholders are the President of India and two Secretaries to Government in their official capacities and that its management is a governmental function for the benefit of the nation. It may be conceded that it possesses Indian Nationality in an ideal sense and that there is also no possibility of its acquiring an enemy character. But even so it is not a 'national' that is to say an individual who is a part of our nation. When we count Indian nationals for purposes of census we do not count the corporations as nationals. The argument is not one whit advanced by dropping the word 'citizen' and using the word 'national'. No doubt the existence of corporations as entities is recognised but the entity obtains only such rights as the law confers on it. This entity cannot claim other rights as a matter of course or by standing side by side with citizens. This entity cannot aspire to hold a public office or to membership of Parliament or the Legislatures or to franchise or to entry into educational institutions. This is because it is not a citizen in the true sense of the term and because its 'nationality' though of consequence in Public or Private International Law, in treaties, in conventions and in protocols, is of no consequence in Municipal Law except to the extent that the Municipal Law says so.

This is not to say that corporations have not been given any protection under our Constitution. Unlike the Constitution of the United States of America our Constitution does not overlook corporations. The General Clauses Act is applicable to interpret the Constitution and that Act, as has been pointed out already, defines 'person' as including corporations. The following articles of the Constitution employ the word 'person' which applies equally to individuals and to corporations etc.

*Article 14.*—Equality before the law.

*Article 20.*—Protection in respect of convictions for offences.

*Article 27.*—Freedom as to payment of taxes for promotion of any particular religion.

*Article 31.*—Compulsory acquisition of property.

The seven freedoms guaranteed by Article 19 (1) are for 'citizens'. It was easy to say that the word 'citizen' included corporations, etc. of Indian Nationality for purposes of any of the clauses of Article 19 (1) but it has not been so said. It is to be noticed that in the third part the Constitution defines 'the State', 'the law', 'law in force', 'estate' and 'rights'. The expression 'law in force' is defined twice and differently. Can it be said that the word 'citizen' was purposely left vague so that a broad and liberal spirit could enter the interpretation? What a chance to take. It must have been well-known that an attempt by the Supreme Court of the United States to give an artificial meaning to the word 'citizen' has been regarded on all hands as Constitution making. It is easy to see that our Constitution was circumspect enough to use a word of larger import (person) in some places but not in others. The intention may well have been that the seven freedoms shall guarantee the rights of individuals whom the body politic recognised as 'citizens' and not the rights of abstractions like corporations. The observations of Chief Justice

Mukherjea quoted earlier mean that a corporation is protected only where the language admits the inclusion of corporations otherwise only individuals are meant.

It is however argued that in the United States the Supreme Court has held that the word 'citizen' includes corporations. Reference was also made to the Constitutions of some minor countries where corporations are expressly mentioned. It is not necessary to refer to these Constitutions because no inspiration can be drawn from them to rewrite our Constitution. As Willis said (and he is not alone in this) of the position in the United States that the rights and liabilities of corporations "have been worked out under and through the judge-made United States Constitution". Perhaps this was forced upon the Supreme Court by the diversity of citizenship existing in the United States but it may be noted that the word 'citizen' has not been held to include corporations in other articles. Since this precedent was strongly relied upon I shall briefly refer to it.

The Constitution of the United States of America overlooked corporations and this has made the language intractable in places. The Supreme Court has supplied this want by 'judicial legislation'. How this was done may be explained. I have already referred to the dictum of Chief Justice Taney and to the attitude of the Congress and the Supreme Court on the subject of nationality of corporations. There is a fixed view that nationality follows incorporation and is unalterable. This geographical theory coupled with dual citizenship of the State and United States has led to some difficulties. Corporations were always regarded as the citizens of the State of incorporation but not of the United States. The citizenship of the State has been accepted for purposes of exercise of the judicial power of the United States. The following provisions of the Constitution of the United States may be read at this stage :

*Article I, section 8.*—"Congress shall have power . . . to establish a uniform Rule of Naturalization."

*Article III, section 1.*—"The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . ."

*Article III, section 2.*—"The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State ; between Citizens of different States ; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

*Article IV section 2.*—"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

*Amendment XIV section 1.*—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ; nor shall any State deprive any person of life, liberty or property, without due process of law ; nor deny to any person within its jurisdiction the equal protection of the laws."

The Supreme Court has held that a corporation is the citizen of the State of incorporation for purposes of federal jurisdiction on the ground of diversity of citizenship. Though Article I section 8 and Amendment XIV refer to natural persons the word 'citizen' was given a larger meaning for purposes of controversies between citizens of different States over which federal Courts alone have jurisdiction. The jurisdiction of the national Courts could not be invoked if the defendant was a corporation but the Supreme Court has by slow stages created a fictional jurisdiction. The development of the law has had an interesting course. Rather than describe it in my own words I quote a small passage from Willis on Constitutional Law of the United States (p. 850) :

"At first a corporation was not regarded as a citizen for any purpose and it could not get into or be taken into the federal Courts on the ground of diversity of citizenship. Then a case arose where all of the stockholders of the corporation were citizens of the same State where the corporation was incorporated and the plaintiff was a citizen of another State, and it was held that the Court would look behind the corporate veil to the stockholders and give the federal Courts jurisdiction because of the diversity of citizenship thus found. In a later case some of the stockholders were not citizens of the State where the corporation was incorporated but of the State in which the opposing litigant

was a citizen. To avoid robbing the federal Courts of their jurisdiction, the Court held that for purposes of diversity of citizenship all of the stockholders of a corporation would be conclusively presumed to be citizens of the chartering State. This rule, however, had to be modified later so as to make an exception in the case of a stockholder plaintiff. Now it is believed that the Courts have come to the position that the corporation is itself a citizen of the State of its incorporation for the purposes of diversity of citizenship."

The following extract from *St. Louis and San Francisco Railway Co. v. James*<sup>1</sup> sums up the position so far as the Supreme Court is concerned :

"There is an indisputable legal presumption that a State corporation, when sued or suing in a circuit Court of the United States, is composed of citizens of the State which created it. . . . That doctrine began, as we have seen, in the assumption that State corporations were composed of citizens of the State which created them ; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the Federal Courts might be defeated. Then, after a long contest in this Court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it."

States have, however, begun to destroy the presumption which is thus created, by requiring a corporation as a condition to doing business there to incorporate in the State. This can be done because the Supreme Court has rejected the claim of corporation to citizenship for purposes of the privileges and immunities clauses quoted above. As Corwin pointed out in "The Constitution and what it means today", 11th edn., p. 166 :

"Nor does the term 'citizens' include corporations. Thus a corporation chartered elsewhere may enter a State to engage in local business only on such terms as the State chooses to lay down, provided these do not deprive the corporation of its right under the Constitution, of its rights for instance, to engage in inter-State commerce, or to appeal to the national Courts or, once it has been admitted into a State, to receive equal treatment with corporations chartered by the latter."

It remains to point out that corporations have been held to be 'persons' within the Fourteenth Amendment and are entitled to equal protection of the laws. But a foreign corporation as Corwin points out (at p. 268) is entitled to equal treatment with the corporations chartered by a State if there is submission to the jurisdiction of the State.

The Nationality Act of 1940 declared that for the purpose of that Act a 'national' meant a person owing personal allegiance to a State in the United States. Corporations were thus not included because in the words of Buckley, L. J., a corporation cannot be loyal or disloyal. For international purposes a corporation is treated as a national if subjected to illegal treatment in an international aspect by a foreign power. The position of corporations is protected in treaties as for example the treaties between Great Britain and the United States of 1783 and 1794 and the treaty of Guadalupe Hidalgo between the United States and Mexico. Other examples are found in Hyde and international documents. Similarly treaties of commerce are construed to include corporations within expressions denoting natural persons. But even in international sphere corporations are not on a par with natural persons or nationals. As Hyde points out :

".....at least in a technical sense, a corporation is not, for many purposes, to be deemed a national of the State to which its life is due, and lacks many privileges that enure to a natural person....."

The question is whether the precedent of the United States Supreme Court should be followed. Apart from the fact that this involves a conscious effort at judicial legislation, I am of opinion that such a spirit of *libre recherche scientifique* is hardly justified in India in view of the following considerations :—

(a) We have a single citizenship and there is no citizenship of the States to create diversity ;

(b) We have only one set of Courts and not two with separate jurisdictions ;

(c) Our Constitution has not completely overlooked corporations and some of the fundamental rights are *prima facie* guaranteed to corporations as well ;

(d) Members of a corporation who are citizens can enforce the rights under Article 19 (1) (f) and (g). Even if corporations may not be able to do so directly,

1. (1896) 161 U.S. 545 at pp. 562, 563.

tion without authority of law, no curbs involving freedom of trade, commerce or intercourse and no compulsory acquisition of property. There is sufficient guarantee there and if more is needed then any member (if citizen) is free to invoke Article 19 (1) (f) and (g) and there is no doubt that the corporation in most cases will share the benefit. We need not be apprehensive that corporations are at the mercy of State Governments.

For these reasons my answers to the question posed are against the State Trading Corporation.

*Das Gupta, J.*—I think the State Trading Corporation of India is entitled to fundamental rights under Article 19 (1) (f) and (g) of the Constitution as a citizen of India.

The petitioner bases its claim to these fundamental rights on the fact that all its members are citizens. That this is so is not disputed by the respondent. But the respondent resists the claim on the legal basis that the Corporation is not a natural person but only an artificial person forming a distinct entity from the natural persons who are its members. According to the respondent no artificial person is a citizen of India either under the Constitution or under the Citizenship Act which was passed in 1955 in accordance with the Constitution. The respondent also contends that it would be a mistake to confuse nationality with citizenship and while it is correct that the present petitioner having been incorporated in India under the Indian Companies Act is a national of India it would be wholly erroneous to think that it also became on such incorporation a citizen of India. The fact that it is a national of India puts it in no better position than any other person, natural or artificial, which is not a citizen of India in the matter of fundamental rights.

While creating fundamental rights "the people of India" created some which they conferred on all persons (Articles 14, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 30); but some were created that were conferred only on citizens and were denied to others. Among those conferred on citizens only are the fundamental rights created by Articles 15, 16, 19 and 29. The word "citizen" was not however defined in the Constitution and so we have not got a key that is provided by a clear definition, to the minds of those who framed the Constitution, on the question whether they intended to exclude corporations as such from the fundamental rights conferred on citizens. The respondent points out that immediately before dealing with the question of fundamental rights, the Constitution deals with the question of citizenship in seven Articles, viz., Articles 5 to 11. There is force in the respondent's contention that these articles do not appear to contemplate any artificial person, like a corporation, being in its capacity of corporation, a citizen of India. Article 5, the first and the main article dealing with the question makes person, (1) born in the territory of India, or (2) born of parents one or both of whom were born in the territory of India, or (3) persons who have been ordinarily residents in the territory of India for not less than 5 years preceding the commencement of the Constitution, citizens of India. Articles 6 and 7 deal with the cases of certain persons who have migrated to India from Pakistan, while Article 8 deals with the question of rights of citizenship of persons of Indian origin residing outside India. Article 9 lays down that spite of Articles 5, 6, or 8 a person who has voluntarily acquired the citizenship of any foreign State shall not be a citizen of India. Article 10 embodies the provisions of continuity of citizenship "subject to the provisions of any law that may be made by Parliament"; Article 11 makes an express provision that Parliament would be competent to make any provision with respect to acquisition and termination of citizenship and all other matters relating to citizenship.

I agree with the contention raised on behalf of the respondent that it is not reasonably possible to read into these articles of the Constitution any intention that an artificial person might also be a citizen. We also find that the Citizenship Act, 1955 which was enacted by Parliament in exercise of the powers preserved to it by Article 11 of the Constitution, expressly excludes from its benefit "any company or association or body of individuals, whether incorporated or not." A Corporation is not a citizen

under the Citizenship Act, 1955 nor is a corporation as such a citizen under the constitutional provisions on the question of citizenship. From this it seems an easy step to say : Articles 5 to 11 do not make the corporation a citizen ; the Citizenship Act does not make the corporation a citizen ; there is no other Indian law that makes the corporation a citizen ; and so the problem is solved : corporation is not a citizen for the purpose of fundamental rights.

That, according to the respondent, should end the search for light. I am unable to agree. After all it is a constitution that we are interpreting and it has again and again been laid down that those on whom falls this task have to take a broad and liberal view of what has been provided and should not rest content with the mere grammarians' role. If, as is undoubtedly true, a syllogistic or mechanical approach of construction and interpretation of statutes should always be avoided, it is even more important when we construe a Constitution that we should not proceed mechanically but try to reach the intention of the Constitution-makers by examining the substance of the thing and to give effect to that intention, if possible.

There was some discussion at the Bar as to whether there were citizens of India, even before the Constitution. It will serve no useful purpose, in my opinion, to enter into that controversy. For, I am inclined to think that the Constitution in dealing with the matter of citizenship has no intention to keep any former citizenship alive. If that had been intended a suitable provision would have been made to make that clear. In the absence of any provision to that effect it is difficult to hold that citizenship as might have existed in pre-Constitution India continued even after the Constitution.

Nor do I find it possible to agree that because a company incorporated in India would be a national of India it would necessarily be a citizen of India. Nationality and citizenship are not identical ; and it has been rightly said that while every citizen will be a national, every national is not necessarily a citizen.

We are still left with the question whether the framers of the Constitution when conferring some fundamental rights on citizens only intended that citizens forming themselves into a corporation would cease to enjoy these rights. The peculiar position that results from the strict legalistic approach to the problem can be best shown by means of an illustration.

*A*, a citizen of India, whether under the Constitution or under the Citizenship Act is entitled to the fundamental right to acquire, hold and dispose of property under Article 19 of the Constitution. When *A* engages with another such citizen, *B*, in business the two can still come to the courts to claim the benefit of the same fundamental right. The position remains the same if *A* and *B* join more persons without incorporating themselves into a company ; even if the number is seven or more they can still join in the same application and come to the court jointly for enforcement of their fundamental right under Article 19 when they are jointly engaged in the same business. For, in all these cases the claim of each to the fundamental right cannot be, in law, defeated by the fact that several other citizens have joined him in making a similar claim for themselves. As soon as, however, two or more persons who are in their own right citizens of India form themselves into a private company, or seven or more persons, each of whom is a citizen in his own right, form a public incorporated company, they are faced with the proposition that the company not being a citizen, it is excluded from the right which they could have claimed.

It is well known that for many years before 1950 when the Constitution came into force much of the trade and industry of this country was being carried on by corporations. Most of these corporations were and are composed of persons who are clearly citizens of India under the provisions of the Constitution. The obvious effect of the strictly legalistic approach that a corporation being an artificial person cannot be a citizen for the purpose of any of the fundamental rights even when all its members are citizens of India would thus be to deny a considerable part—if not the major part of Indian industry and commerce (using the word "Indian" to mean 'carried on by Indian citizens') the valuable protection of the fundamental rights under Article

19 (1) (f) and (g). No doubt the mere fact that the effect is inconvenient or even regrettable can be no justification for a forced construction of a constitutional provision. But it is permissible, nay proper, often to consider the effect of proposed construction to find an answer to the question : was that the intention of the Constitution makers ?

What do we find here ? In Article 19 (1) (f) and (g) the Constitution-makers are creating a right intended to be of great benefit to industry and trade. They decide to restrict this benefit to only citizens of India. They are aware that much if not most—of the trade and industry carried on by Indian citizens are carried on by them, after forming themselves into corporations. They know equally well that corporations are in law distinct entities from their members and so the 'State' naturally anxious to extend the domain where the restriction of fundamental right or its powers does not operate, may well argue that corporations even though composed entirely of citizens are not entitled to fundamental rights. The concern of the Constitution-makers to improve the economic condition of the country is writ large over the Constitution's many provisions. The question has reasonably been asked; why then did not the Constitution-makers distinctly provide the corporations composed of Indian citizens will be deemed to be citizens for at least the fundamental rights under Article 19 (1) (f) and (g)? The mystery disappears however if we credit the Constitution-makers with the further knowledge that in the United States of America when somewhat similar questions had arisen regarding the character of corporations composed of citizens of a particular State the Courts had not hesitated to apply the process of what has been called "tearing the veil" and granted to a corporation composed of citizens of a State some of the rights of a citizen of that State, inspite of the fact that the corporation as such is an artificial person distinct from its members. Is it not reasonable to think that the makers of our Constitution trusted that Courts in India would also not hesitate to apply a similar process of going under the surface and looking at the composition of the corporation, in deciding whether the corporation is entitled to fundamental rights? In my judgment, the answer to the question must be in the affirmative. Indeed I would go further and say that to take another view is an insult to the intelligence and understanding of those who drafted the Constitution.

I am thus clearly of opinion that the Constitution-makers when they used the word "citizen" in Article 19 intended that at least a corporation of which all the members were citizens of India would get the benefit of the fundamental rights enshrined in that Article. The legal position that the corporation is a distinct entity from its members does not appear to me to create any real difficulty in the way of giving effect to this intention. The proposition, viz., that the corporation is a distinct legal entity from its members is too well established to require discussion. I see no reason however why the charm of this legal learning should so hold us captives as to blind us to the great rule of interpretation of giving effect to the intention of those who made the law unless the words make that impossible. I can find nothing in the words of the Constitution that stand in the way of giving effect to the intention of the Constitution-makers of giving all citizens of India, whether forming into a corporation or not, the benefit of the fundamental rights under Article 19 (1) (f) and (g). Whether the Constitution-makers also intended that a corporation of which the major portion of the interest was held by citizens of India would also get the benefits of the rights, it is unnecessary for the purpose of this case to investigate.

This view of the law was taken, and in my opinion rightly, by the Bombay High Court in *The State of Bombay v. R. M. D. Chamarbaughwala*<sup>1</sup>. It is of interest also to mention that in this view of the law it is possible to appreciate what was said by way of dicta by Mr. Justice Mukherjea (as he then was) in *Chiranjit Lal Chaudhuri v. The Union of India and others*<sup>2</sup> :—

"The fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well except where the language of the provision or the nature of

1. I.L.R. (1955) Bom. 680.

2. (1951) S.C.J. 29 : (1950) S.C.R. 869.

the right compels the inference that they are applicable only to natural persons. An incorporated company therefore can come up to this Court for enforcement of its fundamental rights.".....

In that case the Court had to consider an allegation of infringement of the fundamental rights not only under Articles 31 and 14 but also under Article 19 (1) (f). While the observations of Mr. Justice Mukherjea may not perhaps be regarded as a considered decision on the question now before us, it is not unreasonable to think that his Lordship felt no difficulty about extending the fundamental rights under Article 19 (1) (f) to the Sholapur Spinning and Weaving Company, the share-holders of which were Indian citizens.

It is proper to mention in this connection that in the 13 years that have rolled by since the Constitution came into force there have been many cases in which this Court as also the High Courts have given companies of which the members were Indian citizens the benefit of fundamental rights, special to citizens. In some of these cases the question was sometimes raised whether or not a corporation was a citizen for the purpose of the fundamental rights but that was left unanswered. Among the cases in which relief claimed on fundamental rights, specially conferred on citizens have been granted to corporations may be mentioned : *The Express Newspapers (Private), Ltd. v. Union of India*<sup>1</sup>. *The Bengal Immunity Co. v. The State of Bihar*<sup>2</sup> ; *The Bombay Dyeing and Manufacturing Co., Ltd. v. State of Bombay and others*<sup>3</sup>.

In my judgment, therefore the first question referred to this Special Bench should be answered in the affirmative.

On the other question that has been referred, I agree with the conclusion of my learned brother Shah, J., that the State Trading Corporation is not in substance a department and organ of the Government of India. As I entirely agree with the reasoning on which he has based this conclusion, I do not propose to discuss the matter further.

For the reasons mentioned above I would answer the two questions referred to this Special Bench thus :

(1) The State Trading Corporation, so long as it consists wholly of citizens of India, can ask for enforcement of the fundamental rights granted to citizens under Article 19 (1) (f) and (g) of the Constitution.

(2) The State Trading Corporation is not a department or organ of the Government of India and can claim to enforce the fundamental rights under Part III of the Constitution against the State as defined in Article 12 thereof.

*Shah, J.*—On May 18, 1956 the State Trading Corporation of India, Ltd., hereinafter called 'the Company' was incorporated as a Private Limited Company under the Indian Companies Act, 1956, with an authorised capital of Rs. 5 crores divided into five hundred thousand shares of Rs. 100 each. Ninety-eight per cent of the subscribed capital which was contributed out of the funds of the Government of India stood registered in the name of the President of India and the remaining two per cent in the names of two Joint Secretaries in the Ministry of Commerce and Industries. On February 12, 1961 the Commercial Tax Officer, Vishakhapatnam assessed the Company in the sum of Rs. 5,79,198-17 nP. to sales-tax in respect of certain transactions and issued a notice demanding payment of the amount. The Company and Mr. K. B. Lall, Joint Secretary, Ministry of Commerce and Industries then petitioned this Court for a writ quashing the order of the Commercial Tax Officer and the notice of demand on the plea that the assessment order and the notice of demand infringed the fundamental rights of the petitioners amongst others, under Article 19 (1) (f) and (g). At the hearing of the petition, Counsel for the Commercial Tax Officer and the State of Andhra Pradesh submitted that the petition was not maintainable because the Company was not a 'citizen' within the meaning of Article 19 of the Constitution, and in any event the Company being "an organ, department or instrumentality" of the Government of India was incompetent to

1. (1958) S.C.J. 1113 : (1959) S.C.R. 12. 168 : (1955) 2 S.C.R. 603 : A.I.R. 1955 S.C. 661.  
2. (1955) S.C.J. 672 : (1955) 2 M.L.J. (S.C.) 3. (1958) S.C.J. 620 : (1958) S.C.R. 1122.

enforce any fundamental right against the State of Andhra Pradesh. The Court thereupon referred the following questions to a larger Bench :

" (1) Whether the State Trading Corporation a company registered under the Indian Companies Act, 1956 is a citizen within the meaning of Article 19 of the Constitution and can ask for the enforcement of fundamental rights granted to citizens under the said article ; and

(2) Whether the State Trading Corporation is notwithstanding the formality of incorporation under the Indian Companies Act, 1956 in substance a department and organ of the Government of India with the entirety of its capital contributed by Government and can it claim to enforce fundamental rights under Part III of the Constitution against the State as defined in Article 12: thereof ? "

We are not at this stage concerned to deal with any right which the second petitioner K. B. Lal may have, to maintain the petition, for the questions deal only with the rights of the *Company* to set up the protection of Article 19 (1) (f) and (g) of the Constitution.

Article 19 guarantees certain basic freedoms in favour of *citizens* : it provides that—

" (1) All citizens shall have the right

(a) to freedom of speech and expression ;

(b) to assemble peaceably and without arms ;

(c) to form associations or unions ;

(d) to move freely throughout the territory of India ;

(e) to reside and settle in any part of the territory of India ;

(f) to acquire, hold and dispose of property ; and

(g) to practise any profession, or to carry on any occupation trade, or business."

The fundamental freedoms (exercise whereof is by clauses (2) to (6) subject to certain restrictions) being expressly guaranteed to citizens, the question which presents itself at the threshold is whether the Company can claim to be a citizen and on that basis claim protection of the freedoms to acquire, hold and dispose of property, and to carry on any trade, occupation or business. The plea that a Company incorporated under the Indian Companies Act is not a 'citizen' within the meaning of Article 19 of the Constitution is advanced principally on two grounds :

(1) That prior to January 26, 1950, there was no law relating to citizenship in force in India and by Articles 5 to 10 of the Constitution only natural persons were for the first time declared citizens. Under the provisions of the Citizenship Act, 1955 only natural persons may claim rights of citizenship since the commencement of the Constitution. The Company which came into existence after the promulgation of the Constitution not being a citizen under the Citizenship Act, 1955 is therefore incompetent to enforce the rights claimed by it, for Articles 5 to 11 constitute an exhaustive code relating to citizenship in India, and an artificial person not being of the classes enumerated in Articles 5, 6 and 8, nor under the Citizenship Act, 1955 (enacted in exercise of powers under Article 11), the claim of the Company to citizenship must stand rejected ; and

(2) Citizenship postulates allegiance to the State of which a person claims to be a citizen and involves a duty to serve when called upon in the civil administration, and in the defence forces in the maintenance of peace or defence of the State in an emergency, and an artificial person being incapable of owing allegiance and of rendering these services cannot be regarded as a citizen. This argument is based on what is called the traditional concept of citizenship.

Counsel for the Company submits that citizenship is the status which a person endowed with full civil and political rights in a State possesses under its municipal law, and such rights inhere the status of natural and artificial persons alike.

In determining the content of the expression 'citizen' used in Article 19 which is defined neither in the Constitution nor in the General Clauses Act, it may, in the first instance, be useful to consider the scheme under which the diverse fundamental rights are declared and guaranteed by Part III of the Constitution and the extent of



protection afforded against infringement of those fundamental rights. The Constitution in declaring the fundamental rights, uses different expressions to denote the beneficiaries of different rights. By Articles 14, 20 (1), (2) and (3), 21, 22 (1), (2) and (4), 25 (1), 27, 28 (3) and 31 certain fundamental rights are declared in favour of *persons*. By Articles 15 (1) and (2), 16 (1) and (2), 19 (1) and 29 (2) *citizens* are the recipients of fundamental rights guaranteed thereby. Certain fundamental rights are declared in favour of groups such as denominations, sections, minorities or institutions, e.g., Articles 26, 29 (1), 30 (1) and 30 (2) : these would in the very nature of things be groups of individuals. By certain other Articles prohibitions are declared e.g., 17, 23 (1), 24 and 28 (1) for removal of evils, such as untouchability, traffic in human beings, forced labour, employment of children in hazardous employment and against imparting of religious instructions in educational institutions. The expression 'citizen' used in Chapter III has undoubtedly a narrower connotation than 'person'. By Article 367 of the Constitution read with section 3 (42) of the General Clauses Act a "person" includes any Company or association or body of individuals whether incorporated or not. By declaring rights in favour of persons, it may at first sight appear that it was intended to confer those rights upon persons artificial as well as natural. But this presumption is not in fact uniformly true : in Articles 25 (1), 28 (3) and probably Article 20 (3) by the use of the expression "person" having regard to the character of the right conferred natural persons only could be the beneficiaries of the rights declared thereby. By Article 15 (1) and (2) prohibitions are imposed against the State in making discrimination between citizens on the ground of religion, race, caste, sex or place of birth ; clauses (1) and (2) of Article 16 declared equality of opportunity to citizens in matters of public employment, and Article 18 (2) imposes restrictions on citizens against acceptance of titles from any foreign State. In these Articles, the expression 'citizen' may refer only to a natural person. But that cannot be decisive of the meaning of the expression "citizen" in Article 19. In ascertaining the meaning of expressions used in a vital document like the Constitution of a nation, a mechanical approach would be impermissible. The Constitution is but the declaration of the will of the people, and must be interpreted liberally, and not in any narrow or doctrinaire spirit. It must be interpreted according to its true purpose and intent as disclosed by the phraseology in its natural signification—in the light of its setting and its dynamic character which is intended to fulfil the aspirations of the people. There can be little doubt that an artificial person like a Corporation is capable of exercising rights conferred by clauses (a), (c), (f) and (g) of Article 19 (1) and the right to hold property and the right to carry on trade or business are two rights of vital importance vested in artificial persons and a substantial segment of trade and business in India and abroad is carried on through corporate activity. On the view that only a natural person having certain attributes under the municipal law may be a citizen, the rights conferred by Article 14 (equality before the law and equal protection of the laws), Article 27 (freedom from payment of taxes for promotion of any particular religion or religious denomination), Article 20 (1) and (2) (bar against retrospective operation of penal statutes, and rule against double jeopardy) and Article 31 (bar against deprivation of property otherwise than by authority of law) are guaranteed even in the case of artificial persons, but some of the most cherished rights, i.e., right to acquire, hold and dispose of property, and to carry on trade or business of artificial persons may not be protected against executive or legislative action. Was it intended by the Constituent Assembly when declaring the freedoms under Article 19 to make a deliberate departure, and in respect of rights declared under Article 19 to restrict the enforcement thereof against action of the law makers or the executive only in favour of natural persons and not in favour of artificial persons ?

It is in this background we may turn to the question whether, the declaration of citizenship under Articles 5, 6 and 8 of the Constitution, and the Citizenship Act, 1955, was to be exhaustive, or merely to deal with the rights of natural persons. It may be necessary first to have a true concept of citizenship and to ascertain whether the common law of England which formed the foundation of the Indian jurisprudence, attributed to artificial persons prior to the Constitution the status of citizens or 'subjects' at it was usual to call them in a monarchical form of Government.

chise is not a *sine qua non* of citizenship. The State normally affords to Corporations protection as to its national abroad and recognises its corporate character with capacity to exercise rights within the realm. In the matter of protection, the law makes no distinction between natural persons and artificial persons like Corporations. Was it then intended by the Constitution which afforded protection of the widest amplitude in favour of Corporations as well as natural persons against discrimination under Article 14, against deprivation of property under Article 31 (1), against compulsory acquisition or requisition of property for purposes not public and without payment of compensation under Article 31 (2), against imposition of taxes the proceeds of which are specifically appropriated for payment of expenses for maintenance of a particular religion or religious denomination under Article 27, against being subjected to taxation without authority of law under Article 265, and to the freedom of trade, commerce and intercourse, subject only to the provisions of Part XIII still did not guarantee the right to carry on business or trade, to acquire, hold and dispose of property and the right to form associations, or the right to take up residence of its choice within the territory? Unless the language or the scheme of the Constitution is so compulsive, it would be difficult to reach that conclusion, on any predilection as to a limited connotation of the expression citizen occurring in Article 19 (1). It may be remembered that Constitutional practice is not inconsistent with the recognition of artificial persons as citizen. The Constitution of the United States of Mexico 1917, of El Salvador 1950, and of the Spanish People do recognise the status of Corporations as citizens. It was also not disputed at the Bar and could not reasonably be disputed that it was open to Constitution-makers, and the Parliament of India to make express provisions declaring artificial persons as citizens of India.

But it is urged that the intention of the Constitution-makers was not to recognise the corporate character of a Company as a citizen. It is said that the provisions of Articles 5, 6 and 8 and the law made under Article 11 in matters post-constitutional, are exhaustive of the conferral of the right of citizenship and there can be no citizen who does not satisfy the prescribed requirements. A necessary corollary of that thesis is that there were no citizens in India before the Constitution—natural or artificial—and it was by the Constitution and the Citizenship Act, 1955, that only natural persons are made citizens and no one else.

To examine the validity of this assumption, it is necessary to examine carefully the relevant provisions of the Constitution and the material provisions which proceeded the Constitution. It must be conceded that persons mentioned in Articles 5 (1), 5 (b), 6 and 8 are natural persons and the expression 'person' in the context of those provisions does not include artificial persons. Clause (c) of Article 5 refers to persons resident within the territory of India for not less than five years, and it may be presumed that this clause was also intended to apply to natural persons. Similarly by the definition contained in section 2 (f) of the Citizenship Act, 1955 the Act is made applicable only to natural persons. But the assumption that there were in India prior to January 26, 1950, no citizens, and citizenship rights were conferred for the first time by the Constitution is not warranted either by the language used in the Constitution, or the history of our national evolution. The status of British Indian prior to 1947 was governed by the British Nationality and Status of Aliens Act, 1914. They were regarded as British subjects, and entitled in British India to such rights and privileges as were accorded to British nationals in India. Their status as British subjects was analogous to the status of citizens of a republic. They exercised civil rights, and such political rights as the form of Government permitted. If a citizen is a national who under the law of the State is entitled to enforce full civil and political rights, British Indian subjects prior to the Constitution had within the territory of British India that quality of rights which would go to make them citizens. Similarly the subjects of the Indian States had the rights of citizenship within their own States, and those rights were not affected by the stand-still and merger agreements of their rulers with the Dominion of India. The thesis being merely to establish the existence of rights which were analogous to rights of citizenship prior to the enactment of the Constitution, it is unnecessary to enter upon a

detailed examination of the constitution development which took place between August, 1947 and November 26, 1949, which culminated in the setting up of the Republic of India by the erstwhile British Indian subjects and the subjects of the Indian States. It may be sufficient to observe that before the Indian Independence Act, 1947, the Legislature was invested with the power to confer upon foreigners rights as British Indians by naturalization, and had also sought to invest the Government of the day with power to deny entry into India to foreigners or even of nationals of British possessions. Part II of the British Nationality and Status of Aliens Act, 1914, relating to the naturalization of aliens was not extended to British India, though Parts I and III were intended to apply to all territories which formed part of the British Empire subject to the provisions of section 26 of the Act which preserved the power of Colonial or Dominion Governments and Legislatures to legislate on the subject of nationality and to safeguard the validity of laws passed by them relative to the treatment of different classes of British subjects. Under the Act of 1914 the place of birth within the British Empire was determinative of British nationality, but power was reserved to the Dominions and the Colonies by legislation to make provision for naturalization restricted to their territory. The British Indian Legislature in 1926 enacted the Indian Naturalization Act, 1926, which enabled the local Governments to grant certificates of naturalization to persons applying in that behalf and satisfying the local Government on matters specified therein. Power was also reserved to revoke the certificates of naturalization. The Legislature also enacted the Immigration into India Act, III of 1924 which authorised the Central Government to make rules for the purpose of securing that persons not being of Indian origin, domiciled in any British Possession, shall have no greater rights and privileges, as regards entry into and residence in British India than are accorded by the law and administration of such possession to persons of Indian domicile. The effect of these statutory provisions was subject to certain exceptions to recognize the right of British subjects in India and to approximate them to the rights of citizenship, to grant such rights by naturalization and to restrict immigration into India. The British Nationality Act, 1948, was enacted after the Indian Independence Act, 1947, and was not incorporated in the stream of the statute law in India. The effect of that Act was to create a new statutory concept of citizenship of the various constituent units of the British Commonwealth and to provide for a dual citizenship, citizenship of the country in which the local community resided within the units and of the Commonwealth. The concept of allegiance which was the foundation of the status of a subject, was excluded from the rules governing local citizenship. The Act contemplated the passing of Citizenship Acts by various Dominions and till the enactment of such Acts accorded to the citizens potential or actual of any Dominion (which expression included India) the status of Commonwealth citizen. In relation to this citizenship, allegiance to the British Crown was not a condition.

This brief review of the legislative history is sufficient to destroy the assumption that the status of citizenship was not recognized under the common law operative in India prior to January 26, 1950, for, in my judgment, British subjects of Indian origin held for all purposes the status in British India of citizens. That status arose by birth and could also be conferred by naturalization.

If a natural person could be a citizen prior to November 26, 1949 (the day on which by Article 394, Articles 5 to 9 came into force), there is no reason to suppose that artificial persons who were nationals of the British Empire and who could claim the protection abroad could not claim rights of citizenship within the territory of India, when they were in fact exercising all the rights and privileges which natural persons who were citizens exercised, except those which by their incorporation they could not exercise. There was before the Constitution no statute which indicated even indirectly that a Corporation aggregate could not be a citizen.

At the time when the Constitution of the United States of America was proclaimed, no citizenship laws were enacted, but rights of citizenship were recognized under diverse provisions of the Constitution of the United States. The American Constitution recognised even without any express statute law, citizenship of States,

and also of the Union. Under the Constitution of the United States of America, the expression "citizen" has been given different meanings under diverse Articles. In some clauses the expression "citizen" meant only natural persons, in others it included artificial persons like Corporations. Though the Constitution as originally proclaimed was silent upon the subject, corporations were regarded as citizens of the State of their incorporation for the purpose of federal jurisdiction. Initially no corporation was regarded according to the decisions of the Court in the United States as a citizen within the meaning of Article 3 section 2 : *The Bank of the United States v. Deveaux et al*<sup>1</sup>. But this view was modified in a latter case : *The Louisville, Cincinnati and Charleston Railroad Company v. Thomas W. Leston*<sup>2</sup>. This case arose on the interpretation of the "diversity clause" in Article 3 section 2. In neither of these cases was the capacity of corporations to be citizens of the State in which they were incorporated, denied. For the purpose of the 14th Amendment which prohibits a State from making or enforcing any law which abridged privileges or immunities of citizens of the United States, an individual alone was regarded as a citizen : *Orient Insurance Company v. Robert E. Daggs*<sup>3</sup>, and *Bankers Trust v. Texas and Pacific Railway*<sup>4</sup>. In cases arising under Article 4 section 2 it was also held that a corporation could not be regarded as a citizen of a State *other than the State of its incorporation*. In *Paul v. Virginia*<sup>5</sup>, Field, J., delivering the opinion of the Court observed at p. 359 :

"But in no case which has come under our observation, either in the State or Federal Courts, has a corporation been considered a citizen within the meaning of that provision of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

The learned Judge however made it clear that he was restricting the observations only to the claim of citizenship made by a corporation in a State *other than the State which incorporated it*. On p. 360 he observed :

".....grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. ....Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course that such assent may be granted upon such terms and conditions as those States may think proper to impose."

It may be noticed that corporations have been regarded as *persons* within the meaning of the 14th Amendment and therefore they cannot be deprived of their property or rights without due process of law : *Smyth v. Ames*<sup>6</sup> and *Kentucky Finance Corporation v. Paramount Auto Exchange Corporation*<sup>7</sup>. Our Constitution has not accepted the doctrine of due process as a test for protection of fundamental freedoms, but has sought to effectuate protection of those freedoms by the 19th Article.

In this Court there has been no definite expression of opinion about the rights of corporations aggregate to enforce the fundamental freedoms under Article 19 of the Constitution, though it seems to have been consistently assumed that corporations aggregate are entitled to claim protection of the Courts against violation of fundamental freedoms enumerated in Article 19 (1). In *Chiranjit Lal Chowdhuri v The Union of India and others*<sup>8</sup>, Mukherjea, J., observed at p. 898 :

"The fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well except where the language of the provision or the nature of the right compels the inference that they are applicable only to natural persons. An incorporated company, therefore, can come up to this Court for enforcement of its fundamental rights and so may the individual shareholders to enforce their own ; but it would not be open to an individual shareholder to complain of an Act which affects the fundamental rights of the company except to the extent that it constitutes an infraction of his own rights as well."

1. 3 L.Ed. 38.

2. 11 L. Ed. 353.

3. 172 U.S. 552.

4. 241 U.S. 295.

5. 75 U.S. 357.

6. 169 U.S. 466.

7. 262 U.S. 544.

8. (1951) S.C.J. 29 : (1950) S.C.R. 869.

In that case an individual shareholder petitioned this Court for the issue of a writ declaring that the Sholapur Spinning and Weaving Company (Emergency Provisions) Act (XXVIII of 1950) which enacted that the managing agents of the Company stood dismissed and the Directors automatically vacated their office, and which authorised the Government to appoint new Directors and restricted the rights of shareholders in the matter of voting and appointment of Directors, passing resolutions and applying for winding up and which further authorised the Government to modify the Indian Companies Act was *ultra vires* the legislative authority of Parliament, in that it infringed the fundamental rights of the shareholders and the action taken thereunder infringed the shareholders' fundamental rights under Articles 19 (1) (f), 31 and 14 of the Constitution. The Court in that case dismissed the petition holding that the fundamental rights of the petitioner under Articles 31 (1) and (2), 19 (1) (f) and 14 were not infringed. The observations of Mukherjea, J., cannot be regarded as an expression of a considered opinion of the Court holding that all fundamental rights are enforceable by individual citizens as well as corporate bodies. The question was mooted in two later cases : *The Bengal Immunity Company Ltd. v. The State of Bihar and others*<sup>1</sup> and *The State of Bombay v. R. M. D. Chamarbaugwala*<sup>2</sup>. It may be pointed out that the High Court of Bombay in *The State of Bombay v. R. M. D. Chamarbaugwala*<sup>3</sup>, held that an application at the instance of a corporation alleging infringement of a fundamental right to carry on business was maintainable. Again in *The State of West Bengal v. The Union of India*<sup>4</sup>, Sinha, C.J., in delivering the judgment of the majority observed :

"The fundamental rights are primarily for the protection of rights of individuals and Corporations enforceable against executive and legislative action of a governmental agency....."

It may be pointed out that there have been scores of cases in this Court in which it has been assumed without contest that a Company is a citizen, and competent to enforce fundamental rights under Article 19 (1) (f) and (g) of the Constitution. I propose only to set out a short illustrative list of cases picked up at random :

- (1) (1955) S.C.J. 51 : (1955) 1 M.L.J. (S.C.) 10 : *Bijay Cotton Mills Ltd v. The State of Amer.*  
(1955) 1 S.C.R. 752.
- (2) (1958) S.C.J. 844 : (1958) 2 M.L.J. (S.C.) 130 : *Messrs. Kasturi and Sons (Private) Ltd v. Shri N. Salivateeswaran and another.*  
(1958) 2 An. W.R. (S.C.) 130 : (1958) M.L.J. (Cr.) 635 : (1959) S.C.R. 1.
- (3) (1958) S.C.J. 1113 : (1959) S.C.R. 12. *Express Newspapers (Private) Ltd. v. Union of India.*
- (4) (1960) S.C.J. 235 : (1960) M.L.J. (Cr.) 184 : *Messrs. Fedco (P.) Ltd and another v. S. N. Bilgrami and others.*  
(1960) 1 M.L.J. (S.C.) 71 : (1960) 1 An. W. R. (S.C.) 71 : (1960) 2 S.C.R. 408.
- (5) (1961) 1 S.C.J. 22 : (1960) 3 S.C.R. 528. *M/s. Hathisingh Manufacturing Co. Ltd. and another v. Union of India and others.*
- (6) (1961) 1 S.C.R. 379. *Tata Iron and Steel Co., Ltd. v. S. R. Sarkar and others.*
- (7) A.I.R. 1963 S.C. 548. *State Trading Corporation of India Ltd. v. The State of Mysore and another.*

There have arisen a number of cases in the High Courts in which conflicting views have been expressed. In the *Narasaraopeta Electric Corporation Ltd. v. The State of Madras*<sup>5</sup>, the Madras High Court held that Article 19 (1) (f) applies only to citizens and a company incorporated under the Indian Companies Act does not satisfy the requirements of the definition of citizen in Article 5. This case reached the Supreme Court in *Rajahmundry Electric Supply Corporation Ltd. v. A. Nageswara Rao and others*<sup>6</sup>, but the question whether the fundamental right could be enforced by a company was, it appears, not raised. In *Jupiter General Insurance Company Ltd. v. Rajgopalan and others*<sup>7</sup>, it was held by the Punjab High Court that a company cannot raise the question that an impugned legislation takes away or abridges the rights conferred by Article 19 (1) (f) and (g) of the Constitution, because a company

1. (1955) S.C.J. 672 : (1955) 2 M.L.J. (S.C.) 168 : (1955) 2 S.C.R. 603.  
2. (1957) S.C.R. 874.  
3. I.L.R. (1955) Bom. 680.  
4. Suit No. 1 of 1961—decided on Dec. 21, 1962.  
5. (1951) 2 M.L.J. 277 : A.I.R. (1951) Mad. 979.  
6. (1956) S.C.J. 218 : (1956) 1 M.L.J. (S.C.) 95 : (1955) 2 S.C.R. 1066.  
7. I.L.R. (1952) Punjab 1.

is not a citizen. In *Amrita Bazar Patrika Ltd. v. Board of High School and Intermediate Education, U. P. and another*<sup>1</sup>, a single Judge of the Allahabad High Court held that Article 5 applied to natural-born persons and not to artificial persons and hence a corporation is not a citizen within the meaning of Article 19. But the Rajasthan High Court in *Maharaja Kishangarh Mills Ltd. v. State of Rajasthan*<sup>2</sup> assumed that the question whether a corporation was a citizen for the purpose of Article 19 was generally decided in *Chiranjit Lal Chowdhuri's case*<sup>3</sup>, and held that a corporation was entitled to raise by a petition under Article 226 a plea of a breach of a fundamental right under Article 19. Authorities in the Calcutta High Court appear to be somewhat conflicting. In *Everett Orient Line Incorporated v. Jasjit Singh and others*<sup>4</sup>. It was held that the rights conferred by Article 19 being granted only to citizens, non-citizens could not enforce such rights and the Company incorporated in India not being a citizen could not challenge the validity of sections 52-A and 167 (12-A) of the Sea Customs Act on the ground that those provisions infringed Article 19 (1) (g) of the Constitution. The same view was affirmed in *Cherry Hosiery Mills Ltd. v. S. K. Ghose and others*<sup>5</sup>. It was held in that case that a company was not entitled to enforce the fundamental rights granted under Article 19, which are available only to citizens. But it was held in *M/s. T. D. Kumar and Brothers Private Ltd. v. Iron and Steel Controller and others*<sup>6</sup> that a corporation ordinarily resident in India for a period exceeding five years prior to the commencement of the Constitution being a person was a citizen within the provision of Article 5 (c) of the Constitution, and entitled to enforce fundamental rights under Article 19 (1), but a company incorporated after January 26, 1950 will not be regarded as a citizen, for the Citizenship Act expressly excludes artificial persons from the benefit of citizenship rights. In recording this conclusion the earlier Judgment of the Calcutta High Court in *Liberty Cinema v. The Commissioner, Corporation of Calcutta and another*<sup>7</sup>, was referred to, and it was pointed out that in the group of cases which were then heard relief was granted to petitioners some of whom were Corporations claiming that their fundamental rights were infringed.

In *The State of Bombay v. R. M. D. Chamarbaugwala and another*<sup>8</sup>, in considering whether a company incorporated under the Indian Companies Act prior to the Constitution could claim protection of its fundamental rights under Article 19 (1) (g), Chagla, C.J., speaking for the Court observed :

".....can it be said in the first place that a corporation can ever be under any circumstances a citizen, and if it can be so said, what must be the constitution of the corporation before it could be said that it is a citizen? "Citizen" has not been defined by the Constitution and the only provision which is relevant is the provision contained in Article 5. But that article only deals with the citizenship at the commencement of the Constitution and it lays down who was a citizen at the commencement of the Constitution..... although domicile is a question of private international law, rights and acquisition of citizenship is a creation of municipal law and it is only Parliament by municipal law that can determine who is a citizen. It would be perfectly competent to Parliament by legislation to provide that a corporation satisfying certain conditions should be deemed to be a citizen for the purpose of Article 19 (1), but Parliament has not done so. But the very curious anomaly that arises is that when we turn to some of the provisions of Article 19 (1) it is impossible to contend that it could ever have been the intention of the Constituent Assembly that the rights guaranteed by those provisions were not to apply to corporations but only to individual citizens. Take two of the rights guaranteed under Article 19 (1) (f) and (g). Can it be suggested that a corporation which, let us assume, is Indian in every sense of its term—its shareholders are Indians, its directors are Indians, its capital is Indian—that such a corporation should not have the right under clause (f) to acquire, hold and dispose of that property, or under clause (g) to practise any occupation, trade or business?"

In *The Assam Company Ltd v. The State of Assam and others*<sup>9</sup>, the High Court of Assam proceeded to consider the claim for protection of fundamental rights under Article 19 (1) (f) on the assumption that a corporation could seek to enforce those rights.

In *Reserve Bank of India v. Palai Central Bank Ltd.*<sup>10</sup>, Raman Nayar, J., observed:

1. A.I.R. 1955 All. 595.

2. I.L.R. (1953) Raj. 363.

3. (1951) S.C.J. 29; (1950) S.C.R. 869.

4. A.I.R. 1959 Cal. 237.

5. A.I.R. 1959 Cal. 397.

6. A.I.R. 1961 Cal. 258.

7. A.I.R. 1959 Cal. 45.

8. I.L.R. (1955) Bom. 680.

9. A.I.R. 1953 Assam 177.

10. I.L.R. (1961) 1 Kerala 166.

"Many of the rights in Article 19 (1) and, in particular, those in clauses (f) and (g) thereof, are capable of enjoyment by companies. Our Constitution-makers could not have been unaware of the existence of legal persons. By Article 19 (1) (c) they gave all citizens the right to form associations and unions, and it could not have been their intention that the corporate bodies so formed by citizens, should be denied the rights guaranteed to the individual citizens, in particular that the agencies through which a substantial portion of their business is conducted by the citizens of this country and a considerable portion of their property held, should not have the protection of clauses (f) and (g).

That would mean a denial of the fundamental rights to property and occupation not merely to companies but to all corporate bodies even though they may be Indian in every sense of the term, their members Indian, directors Indian and capital Indian, a denial which virtually amounts to a denial of those fundamental rights to the citizens who (though, of course, different persons) really constitute those bodies."

*The Palai Central Bank's case*<sup>1</sup>, was carried to this Court in appeal, and the Court entered upon an exhaustive discussion of the complicated questions raised therein, instead of disposing the appeal on the limited ground that the Palai Bank was not a citizen and could not claim any fundamental rights under Article 19 (1) (f) and (g) : *Joseph Kuruvila Vellukunnei and another v. Reserve Bank of India*<sup>2</sup>.

It was submitted that he alone can be a citizen who can take an oath of allegiance to the State because the bond of citizenship arises by virtue of the allegiance which the citizen bears to the State. Municipal laws of various States do insist upon an oath of allegiance being taken on naturalisation, but the actual swearing of an oath of allegiance is not one of the conditions which go to make or constitute the right of citizenship. Children of Indian citizens become citizens by their birth and taking of oath or even capacity to swear an oath of allegiance is not predicated as a condition of citizenship. If allegiance may be presumed from birth and the requirement of taking a formal oath of allegiance is not a condition of citizenship the law proceeding upon a presumption of allegiance in respect of natural persons, I see no reason why such a presumption of allegiance may not be made in respect of artificial persons like corporations.

It was also submitted that corporations are incapable of rendering military service, or to assist in the maintenance of peace when called upon to serve the State. But that again, in my view, is not a ground on which the rights of citizenship could be denied. Incapacity to render service may arise on account of diverse causes such as infancy, physical or mental incapacity, and such incapacity in the case of a natural person will not deprive him of the rights of citizenship. By reason of their constitution, artificial persons are incapable of rendering service—military or civil—but that may not by itself be a ground for holding that they cannot be citizens. If the corporations or artificial persons can be regarded as nationals of the State where they are incorporated and if they are permitted to exercise the various functions for which they are constituted and no prohibition is imposed upon them in the enforcement of the rights similar to those which are enforceable by natural persons who are citizens, notwithstanding the special character of the corporations and their incapacity to perform duties or to exercise such other rights which natural persons may possess, it will not be a ground for depriving them of the rights of citizenship for enforcing the fundamental rights under Article 19.

Two views are presented before us as to the meaning of the expression "citizen" used in Article 19 (1). On the one hand it is said that a citizen is a person natural or artificial who is entitled to all the rights which are capable of being enjoyed by the citizens under municipal law as distinguished from persons who are aliens or persons who are not competent to exercise such rights. The distinction, according to this view, springs from the capacity to exercise the rights—whether the body which exercises the rights is a natural person or an artificial person. The other view is that citizens are only natural persons who being nationals and not aliens are under the municipal law competent to exercise all the rights which the State permits. This view proceeds on the assumption that an artificial person can never be a citizen and it is only the natural persons who can be citizens. But having regard to the privileges

1. I.L.R. (1961) 1 Ker. 166.

2. A.I.R. 1962 S.C. 1371.

and duties of nationals competent by the municipal law, to exercise full political and civil rights, and also having regard to the fact that Companies are invested with important fundamental rights like equality before law, protection against taking of property without authority of law, protection against acquisition of property without payment of compensation or without public purpose, protection from imposition of taxes for sectional purposes, and also having regard to the fact that the companies are persons by their constitution and by the recognition afforded to them are competent to hold property and to dispose of property and to carry on trade, business, vocation or occupation and are protected from levy of taxes without authority of law and are guaranteed the freedom of trade, commerce and inter-course it would be difficult to hold that the expression "citizen" used in Article 19 was intended to have a restricted meaning of one who is a natural person.

The alternative argument submitted by Mr. Setalvad based upon the decision of the Bombay High Court in *The State of Bombay v. R. M. D. Chamarbaugwala*<sup>1</sup> need not then be considered in any detail. Chagla, C.J., in delivering the judgment of the Court relying upon a number of cases which arose under Article 3 section 2 of the Constitution of the United States of America expressed the view that it was open to the Court 'to tear the corporate veil' and to look behind it and if all the shareholders of the corporation are found to be citizens, the corporation should not be denied the fundamental rights which each of the shareholders has under Article 19 (1) (g) of the Constitution. In reaching that conclusion the learned Chief Justice relied upon the observations made by Mukherjea, J., in *Chiranjit Lal Chowdhury's case*<sup>2</sup>, which have already been set out. I am however unable to agree with the principle enunciated by the learned Chief Justice. A corporation is distinct from the shareholders who constitute it. The theory of corporate existence independent of shareholders, and its capacity to exercise rights has been built on *Saloman v. Saloman & Company Ltd.*<sup>3</sup> The rights and obligations of the company are different from the rights and obligations of the shareholders. By action taken against the company, the shareholders may be indirectly affected because their interest in the capital of the company is reduced. But action taken against the company does not directly affect the shareholders. The company in holding its property and carrying on its business is not the agent of the shareholders. Mukherjea, J., in *Chiranjit Lal Chowdhury's case*,<sup>2</sup> pointed out the difference in the passage already quoted between the rights of the company and the shareholders. Even if a company consists of shareholders who are all Indian citizens, the company has, still a distinct personality and an infringement of the rights of the company alone will not furnish a cause of action to the shareholders. The doctrine of what is called 'ripping open the Corporate veil' was evolved by American jurists in dealing with cases under the "diversity of jurisdiction" clause to enable companies constituted within State to have recourse to the Federal Courts in respect of disputes arising in other States as citizens. If the company is not a citizen it would be difficult to found a claim upon this doctrine attributing the status of citizenship to the company relying upon status of its shareholders and thereby to enforce rights of the shareholders as if they were the fundamental rights of the Company. In enforcing the rights of the shareholders, as if they were the rights of the company as envisaged by Chagla, C.J., numerous practical difficulties may arise. Suppose in the case of a company a substantial number of shareholders though not the majority are aliens, would it be possible for the Court to attribute rights of citizenship to the company relying upon the citizenship of some of its members so as to enable it to enforce fundamental rights under Article 19? Similarly in a case where a company incorporated in India may have a majority of its shareholders aliens. Would it be possible for the Court to enter upon an enquiry and to deny the rights of citizenship notwithstanding the place of its incorporation, because a majority of its members are aliens? The shareholding may vary from time to time: to-day the shareholding of aliens may exceed the shareholding of citizens and the next day the position may be reversed. Can it be said that the company goes on changing its citizenship, according as the shareholding fluctuates

1. I.L.R. (1955) Bom. 680.

2. (1951) S.C.J. 29 : (1950) S.C.R. 869.

3. L.R. (1897) A.C. 22.



between nationals and aliens? If the place of incorporation and the centre of management of its affairs do not confer right of citizenship upon the company, it would be impossible to project the citizenship of the shareholders upon the company so as to enable it to claim this reflected right and on that basis to claim relief for breach of fundamental rights.

The first part of the second question raises what is essentially a question of fact. The State Trading Corporation was, on the date of the petition, functioning under the direct supervision of the Government of India, the shareholding was in the names of the President and two Secretaries to the Government and its entire subscribed capital was contributed by the Government of India. But it is a commercial body; incorporated as the Memorandum of Association indicates to organise and undertake trade generally with State Trading Countries as well as other countries in commodities entrusted to it for such purpose by the Union Government from time to time and to undertake purchase, sale and transport of such commodities in India or anywhere else in the world and to do various acts for that purpose. The Articles of Association make minute provisions for sale and transfer of shares, calling of general meetings, procedure for the general meetings, voting by members, Board of Directors and their powers, the issue of dividend, maintenance of accounts and capitalisation of profits. The State Trading Corporation has been constituted not by any special statute or charter but under the Indian Companies Act as a Private Limited Company. It may be wound up by order of a competent Court. Though it functions under the supervision of the Government of India and its Directors, it is not concerned with performance of any governmental functions. Its functions being commercial, it cannot be regarded as either a department or an organ of the Government of India. It is a circumstance of accident that on the date of its incorporation and thereafter its entire shareholding was held by the President and the two Secretaries to the Government of India.

Strong reliance was sought to be placed upon the decision of the House of Lords in *Bank Voor Handel En Scheepvaart N. V. v. Administrator of Hungarian Property*<sup>1</sup>, in support of the contention that the State Trading Corporation, which is the first petitioner in this case, was merely an agent of the Government of India. That was a case in which after the invasion of Holland in 1940, certain stocks of gold belonging to a Dutch banking corporation in London were transferred to the Custodian of Enemy Property, who sold the same and invested and re-invested the proceeds. These investments were subsequently transferred to the Administrator of Enemy Property in the erroneous belief that they were the property of a Hungarian national. After the termination of hostilities the Bank obtained judgment for recovery of the proceeds of sale together with interest or other profits earned thereon. During the management of the Custodian, tax was paid to the British Treasury on the income received by him by the sale of the stocks of gold, but the Bank claimed that it was entitled to recover a sum equivalent to an amount assessed on the Custodian as tax with respect of the income of the invested proceeds of sale and paid by him. The House of Lords by a majority held that if the Custodian had asserted Crown immunity, he would not have been obliged to pay tax on the income, for the Custodian was a servant or agent of the Crown and under the 'trading with the enemy legislation' the Crown had sufficient interest to enable it to invoke immunity from tax if it chose to do so even if the Crown had no beneficial interest in the income. The principle of that case, in my judgment, has no application in the present case. The Custodian who was constituted a Corporation sole was regarded by the House of Lords as entitled in the circumstances of the case to Crown immunity from payment of income-tax.

The question whether the corporation either sole or aggregate is an agent or servant of the State must depend upon the facts of each case. In the absence of any statutory provision a commercial corporation acting on its own behalf even if it is controlled wholly or partially by a Government Department, will be presumed not

to be a servant or an agent of the State. The fact that a Minister appoints the members of the Corporation and is entitled to call for information and to supervise the conduct of the business, does not make the Corporation an agent of the Government. Where, however, the Corporation is performing in substance governmental, and not commercial functions, an inference that it is an agent of the Government may readily be made.

In *Tumlin v. Hannaford*<sup>1</sup>, a house had vested by the operation of the Transport Act, 1947 in the British Transport Commission and the question arose whether the house could be regarded as owned by the Crown and administered by the British Transport Commission as Crown's agent. Denning, L.J., pointed out that the Minister of Transport had extensive powers over the British Transport Commission. The Minister had powers as great as those of a man holding all the shares in a private company possesses. He appointed the Directors *i.e.*, the Members of the Commission and fixed their remuneration. They were bound to give him the information he wanted, he was entrusted with power to give directions of a general nature, in matters which appeared to him to affect the national interest, as to which he was the sole Judge and the Commissioners were bound to obey him. Notwithstanding these great powers the Corporation could not be regarded as an agent of the Minister any more than the Company is the agent of the shareholders or even of the sole shareholder Denning, L.J., observed :

"In the eye of the law, the Corporation is its own master and is answerable as fully as any other person or Corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a Government Department nor do its powers fall within the province of Government."

The assumption underlying the second question that a department and organ of the Union or the State even if it is entitled to be called a citizen cannot claim to enforce fundamental rights under Part III of the Constitution against the "State" as defined in Article 12 thereof needs to be examined. Assuming that the State Trading Corporation is a department or organ of the Government of India, it is not still seeking to enforce any fundamental rights against the Union of India : it is seeking to enforce its rights against the State of Andhra Pradesh. By Article 12 of the Constitution the Union as well as the State of Andhra Pradesh are States. Assuming that the State Trading Corporation be regarded as 'the State' within the meaning of Article 12 of the Constitution if it be regarded as a citizen there is nothing in Article 19 which prohibits enforcement by the citizen the fundamental rights vested in it. For the application of Article 19, two conditions are necessary (1) that the claimant to the protection of the right must be a citizen and (2) that the right infringed must be one of the fundamental freedoms mentioned in Article 19. If these two conditions are fulfilled, the citizen would, in my judgment, be entitled subject to the restrictions imposed by the Article to enforce the rights against their infringement by action executive or legislative by any Government or the Legislature of the Union or the State and all local or other authorities within the territory of India or under the control of the Government of India. There is no warrant for restricting the enforcement of those rights on some implication that an agent or servant of the State if he or it be a citizen cannot enforce the fundamental rights against another body which can be regarded also as a State within the meaning of Article 12 of the Constitution.

In my view, therefore, the first question should be answered in the affirmative, and first part of the second question in the negative. The answer to the second part of the second question will be as follows : even if the State Trading Corporation be regarded as a department or organ of the Government of India, it will, if it be a citizen competent to enforce fundamental rights under Part III of the Constitution against the State as defined in Article 12 of the Constitution.

V.S.

*Opinion delivered against the petitioner.*

# THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. C. DAS GUPTA AND RAGHUBAR DAYÁL, JJ.—

The Board of High School and Intermediate Education, U.P.,  
Allahabad and another

.. *Appellants\**

v.

Bagleshwar Prasad and another

.. *Respondents.*

*Constitution of India (1950), Article 226—Court's powers to interfere under—Extent and scope—If can interfere with orders of Domestic Tribunals appointed by Board of Education.*

Where the students against whom charges are framed are given adequate opportunities to defend themselves, Courts should be slow to interfere with the decisions of domestic tribunals appointed by educational bodies like the Board of Education or University. In dealing with the validity of the impugned orders passed by the Board under Article 226 of the Constitution of India (1950) the High Court is not sitting in appeal over the decision in question and its jurisdiction is limited. Though, if the impugned order is not supported by any evidence at all, the High Court would be justified to quash that order, the conclusion that the impugned order is not supported by any evidence must be reached after considering the question as to whether probabilities and circumstantial evidence do not justify the said conclusion.

Appeal by Special Leave from the Judgment and Order, dated the 4th September, 1961 of the Allahabad High Court in Civil Miscellaneous Writ No. 3469 of 1960.

*K. L. Misra*, Advocate-General for the State of Uttar Pradesh and *C. B. Agarwala* and *K. S. Hajela*, Senior Advocates (*G. P. Lal*, Advocate, with them), for Appellants.

*S. P. Sinha*, Senior Advocate (*M. I. Khowaja*, Advocate, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

*Gajendragadkar, J.*—This appeal by Special Leave arises out of a Writ Petition filed by the respondent Bagleshwar Prasad against the Board of High School and Intermediate Education, U.P., Allahabad, and its Secretary, appellants 1 and 2, and another. By his petition, the respondent challenged the validity of the order passed by appellant No. 1 on 5th December, 1960, cancelling the respondent's result at the High School Examination held in 1960. It appears that the respondent appeared for the said examination from the Nehru Intermediate College Centre, Bindki. He was declared to have passed the said examination in the II Division with distinction in Art. Thereafter, he joined Intermediate first year class in the Kulbaskar Ashram Agriculture College at Allahabad. On 3rd September, 1960, he received a letter from the Principal, Adarsh Higher Secondary School, Kora Jahanabad, from where he had appeared for the High School Examination, calling upon him to appear before a Sub-Committee to answer the charge of having used unfair means in English, Mathematics and Hindi papers. Accordingly, he appeared before the said Sub-Committee. A charge was given to him and his explanation was obtained on the said charge. This charge was based on the fact that in Hindi 3rd paper set at the said examination, the respondent had given wrong answers to Question No. 4 in precisely the same form in which the said answers had been given by a candidate whose Roll No. was 94733. The respondent's Roll No. was 94734. The respondent was shown the identical wrong answers to the said Question which were found in the two papers, and he was asked to explain about the said identity of the wrong answers. He admitted that the wrong answers appeared to be identical, but he denied that he had used any unfair means. The Sub-Committee however, was not satisfied with the explanation and reported that both the respondent and the candidate whose Roll No. was 94733 had used unfair means. As a result of the report made by the Sub-Committee, the first appellant passed an order cancelling the results of both the candidates. Both the said candidates disputed the validity of the said order in the Allahabad High Court. The petition filed by the candidate whose Roll No. was 94733.

was dismissed, but that of the respondent was allowed, and the impugned order passed by appellant No. 1 cancelling the result of the respondent in the High School Examination for 1960, has been set aside. It is against this order that the appellants have come to this Court by Special Leave.

From the petition filed by the respondent in the High Court (W.P. No. 3469 of 1960) it appears that he challenged the validity of the impugned order on several grounds. The principal contentions raised by the petitioner against the competence and the authority of appellant No. 1 and against the regularity and fairness of the enquiry held, arose for decision before the High Court in the companion W.P. No. 3196 of 1960 also. The High Court rejected the said contentions of law in that W.P. and for the reasons recorded in the judgment in that petition, the said contentions were rejected even in the present petition. Thus, the challenge to the validity of the order made on points of law was not sustained.

The High Court then proceeded to examine the narrow ground of attack against the validity of the order which was made on the basis that the impugned order was not supported by any evidence at all. It appears from the judgment of the High Court that the High Court was inclined to accept this argument and it has set aside the order on the ground that it is not supported by any evidence. The correctness of this finding is seriously disputed before us by the learned Advocate-General who appears for the appellants.

It is common ground that the proceedings taken against the respondent in respect of the unfair means alleged to have been adopted by him at the examination, are in the nature of quasi-judicial proceedings, and as such, in a proper case, orders passed as a result of the said proceedings would be liable to be challenged under Article 226 of the Constitution. It is also common ground that the High Court would be justified in quashing the impugned order if it is satisfied that the said order is not based on any evidence at all. An order passed by a Tribunal holding a quasi-judicial enquiry which is not supported by any evidence, is an order which is erroneous on the face of it and as such, is liable to be quashed by the High Court in exercise of its high prerogative jurisdiction to issue a writ under Article 226.

In the present case, the High Court has found that the conclusion of the Enquiry Committee that the respondent had copied either from the answer book of the candidate bearing Roll No. 94733 or from a common source, was not supported by any evidence. In coming to this conclusion, the High Court has assumed that the charge against the respondent was that he had copied from the candidate bearing Roll No. 94733. Having made this assumption, the High Court has observed that there was no charge against the respondent that he connived in the act of copying by the other candidate from his answer-book, and it has added that there is no evidence in proof of such connivance. The High Court has also stated that no evidence had been shown to justify the allegation that any outsider had helped the candidates, including the respondent. That, in brief, is the genesis of the final conclusion of the High Court.

It appears that the High Court was in error in assuming that the only charge against the respondent was that he had copied from the paper of the candidate bearing Roll No. 94733 and this error is basically responsible for the other observations made by the High Court. The translation of the charge as it has been printed in the record before us, no doubt, seems to support the assumption made by the High Court in regard to the nature of the charge. But the charge was framed in Hindi and it is common ground before us that the Hindi charge has not been properly translated from the record when it seems to show that what was alleged against the respondent was only that he had copied out from candidate bearing Roll No. 94733. The charge, in terms, was that having regard to the identity of the mistaken answers, the apprehension was that there had been copying, and that is very different from saying that the only charge was that the respondent had copied from the other candidate. This position is made very clear when we consider the explanation given by the respondent. In his explanation, the respondent had stated that he had not copied out from the answer-book of any candidate, nor had he allowed anyone to copy out from his answer-book, so far as he could.

He admitted that the mistaken answers in the two papers were identical and he pleaded that he could not say anything as to why this happened. He was also asked whether he had got any help from outside and he gave an answer in the negative. It would thus be seen that at the enquiry, the charge against the respondent was, either that he copied from candidate bearing Roll No. 94733, or that he connived at the said candidate copying from his answer-book, or that both of them had copied from a common source. In either case, it would amount to the adoption of unfair means. Therefore, in our opinion, the High Court was in error in assuming that the charge was very narrow and did not include the two other alternatives on which the adoption of unfair means was sought to be established.

There is another circumstance which is relevant and significant and that has been ignored by the High Court in dealing with this petition. It appears that at the examination held at Bindki Centre, unfair means were adopted on a very large scale by a large number of students and the examination appears to have been conducted in an atmosphere which was not at all congenial to the enforcement of the discipline which has to be observed in conducting examinations. It appears that there are rivalries and party politics in the Municipal Board of Bindki that runs the institution at which this examination was held, and there are rivalries and party politics even amongst the members of the staff. The members of the Municipal Board and other influential people of the locality bring undue pressure on the Principal and the Invigilators to help their wards or the wards of their friends and relatives in the Board's Examination. As a result of this unhealthy atmosphere, the Centre at Bindki for High School Examinations had been abolished for some years, but on account of public pressure it was re-started in 1960, and the result was very unfortunate.

It also appears that on the day of English paper, while students were answering the paper in room No. 3 an answer paper by some outsider was dropped into the room 15 minutes before the time to answer questions was over. This paper was thrown in room No. 3 from room No. 18. It was a typed paper giving answers to all the questions. The Assistant Teacher, Khajuha, who was one of the Invigilators, complained that the Parcha was typed in the office of the Superintendent of the Centre, but this allegation was denied. Indeed, from the reports made by the Invigilators and the findings made by the Enquiry Committee, it appears that the Invigilators themselves were so much frightened by the prevailing rowdiness and by pressure from influential people that they found themselves powerless to maintain discipline in the Examination Hall. It is, therefore, not surprising that some Invigilators could not prevent copying and in fact, six of them had to be warned to be careful in future.

The report of the Enquiry Committee also shows that the complaints which they were to investigate referred to copying on a large scale in several papers besides Hindi, and it is after examining all the complaints in the light of the evidence available to them that the Committee made its final report; and in that report, it held that the respondent and candidate bearing Roll No. 94733 were guilty of having used unfair means.

In dealing with the question as to whether the Committee was justified in coming to this conclusion against the respondent, it would not be reasonable to exclude from consideration the circumstances under which the whole enquiry came to be held and the general background of the prevailing disturbed and riotous atmosphere in the Examination Hall during the days that the High School Examination was held at the Centre in 1960. Unfortunately, the High Court has ignored this background altogether.

Before the High Court, a statement was filed showing the seating arrangement in room No. 10 where the respondent was sitting for writing his answers. It appears that he was No. 3 in the 3rd row, whereas the other candidate with Roll No. 94733 was No. 4 in the second row. The High Court was very much impressed by the fact that the respondent could not have looked back and copied from the

answer-book of the other candidate, and the High Court did not think that there was any evidence to show that the other candidate could have copied from the respondent's paper with his connivance. We have looked at the incorrect answers ourselves and we are not prepared to hold that the identical incorrect answers were given by the two candidates either by accident or by coincidence. Some of the incorrect answers, and, particularly, the manner in which they have been given, clearly suggest that they were the result of either one candidate copying from the other, or both candidates copying from a common source. The significance of this fact has been completely missed by the High Court. The question before the Enquiry Committee had to be decided by it in the light of the nature of the incorrect answers themselves, and that is what the Enquiry Committee has done. It would, we think, be inappropriate in such a case to require direct evidence to show that the respondent could have looked back and copied from the answer written by the other candidate who was sitting behind him. There was still the alternative possibility that the candidate sitting behind may have copied from the respondent with his connivance. It is also not unlikely that the two candidates may have talked to each other. The atmosphere prevailing in the Examination Hall does not rule out this possibility. These are all matters which the Enquiry Committee had to consider, and the fact that the Enquiry Committee did not write an elaborate report, does not mean that it did not consider all the relevant facts before it came to the conclusion that the respondent had used unfair means.

In dealing with petitions of this type, it is necessary to bear in mind that educational institutions like the Universities or appellant No. 1 set up Enquiry Committees to deal with the problem posed by the adoption of unfair means by candidates, and normally, it is within the jurisdiction of such domestic tribunals to decide all relevant questions in the light of the evidence adduced before them. In the matter of the adoption of unfair means, direct evidence may sometimes be available, but cases may arise where direct evidence is not available and the question will have to be considered in the light of probabilities and circumstantial evidence. This problem which educational institutions have to face from time to time is a serious problem and unless there is justification to do so, Courts, should be slow to interfere with the decisions of domestic tribunals appointed by educational bodies like the Universities. In dealing with the validity of the impugned orders passed by Universities under Article 226, the High Court is not sitting in appeal over the decision in question; its jurisdiction is limited though it is true that if the impugned order is not supported by any evidence at all, the High Court would be justified to quash that order. But the conclusion that the impugned order is not supported by any evidence must be reached after considering the question as to whether probabilities and circumstantial evidence do not justify the said conclusion. Enquiries held by domestic tribunals in such cases must, no doubt, be fair and students against whom charges are framed must be given adequate opportunities to defend themselves, and in holding such enquiries, the tribunals must scrupulously follow rules of natural justice; but it would, we think, not be reasonable to import into these enquiries all considerations which govern criminal trials in ordinary Courts of law. In the present case, no animus is suggested and no *mala fides* have been pleaded. The enquiry has been fair and the respondent has had an opportunity of making his defence. That being so, we think the High Court was not justified in interfering with the order passed against the respondent.

We ought, however, to add that though we are inclined to accept the argument raised by the learned Advocate-General against the decision of the High Court, we do not propose to make any consequential order in favour of the appellants, because the learned Advocate-General has fairly conceded that he does not want any such order in the present appeal. It appears that the respondent has, in June, 1962, passed his Intermediate Examination and it has been fairly conceded that there is no intention to disturb his career under the present circumstances. The learned Advocate-General wanted a decision from us in this appeal because he apprehended that the reasoning adopted by the High Court in setting aside the

order passed against the respondent may be construed to mean that under Article 226, the High Court can examine the merits of the order passed by appellant No. 1 in such cases.

The result is, though we agree with the appellants that the order passed by the High Court was not justified, we refrain from setting it aside for the reasons just explained. There would be no order as to costs.

K.L.B.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

The State of Madhya Pradesh

.. *Appellant\**

v.

Peer Mohd. and another

.. *Respondents.*

*Foreigners Act (XXXI of 1946), section 14 and Foreigners Order, 1948, clause 7—Prosecution under—Constitution of India (1950), Articles 7 and 9—Scope and effect—Persons migrating to India after 26th January, 1950—Whether foreigners under Article 7.*

'Has migrated' occurring in Article 7 of the Constitution of India (1950) in the context cannot possibly include cases of persons who would migrate after the commencement of the Constitution. Thus it is only persons who had migrated prior to the commencement of the Constitution of India, that fall within the scope of Article 7. The proviso to Article 7 which deals with cases of persons who having migrated to Pakistan have returned to India under a permit for resettlement also supports the above view.

Similarly the acquisition of the citizenship of any foreign State to which Article 9 refers is acquisition made prior to the commencement of the Constitution. 'Has voluntarily acquired' occurring in Article 9 emphasises that the application of Article 9 is confined to the case of acquisition of citizenship of foreign State before the commencement of the Constitution.

Article 7 refers to migration which has taken place between the 1st day of March, 1947 and January 26, 1950. That being so, it cannot be held that the respondents fall within Article 7 by virtue of the fact that they migrated from India to Pakistan sometime after January 26, 1950 and should therefore be deemed not to be citizens of India.

The question whether the respondents have lost their citizenship of India under section 9 (2) of the Citizenship Act (LVII of 1955) will have to be decided by the appropriate authority namely the Central Government and this cannot be tried in Courts.

The High Court was right in holding that the respondents were not foreigners within the meaning of clause 7 of the Foreigners Order, 1948 and cannot therefore be prosecuted under section 14 of the Foreigners Act, 1946.

Appeal from the Judgment and Order, dated the 26th April, 1960 of the Madhya Pradesh High Court, Jabalpur in Criminal Appeal No. 388 of 1958.

*B. Sen*, Senior Advocate (*I. N. Shroff*, Advocate, with him), for Appellant.

The Judgment of the Court was delivered by

*Gajendragadkar, J.*—A charge-sheet was presented by the appellant the State of Madhya Pradesh against the respondents Peer Mohammad and his wife Mst. Khatoon under section 14 of the Foreigners Act, 1946 (hereinafter called the Act) read with clause 7 of the Foreigners Order, 1948 (hereinafter called the Order) in the Court of the Magistrate, 1st Class, Burhanpur. The case against the respondents was that they had entered India on 13th May, 1956, on the strength of a Pakistani passport and a visa issued in their favour on 8th May, 1956 and reached Burhanpur on 15th May, 1956. Even after the period of the visa had expired, they continued to stay in India. Consequently, the District Magistrate, Burhanpur, served a notice on them on 14th May, 1957 calling upon them to leave India on or before 28th May, 1957. The respondents did not comply with the notice and by their unauthorised and illegal over-stay in India, they rendered themselves liable under section 14 of the Act and clause 7 of the Order.

the commencement of the Constitution. Just as a person who has migrated to Pakistan from India prior to 26th January, 1950 shall not be deemed to be a citizen of India by virtue of such migration, so should a person who has migrated from India to Pakistan even after the commencement of the Constitution be denied the right of citizenship. That is the appellant's case and it is based substantially on the ground that the clause "at the commencement of the Constitution" is not used by Article 7.

This argument, however, cannot be accepted because it is plainly inconsistent with the material words used in the Article. It will be noticed that a person who shall not be deemed to be a citizen of India is one "who has, after the first day of March, 1947, migrated from the territory of India to the territory of Pakistan". It is true that migration after 26th January, 1950, would be migration after the first day of March, 1947, but it is clear that a person who has migrated after 26th January, 1950, cannot fall within the relevant clause because the requirement of the clause is that he must have migrated at the date when the Constitution came into force. "Has migrated" in the context cannot possibly include cases of persons who would migrate after the commencement of the Constitution. It is thus clear that it is only persons who had migrated prior to the commencement of the Constitution that fall within the scope of Article 7. The use of the present perfect tense is decisive against the appellant's contention and so, the absence of the words on which Mr. Sen relies has no significance. Besides, as the Article is worded, the use of the said words would have been inappropriate and having regard to the use of the present perfect tense, such words were wholly unnecessary. The Proviso to Article 7 which deals with cases of persons who having migrated to Pakistan have returned to India under a permit for resettlement, also supports the same conclusion. The migration there referred to appears to be migration prior to the commencement of the Constitution.

It is relevant to refer to Article 9 in this connection. This Article deals with cases of persons who have voluntarily acquired the citizenship of any foreign State and it provides that such persons shall not be deemed to be citizens of India by virtue of Articles 5, 6 or 8. Now, it is clear that the acquisition of the citizenship of any foreign State to which this Article refers is acquisition made prior to the commencement of the Constitution. "Has voluntarily acquired" can have no other meaning, and so there is no doubt that the application of Article 9 is confined to the case of acquisition of citizenship of foreign State prior to the commencement of the Constitution. In other words, the scope and effect of Article 9 is, in a sense, comparable to the scope and effect of Article 7. Migration to Pakistan which is the basis of Article 7 like the acquisition of citizenship of any foreign State which is the basis of Article 9, must have taken place before the commencement of the Constitution. It will be noticed that migration from Pakistan to India as well as migration from India to Pakistan which are the subject-matters of Articles 6 and 7, deal with migrations prior to the commencement of the Constitution. The Constitution-makers thought it necessary to make these special provisions, because migrations both ways took place on a very wide scale prior to 26th January, 1950 on account of the partition of the country. Migrations to Pakistan which took place after 26th January, 1950, are not specially provided for. They fall to be considered and decided under the provisions of the Citizenship Act; and as we will presently point out, citizens migrating to Pakistan after the said date would lose their Indian citizenship if their cases fall under the relevant provisions of the said Act.

It is true that as Article 7 begins with a non-obstante clause by reference to Articles 5 and 6, there is a little overlapping. The non-obstante clause may not serve any purpose in regard to cases falling under Article 5 (c), but such overlapping does not mean that there is any inconsistency between the two Articles and it can, therefore, have no effect on the construction of Article 7 itself. Therefore, we are satisfied that Article 7 refers to migration which has taken place between the first day of March, 1947, and 26th January, 1950. That being so, it cannot be held that the respondents fall within Article 7 by virtue of the fact that they migrated from India



to Pakistan sometime after 26th January, 1950, and should, therefore, be deemed not to be citizens of India.

In this connection, it is necessary to add that cases of Indian citizens acquiring the citizenship of any foreign State are dealt with by Article 9, and the relevant provisions of the Citizenship Act, 1955. If the foreign citizenship has been acquired before 26th January, 1950, Article 9 applies; if foreign citizenship has been acquired subsequent to 26th January, 1950 and before the Citizenship Act, 1955 came into force, and thereafter, that is covered by the provisions of the Citizenship Act, vide *Izhar Ahmed Khan & others v. Union of India & others*<sup>1</sup>. It is well-known that the Citizenship Act has been passed by the Parliament by virtue of the powers conferred and recognised by Articles 10 and 11 of the Constitution and its relevant provisions deal with the acquisition of citizenship of India as well as the termination of the said citizenship. Citizenship of India can be terminated either by renunciation under section 8, or by naturalisation, registration or voluntary acquisition of foreign citizenship in any other manner, under section 9, or by deprivation under section 10. The question about the citizenship of persons migrating to Pakistan from India after 26th January, 1950, will have to be determined under these provisions of the Citizenship Act. If a dispute arises as to whether an Indian citizen has acquired the citizenship of another country, it has to be determined by such authority and in such a manner and having regard to such rules of evidence as may be prescribed in that behalf. That is the effect of section 9 (2). It may be added that the rules prescribed in that behalf have made the Central Government or its delegate the appropriate authority to deal with this question, and that means this particular question cannot be tried in Courts.

The result is that the respondents cannot be said to be foreigners by virtue of their migration to Pakistan after 26th January, 1950, and that is the only question which can be tried in Courts. If the State contends that the respondents have lost their citizenship of India under section 9 (2) of the Citizenship Act, it is open to the appellant to move the Central Government to consider and determine the matter, and if the decision of the Central Government goes against the respondents, it may be competent to the appellant to take appropriate action against the respondents. So far as the appellant's case against the respondents under Article 7 is concerned, the High Court was right in holding that the respondents were not foreigners within the meaning of clause 7 of the Order and cannot, therefore, be prosecuted under section 14 of the Act. The appeal accordingly fails and is dismissed.

K.L.B.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—B. P. SINHA, *Chief Justice*, P.B. GAJENDRAGADKAR, K. N. WANCHOO, K.C. DAS GUPTA AND J.C. SHAH, JJ.

Amir Singh and another

.. *Appellants\**

v.

Ram Singh and others

.. *Respondents.*

*Punjab Pre-emption (Amendment) Act (X of 1960), section 31—Effect of retrospective operation.*

It is clear that when a decree is passed in a pre-emption matter pending before the appellate Court, that Court must refuse to recognize the right to pre-empt which was recognised by the Punjab Pre-emption Act (I of 1913) but has been dropped by the Punjab Pre-emption (Amendment) Act (X of 1960) just as much as it must recognise rights which were not recognized by the unamended Act, but have been created by the Amending Act. The retrospective operation of section 31 of the Amending Act necessarily involves effect being given to the substantive provisions of section 15 retrospectively and that will apply as much to the extinction of the old rights as to the creation of new ones. Therefore, the respondents are entitled to claim that they should be given an opportunity to prove their case that as tenants of the lands in suit they have a right to claim pre-emption.

1. A.I.R. 1962 S.C. 1052.

\*C.As. Nos. 436 to 438 of 1961.

4th October, 1962.

Appeals by Special Leave from the Judgment and Order dated the 9th December, 1959, of the Punjab High Court in Letters Patent Appeals Nos. 407, 408 and 409 of 1959.

*Achhru Ram*, Senior Advocate (*B.D. Jain*, Advocate with him), for Appellants

*Gian Singh Vohra*, Advocate, for Respondents.

The Judgment of the Court was delivered by

*Gajendragadkar, J.*—What is the effect of the retrospective operation of section 31 introduced by the Punjab Pre-emption (Amendment) Act, 1960 (X of 1960) in the parent Act of Pre-emption (I of 1913). That is the short question which arises for our decision in these three appeals which have been ordered to be consolidated for the purpose of hearing by this Court. These appeals arise from three pre-emption suits instituted by the respondents against the respective appellants. The respondents' case was that the properties in suit had been sold by Aftab Rai on the 31st May, 1956, for Rs. 10,000 to the appellants and it is these sales which they wanted to pre-empt. They alleged that they are the owners of agricultural land in Patti Aulakh and Patti Roda, in Mauza Marshar Kalan, and as such, they had the statutory right to claim pre-emption, under section 15 (c) (ii) and (iii). The appellants resisted this claim on the ground that the respective vendees from Aftab Rai had transferred by exchanges about 2 kanals out of the lands purchased by them and as a result of the said exchanges the appellants had themselves become entitled to pre-empt the said sales under the same statutory provision. Since the appellants had acquired equal status with the respondents who claimed to be the pre-emptors, their claim for pre-emption cannot be sustained. That, in brief, was the nature of the contest between the parties.

The trial Court held that the exchanges on which the appellants relied had not been proved and so, it gave effect to the respondent's right to pre-empt under section 15 (c) (ii) and (iii). The appellants took the matter before the Additional District Judge in appeal. The lower appellate Court was pleased to admit additional evidence under Order 41, rule 27 and held that the exchanges in question had in fact been proved and were, in law, valid. It, therefore came to the conclusion that the appellants acquired equal status with the respondents and so, the respondents' claim for pre-emption must fail. That is why the appeals preferred by the appellants were allowed and the respondents' suits were dismissed.

The dispute was then taken up before the High Court of Punjab by the respondents by Second Appeals. Mahajan, J. who heard these appeals held that the property acquired by exchange in lieu of the part of the property purchased by the vendees did not give the appellants a right to pre-empt. He referred to the fact that exchange of lands was sometimes recognised as conferring on the party the right to pre-empt, but that was where the land exchanged did not form part of the land sold and pre-empted. In the result, the High Court held that the plea made by the appellants was not well-founded in law and so, the respondents were entitled to pre-empt. As a result of this finding, the decrees passed by the lower appellate Court were reversed and the respondents' suits were decreed. The appellants then moved the Division Bench by Letters Patent Appeals, but these appeals were dismissed. It is against the decrees thus passed by the Division Bench in Letters Patent Appeals that the appellants have come to this Court by Special Leave.

We have already noticed that both the appellants and the respondents are claiming a right to pre-empt under section 15 (c) (ii) and (iii) of the parent Act of 1913. On the 4th February, 1960, the Amending Act X of 1960 was passed. Section 4 of the Amending Act has substituted a new section 15 for the old section 15 after making substantial changes in the provisions of the earlier section. Clauses (ii) and (iii) of the original section 15 (c) have been deleted, with the result that the claims for pre-emption made both by the appellants and the respondents have ceased to be recognised by the amended provisions. The appellants contend that since the respondents have got a decree for pre-emption in their favour on the provisions of

the unamended section 15, that decree can no longer be sustained because of the provisions of section 31 of the Amending Act. Section 31 provides that no Court shall pass a decree in a suit for pre-emption whether instituted before or after the commencement of the Punjab Pre-emption (Amendment) Act, 1959 (1960) which is inconsistent with the provisions of the said Act. In support of his argument that section 31 being retrospective in operation the respondents' title to claim pre-emption can no longer be entertained, Mr. Achhru Ram for the appellants has invited our attention to a recent decision of this Court in the case of *S. Dayal Singh v. Shri Suraj Singh*<sup>1</sup>, pronounced on 30th August, 1962. In that case, Ayyangar, J. who spoke for the Constitution Bench considered the question about the retrospective operation of section 31 and has observed that the said provision is retrospective and that the language used in the said section is "plain and comprehensive so as to require an appellate Court to give effect to the substantive provisions of the Amending Act whether the appeal before it is one against a decree granting pre-emption or one refusing that relief." It was no doubt urged before the Court in that case that the words used in section 31 did not justify the application of the amended provisions to proceedings pending before the appellate Court; the said words showed that the said provisions could be invoked only in cases which were pending before the trial Court. This contention was rejected and so, it must be taken to be settled that the provisions of section 31 are retrospective and can be relied upon by the appellants in their present appeals before this Court.

This position would undoubtedly have helped the appellants but for another complication which has been introduced by the relevant provisions of the amended section 15 enacted by the Amending Act. We have already noticed that some persons whose right to pre-empt was recognised by the corresponding provision of the parent Act, have been omitted by the amended section. The amended section has also introduced another class of persons on whom the right to claim pre-emption has been conferred. These persons are the tenants who hold under tenancy of the vendors the land or property sold or a part thereof. This class of tenants has been introduced in clauses (a), (b) and (c) of amended section 15. Clause (4) of section 15 (1) (c) provides that the right of pre-emption in respect of agricultural land and village immovable property shall vest in the tenants who hold under tenancy of the vendors or any one of them the land or property sold or a part thereof. Similar provisions are made in clauses (a) and (b) of the said section. For the respondents Mr. Vohra contends that they are the tenants who hold under tenancy of the vendor the lands in question and as such, they are now clothed with the right to claim pre-emption. In other words, the respondent's argument is that though the right to pre-empt which they possessed under clauses (ii) and (iii) of the unamended section 15 (c) of the parent Act have been taken away retrospectively by the Amending Act, they have been clothed with the same right by virtue of the fact that they fall under the fourth clause of the amended section 15 (1) (c) and the conferment of this right like the destruction of their right under the deleted provisions of the unamended section must operate retrospectively. He, therefore, suggests that the respondents ought to be given an opportunity to prove their case under the fourth clause of section 15 (c) as amended. In this connection, he has referred us to the fact that this plea has been specifically taken by the respondents in their Statement of the Case before this Court. It is on this plea that the question about the effect of the retrospective operation of section 31 arises.

Mr. Achhru Ram contends that though section 31 is retrospective and in that sense the rights to pre-empt which vested in the respondents at the time when they instituted the present suits have been retrospectively taken away from them, it cannot be said that the right to pre-empt to which the respondents lay claim in the present appeals has been retrospectively created. His argument is that by the Amending Act, the Legislature has no doubt provided that certain classes of persons who were entitled to pre-empt under the old Act should not be given that right and the extinction of the said right should operate retrospectively, but that

cannot be said to be the policy of the Legislature in regard to the rights which have been created for the first time by the Amending Act.

The argument thus presented may *prima facie* appear to be attractive; but a close examination of the words used in section 31 shows that it is not well-founded. Section 31, in substance, requires the appellate Court to pass a decree in a pre-emption matter which is not inconsistent with the provisions of the Amending Act. In the present appeals, if we were to uphold the respondents' right to claim pre-emption on the strength of the provisions of section 15 (c) as they stood prior to the amendment, that would be inconsistent with the provisions of the Amending Act, and so, the change made by the Amending Act has to be given effect to and the right which once vested in the respondents must be deemed to have been retrospectively taken away from them. On this point there is no dispute. Would it make any difference in the legal position when we are dealing with rights which are created for the first time by the Amending Act on the date when this Court will pass a decree in the present appeals? If the rights created in favour of the tenants are not recognised and a decree is passed ignoring the said rights, that decree would be inconsistent with the relevant provisions of the Amending Act, and section 31 has clearly enjoined that no Court shall pass a decree which is inconsistent with the provisions of the Amending Act. The position, therefore, appears to be clear that when a decree is passed in a pre-emption matter pending before the appellate Court, that Court must refuse to recognise the right to pre-empt which was recognised by the unamended Act but has been dropped by the Amending Act just as much as it must recognise rights which were not recognised by the unamended Act but have been created by the Amending Act. The retrospective operation of section 31 necessarily involves effect being given to the substantive provisions of section 15 retrospectively and that will apply as much to the extinction of the old rights as to the creation of new ones. The retrospective operation of section 15 which is consequential on the retrospective operation of section 31 is not affected by the fact that the right of pre-emption prescribed by section 15 is referred to as a right which shall vest in the persons specified in sub-sections (a), (b) and (c) of section 15 (1).

It is, however, urged that the law of pre-emption requires that the pre-emptor must possess the right to pre-empt at the date of the sale, at the date of the suit and at the date of the decree. This position cannot be disputed. But when it is suggested that the respondents cannot claim that they had the right when they brought the present suit or when the sales were effected, the argument ignores the true effect of the retrospective operation of section 31 and section 15. If the inevitable consequence of the retrospective operation of section 31 is to make the substantive provisions of section 15 also retrospective, it follows that by fiction introduced by the retrospective operation, the rights which the respondents claim under the amended provisions of section 15 must be deemed to have vested in them at the relevant time. If the relevant provisions are made retrospective by the Legislature, the retrospective operation must be given full effect to, and that meets the argument that the right to pre-empt did not exist in the respondents at the time when the sale transactions in question took place. Therefore, we are satisfied that the respondents are entitled to claim that they should be given an opportunity to prove their case that as tenants of the lands in suit they have a right to claim pre-emption. Incidentally, when the respondents filed the present suits, they had a right to pre-empt under the relevant provisions of the Act as they stood at that time; by the amendment, that right has been taken away, but instead they claim another right by virtue of their status as tenants of the lands, and this right is, by the retrospective operation of section 31, available to them. We must accordingly set aside the decrees passed by the High Court and send the matters back to the trial Court with a direction that it should allow the respondents an opportunity to amend their claims by putting forth their right to ask for pre-emption as tenants under the amended provisions of section 15. After the amendments are thus made, the appellants should be given an opportunity to file their written statements and then appropriate issues should be framed and the suits tried and disposed of in the light of the findings on those issues in accordance with law. Under the unusual circumstances in which

this litigation has thus secured a further lease of life, we direct that the costs incurred so far should be borne by the parties.

K.L.B.

*Appeal allowed and  
Case remanded to trial Court.*

# THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J.L. KAPUR AND J.C. SHAH, JJ.

The State of Kerala

.. Appellant\*

v.

M. Appukutty

.. Respondent.

*Madras General Sales Tax Act (IX of 1939), sections 9, 12 (2) and 19—Rules 17 (1), 17 (1-a) and 17 (3-a) framed under section 19 of the Act—Vires scope and effect—Whether the notice issued by the Deputy Commissioner for escaped turnover was without jurisdiction.*

Section 19 (1) of the Madras General Sales Tax Act (IX of 1939) provides that “the State Government may make rules to carry out the purposes of this Act” and the Long Title of the Act is “an Act to provide for the levy of general tax on the sale of goods in the State of Madras”. Thus Rule 17 and the various clauses thereof made under section 19 of the Act are not beyond the rule making power of the State Government.

In the instant case after an appeal to the Commercial Tax Officer there was no further proceeding and therefore the Deputy Commissioner who is the revising authority acted under Rule 17 (3-A) and issued a notice, which according to that sub-rule he had power to issue and then determined the escaped turnover. Sub-rule (3-A) of Rule 17 on its plain construction confers jurisdiction on the revising authority to issue the notice which it did issue and thus the judgment of the High Court is to that extent, erroneous and it cannot be said that the notice was without jurisdiction.

Rule 17 confers on the Deputy Commissioners the power to determine and tax escaped turnover in cases where revisions have been taken to them (sub-rule (1-A)) and also where revisions have not been taken to them (sub-rule (3-A)). Provisions of section 9 (1) and (2) are therefore no bar to the exercise of the power of assessing escaped turnovers. It cannot be said in view of Rule 17 that the power of revision by the Deputy Commissioners is limited to powers under section 12 (2) of the Act.

Appeal by Special Leave from the Judgment and Order dated the 25th September, 1958 of the Kerala High Court in Tax Revision Case No. 11 of 1957.

*S. T. Desai*, Senior Advocate, (*V. A. Syeid Muhammed*, Advocate, with him), for Appellant.

*T.V.R. Tatachari*, Advocate, for Respondent.

The Judgment of the Court was delivered by

*Kapur, J.*—In this appeal by Special Leave against the Judgment and Order of the High Court of Kerala the appellant is the State of Kerala and the respondent is the assessee. The appeal arises out of proceedings under the Madras General Sales Tax Act, 1939, (Madras Act IX of 1939) read with the Rules made under section 19 of that Act. In this judgment the former will be referred to as the Act and the latter as the Rules. The area of Kozhikode was originally within the State of Madras, but by the States Re-organisation Act was transferred to the State of Kerala. The Madras General Sales Tax Act, however, continued to apply.

The assessment period for the purposes of the turnover in dispute is 1952-53. By an order dated 27th March, 1954, the Deputy Commercial Tax Officer, Kozhikode, imposed sales tax on the respondent on a net turnover of Rs. 12,56,178-14-0 and the appeal taken against that order to the Commercial Tax Officer was dismissed. On 15th March, 1956, a notice was issued by the Deputy Commissioner of Commercial Taxes against the assessee proposing to determine the escaped turnover for the period of assessment. By an order dated 31st March, 1956, the Deputy Commissioner determined the revised turnover. An appeal was taken against that order to the Sales Tax Appellate Tribunal, Trivandrum, but that appeal was dismissed on 23rd March, 1957. Against that order a revision was

taken to the Kerala High Court and by its judgment dated 25th September, 1958, the High Court set aside the order of the Deputy Commissioner on the ground that the notice issued by the Deputy Commissioner of Commercial Taxes was without jurisdiction and the order of the Appellate Tribunal was therefore erroneous. Another question which had been raised before the High Court, that the rule under which the Deputy Commissioner purported to act was *ultra vires* of the Act, was not decided because of the decision on the first question i.e., of jurisdiction. Against that judgment and order the State of Kerala has come in appeal by Special Leave to this Court.

In appeal, before us, two main contentions have been raised : One on behalf of the appellant—the State of Kerala—that the notice issued by the Deputy Commissioner was not without jurisdiction and the High Court's opinion on that point is erroneous ; and the second on behalf of the respondent assessee that if the notice was not without jurisdiction then the rule under which the notice was issued was *ultra vires* as it was beyond the substantive provisions of the Act. For this purpose it is necessary to refer to some of the relevant provisions of the Act and the Rules. The procedure to be followed and the power of assessment of the Assessing Authority is contained in section 9 of the Act and we need only quote sub-sections (1) and (2) of that section which read as under :—

"9 (1) Every dealer whose turnover is ten thousand rupees or more in a year shall submit such return or returns relating to his turnover in such manner and within such periods as may be prescribed.

(2) (a) If the assessing authority is satisfied that any return submitted under sub-section (1) is correct and complete, he shall assess the dealer on the basis thereof.

(b) If no return is submitted by the dealer under sub-section (1) before the date prescribed or specified in that behalf or if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority shall assess the dealer to the best of his judgment.

Provided....."

Section 11 deals with appeals and section 12 with the power of the Sales Tax Authorities to pass orders in revision. One of the arguments relating to *ultra vires* was based on sub-section (2) of section 12 of the Act. That sub-section is as follows :—

"Section 12 (1) The Commercial Tax Officer may,—

(i) .....

(ii) .....

(2) The Deputy Commissioner may—

(i) *suo motu* or

(ii) in respect of an order passed or proceeding recorded by the Commercial Tax Officer under sub-section (1) or any other provision of this Act and against which no appeal has been preferred to the Appellate Tribunal under section 12-A on application, call for and examine the record of any order passed or proceeding recorded under the provisions of this Act by any officer subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such order, or as to the regularity of such proceeding, and may pass such order with respect thereto as he thinks fit."

Section 12-A provides for appeals to the Appellate Tribunal and section 12-B for revision to the High Court. Section 19 gives power to the Government to make Rules and the relevant provisions of that section are 19 (1) and 19 (2) (f). They are as under :—

"19 (1). The State Government may make Rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of foregoing power such Rules may provide for—

(f) the assessment to tax under this Act of any turnover which has escaped assessment and the period within which such assessment may be made, not exceeding three years."

Under the rule-making power conferred by section 19 Rules have been framed and we are concerned in this appeal with Rules 17 (1), 17 (1-A) and 17 (3-A). They read as under :—

"17 (1) If for any reason the whole or any part of the turnover of business of a dealer or licensee has escaped assessment to the tax in any year or if the licence fee has escaped levy in any year, the assessing authority or licensing authority, as the case may be, (subject to the provisions in sub-rule (1-A) may at any time within three years next succeeding that to which the tax or licence fee relates (determine to

the best of his judgment the turnover which has escaped assessment and assess the tax payable on such turnover) or levy the licence fee after issuing a notice to the dealer or licensee and after making such enquiry as he considers necessary."

"17 (1-A). Where in respect of the turnover referred to in sub-rule (1) an order has already been passed under section 11 or 12 the assessing authority shall make a report to the appropriate appellate or revising authority as the case may be, which shall thereupon after giving the dealer concerned reasonable opportunity of being heard, pass such orders as it deems fit."

"17 (3-A). The powers conferred by sub-rules (1) and (3) on assessing authority or licensing authority may also be exercised by the appellate authority referred to in section 11; or as the case may be, by the revising authority referred to in section 12, at any time within a period of three years next succeeding that to which the tax, or as the case may be, the licence fee relates provided that such authority shall give the dealer concerned a reasonable opportunity of being heard before passing orders under this sub-rule."

We shall first take up the question of jurisdiction raised by the appellant. The tribunal held that the powers conferred on the Deputy Commissioner of Commercial Taxes under section 12 (2) and rule 17 (3-A) are distinct powers and action taken under Rule 17 (3-A) was not without jurisdiction. This finding was reversed by the High Court. Now section 12 (2) confers on the Deputy Commissioner the power *suo motu* or on an application to call for and examine the record of the proceedings of any officer subordinate to the Deputy Commissioner for the purpose of satisfying himself as to the legality or propriety of such order and he can pass such order with respect thereto as he thinks fit. The respondent's argument was, and that argument was accepted by the High Court, that this provision contains the totality of the powers of the Deputy Commissioner and the power to assess escaped turnover is merely incidental to the power of revision and may be exercised only when revisional jurisdiction under section 12 (2) is invoked under that section and the record is sent for *suo motu* or on application and the legality or propriety of the order made by the Subordinate Officer is scrutinized. Therefore the Deputy Commissioner was not in the absence of any substantive proceeding for exercise of revisional powers competent to assess escaped turnover. But the power to assess escaped turnover does not arise out of the revisional jurisdiction. In exercising revisional jurisdiction the Deputy Commissioner would be restricted to the examination of the record for determining whether the order of assessment was according to law. Rule 17 confers power to assess escaped turnover which may normally be exercised on matters *de hors* the record of assessment proceedings before the Deputy Commercial Tax Officer. It is true that the substantive provisions of the Act do not expressly deal with the power and procedure for assessment of escaped turnover, the Legislature has left it to be dealt with by statutory Rules to be framed under section 19, and rule 17 has been framed thereunder. Rule 17 (1) and (3-A) *ex facie* properly fall under section 19 (2) (f). In any event as was said by the Privy Council in *King Emperor v. Sibnath Banerji & others*<sup>1</sup>, the rule-making power is conferred by sub-section (1) of that section and the function of sub-section (2) is merely illustrative and the rules which are referred to in sub-section (2) are authorised by and made under sub-section (1). The provisions of sub-section (2) are not restrictive of sub-section (1) as expressly stated in the words "without prejudice to the generality of the foregoing power" with which sub-section (2) begins and which words are similar to the words of sub-section (2) of section 2 of the Defence of India Act which the Privy Council was considering. Now sub-section (1) of section 19 of the Act provides that "the State Government may make Rules to carry out the purposes of this Act" and the Long Title of the Act is "an Act to provide for the levy of general tax on the sale of goods in the State of Madras." Therefore in our opinion Rule 17 and the various clauses thereof made under section 19 are not beyond the rule-making power of the State Government as contained in section 19.

The first sub-rule of Rule 17 provides that the assessing authority may subject to sub-rule (1-A) at any time within three years next succeeding that to which the tax relates determine the turnover which has escaped assessment and assess the tax payable on such turnover. That is the power of the assessing authority.

Sub-rule (1-A) deals with those cases where an order has already been passed by the appellate authority under section 11 or by a revising authority under section 12. In those cases the assessing authority has to make a report to the appropriate appellate or revising authority and that authority can, after giving the dealer concerned reasonable opportunity of being heard, pass such orders as it thinks fit. There is then a third case and that is where there has been no appeal or revision under sections 11 and 12 of the Act and therefore no order of the appellate authority or of revisional authority as contemplated in section 12 (2) of the Act and in those cases the appellate authority or the revising authority as the case may be has, under sub-rule (3-A), the same power as the assessing authority had under sub-rule (1-A) of Rule 17. In the present case after an appeal to the Commercial Tax Officer there was no further proceeding and therefore the Deputy Commissioner who is the revising authority acted under Rule 17 (3-A) and issued a notice which, according to that sub-rule he had power to issue and then determined the escaped turnover. We have already held that Rule 17 is a valid rule under section 19 of the Act. Sub-rule (3-A) of Rule 17 on its plain construction confers jurisdiction on the revising authority to issue the notice which it did issue and in our opinion, and we say so with respect, the judgment of the High Court is, to that extent, erroneous and it cannot be said that the notice was without jurisdiction. Therefore the impugned order was not incorrect.

The respondent then argued that Rule 17 is *ultra vires* of the provisions of the Act and he put his argument like this ; that the power to assess is given to the assessing authority under section 9 (1) and (2) which has been quoted above. The assessing authority is defined in section 2 (a-2) to mean any person authorised by the State to make any assessment under this Act. Therefore the assessment of escaped turnover can only be done, if at all, by an "assessing authority" and not by a revising authority as he has not been authorised by the State Government. The answer to this is in section 2-B. That section authorises the State Government to appoint as many Deputy Commissioners of Commercial Taxes as it thinks fit for the purpose of performing the functions conferred on them under the Act and such Officers shall perform their functions within such local limit as the State Government in this behalf may assign to them. Rule 17 confers on the Deputy Commissioners the power to determine and tax escaped turnover in cases where revisions have been taken to them [sub-rule (1-A)] and also where revisions have not been taken to them [sub-rule (3-A)]. Provisions of section 9 (1) and (2) therefore are no bar to the exercise of power of assessing escaped turnovers. Moreover section 9 does not deal with escaped turnovers but is a provision for the determination of the turnover of a dealer in the first instance nor can it be said that Rule 17 is in conflict with section 12 (2). That section deals with another state of affairs and another jurisdiction *i.e.*, where the Deputy Commissioner *suo motu* or on an application made calls for the record and determines the legality or propriety of an order made by one of the subordinate officers. It cannot be said in view of Rule 17 that the power of revision by the Deputy Commissioners is limited to powers under section 12 (2). Rule 17 deals with a separate and independent jurisdiction in regard to the determining and taxing escaped turnovers. The provisions of section 12 (2) are in no way in conflict with the powers conferred under Rule 17 (1), 17 (1-A) and 17 (3-A).

The further argument that sub-rule (3-A) is confined to cases where the revision filed under section 12 (2) is pending is not supported by the language of that rule. Our attention was drawn to the judgment of the Madras High Court in the *State of Madras v. Louis Dreyfus & Co., Ltd.*<sup>1</sup>. But that case does not deal with sub-rule (3-A) which came into force later.

In our opinion the order of the High Court is erroneous and must be set aside. The appeal is allowed with costs.

K.L.B.

*Appeal allowed.*

1. (1956) 2 M.L.J. 327; I.L.R. (1956) Mad. 1285; 6 S.T.C. 318, 328 (F.B.).



## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B.P. SINHA, *Chief Justice*, P.B. GAJENDRAGADKAR, K.N. WANCHOO, K.C. DAS GUPTA AND J.C. SHAH, JJ.

Ananga Bijoy Mittra

.. Appellant\*

v.

The Tata Iron &amp; Steel Co., Ltd., and others

.. Respondents.

*Chotanagpur Tenancy Act (VI of 1908), sections 4 and 6—'Raiyat'—Lease—Construction—'Agricultural' or horticultural purposes.'*

The facts, namely, that the land would be held on monthly tenancy and the tenant would abide by the house-building rules, have to be considered along with the earlier statement that the land was being applied "for garden purpose". The terms of the application for lease are sufficient to show that the lease was not for an agricultural or horticultural purpose. The lessee cannot claim to be a "raiya" and therefore the suit for ejectment is maintainable in the civil Court.

Appeal by Special Leave from the Judgment and Decree dated the 26th March, 1958 of the Patna High Court in Second Appeal No. 1330 of 1954.

N.C. Chatterjee, Senior Advocate (*R.C. Prasad*, Advocate with him), for Appellant.

S.N. Andley and S.P. Varma, Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

*Das Gupta, J.*—The subject-matter of this litigation is a plot of land measuring 1,267 sq. ft. in the Sakchi New Planning Area in the town of Jamshedpur. On 23rd June, 1937, Abdul Gani, through whom the present appellant claims to be interested in the land, applied for settlement of this plot of land to the Land Officer of the owner of the land, the Tata Iron and Steel Company Ltd. The application was allowed and the land was let out to Abdul Gani as a tenant from month to month at a rent of Re. 1 per month. The suit out of which this appeal has arisen was brought in 1949 for ejectment of the tenant after determination of the tenancy by a notice to quit the premises. There was also a prayer for arrears of rent at Re. 1 per month.

The defence of Abdul Gani was that he was an agriculturist tenant as contemplated under the Chotanagpur Tenancy Act and not a monthly tenant and that no monthly rent was paid for the land. It was also pleaded that the lease being for agricultural and horticultural purposes at an annual rent, the defendant acquired a valid occupancy right and was not liable to ejectment. The present appellant was added as a defendant by an order dated 25th May, 1953. He also filed a written statement contending that by operation of the provisions of Chotanagpur Tenancy Act, Abdul Gani had acquired occupancy right, that the purpose for which settlement was made with Abdul Gani could not create a monthly tenancy and the plaintiff was not entitled to Khas possession.

The Trial Court (The Additional Munsif, Jamshedpur), accepted the defence plea that the tenancy created in favour of Abdul Gani was agricultural, that Abdul Gani had acquired an occupancy raiyat's right therein and as the tenancy was governed by the Chotanagpur Tenancy Act the suit was not triable by a civil Court. Accordingly, he dismissed the suit.

On appeal, the Subordinate Judge, Singhbhum, agreed with the findings of the Trial Court that the holding was agricultural and therefore governed by the Chotanagpur Tenancy Act and accordingly affirmed the judgment and decree of the Trial Court.

The High Court of Judicature at Patna however came to the conclusion in Second Appeal that the lease was not for agricultural and horticultural purposes and there was no question of the defendant having acquired the right of occupancy

in the land. The High Court allowed the appeal, set aside the judgment and decree of the Courts below and decreed the plaintiff's suit.

Against this decision of the High Court this appeal has been filed by Special Leave granted by this Court.

In support of the appeal it is urged before us by Mr. N. C. Chatterjee, that the High Court erred in holding that the lease was not for agricultural or horticultural purposes. He points out that the application for lease of the land mentions "garden purpose" as the purpose of the tenancy and argues that that is sufficient to make Abdul Gani a raiyat within the meaning of section 6 of the Chotanagpur Tenancy Act. Section 4 of the Act states that for the purpose of this Act there shall be four classes of tenants, namely, (1) tenure-holders, (2) raiyats, (3) under-raiyats and (4) Mundari Khunt-kattidars. Admittedly and obviously, Abdul Gani was not a tenant under clauses (1), (3) and (4) and the only way he could come within the ambit of Chotanagpur Tenancy Act was by being a "raiya" as mentioned in clause (2). "Raiya" is defined in section 6 of this Act to mean

"primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself or by members of his family or by hired servants, or with the aid of partners; and includes the successors-in-interest of persons who have acquired such a right....."

It has been settled by a number of decisions of the Calcutta and the Patna High Courts that the purpose of planting an orchard comes within "the purpose of cultivation". If it appears that Abdul Gani took lease of the land in dispute for the purpose of growing an orchard he clearly became a raiyat under the Chotanagpur Tenancy Act. While there is no document creating the lease we have, in the present case, Abdul Gani's application for lease and the landlord's order granting the lease. The application is in these words:—

"I beg to apply for a plot of land measuring 1,267 sq. ft. in Sakchi New Planning for Garden Purpose and for permission to retain one step in the east side.

I agree to hold the land on monthly tenancy and to abide by the terms and conditions of the Company and the house building rules. I also agree to abide by the rules and by-laws of the Jamshedpur Notified Area Committee in force from time to time.

I agree to pay the security deposit to be fixed by you in respect of my tenancy as soon as the plot is allotted to me and shall submit the plan of my proposed house for approval of the Chief Town Engineer before I start construction.

I therefore request that you will kindly allot me a plot of land in the above mentioned Basti on your usual terms."

Mr. Chatterjee fastens on the words "for garden purpose" and argues that that shows clearly that the purpose was to grow an orchard. It will not be proper however to look only at this one phrase "for garden purpose" and to ignore the rest of the document. It has to be noticed that after stating in the first sentence that he wanted the land "for garden purpose" Abdul Gani stated in the next paragraph that he agreed to hold the land "on monthly tenancy" and again that he agreed "to abide by the terms and conditions of the Company and the house building rules." It is difficult to conceive of a lease for cultivation being taken on a monthly tenancy. It is even more difficult to understand why Abdul Gani would agree "to abide by the house building rules" if the purpose was only to grow an orchard. These two facts, namely, that the land would be held on monthly tenancy and the tenant would abide by the house-building rules, have to be considered along with the earlier statement that the land was being applied "for garden purpose". The terms of the application for lease are, in our opinion, sufficient to show that the lease was not for an agricultural or horticultural purpose. In view of this, it is unnecessary to investigate how the land was actually used. It may be mentioned however that if one did examine the evidence to find out such user, it becomes clear that while a part of the land was used for growing some guava trees and some flowers, a pacca room was also erected on a portion of the land. On a consideration of all these things we find ourselves in agreement with the High Court that the purpose of the lease was not agricultural or horticultural.

We have, therefore, come to the conclusion that the High Court was right in decrecing the plaintiff's suit. The appeal is accordingly dismissed with costs.

V S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P.B. GAJENDRAGADKAR, K.N. WANCHOO, K.C. DAS GUPTA AND J.C. SHAH, JJ.

Gajendra Narain Singh

.. Appellant\*

v.

Johrimal Prahlad Rai

.. Respondents.

*Civil Procedure Code (V of 1908), Order 21, rule 50 and Order 30, rules 5 and 6—Suit against firm—Person served as a partner—Decree obtained against firm—Execution against person served as partner.*

It is clear by the express words of the Order 30, rule 5, Civil Procedure Code, that in default of the notice prescribed in the rule the person served shall be deemed to be served as a partner.

The person so served as a partner did not enter appearance under protest. He filed an appearance in his individual name in the suit, and obtained an adjournment from the Court to enable him to file his written statement. The appearance so filed must be deemed to be on behalf of the firm. At the hearing of the summons for directions he contended that he was not a partner of the defendant firm and applied for leave to withdraw his appearance which was filed without protest. Unless the Court permitted him to withdraw the appearance initially filed it continued to be an appearance under rule 6 of Order 30 on behalf of the firm. Relying upon sub-clauses (b) and (c) of sub-rule (1) of rule 50 of Order 21 a plaintiff who has obtained a decree against a firm may execute it against any person who has been individually served with the summons as a partner and has failed to appear and also against any person who has appeared in his own name under rule 6 or rule 7 of Order 30.

The plaintiffs did undoubtedly make an application for leave to execute the decree against the partner served under Order 30, rule 5 on the footing that he was a person other than a person referred to in clauses (b) and (c) of sub-rule (1) of rule 50, Order 21, but that proceeding was plainly the result of an incorrect appreciation of the true position in law. On that account his right under Order 21 rule 50 (1) (b) was not lost. The plaintiffs were entitled to abandon the application for leave under sub-rule (2) and to execute the decree under sub-rule (1).

Appeal from the Judgment and Decree dated the 5th September, 1958 of the Patna High Court, in Miscellaneous Appeal No. 252 of 1955.

*A.V. Viswanatha Sastri*, Senior Advocate (*Togeshwar Prasad* and *Udai Pratap Singh*, Advocates, with him), for Appellant.

*G.S. Pathak*, Senior Advocate (*Rameshwar Nath* and *S.N. Andley*, Advocates of *M/s. Rajinder Narain & Co.*, with him), for Respondents.

The Judgment of the Court was delivered by

*Shah, J.*—*M/s. Johri Mal Prahlad Rai*—hereinafter referred to as the plaintiffs—commenced an action against *M/s. Tirhut Umbrella Works* (a firm carrying on business at Laheriasarai in the State of Bihar) in the City Civil Court, Bombay, for a decree for Rs. 320 with costs and interest. Summons of the suit was served upon one Gajendra Narain Singh—hereinafter referred to as 'Singh'—at Road 8 R Block at Patna (Bihar) as a partner of the defendant firm. Mr. D.B. Tilak an Advocate who was engaged by Singh filed on 22nd April, 1953, in Court a Vakalat-nama signed by Singh authorising him to act, appear and plead in the suit. A Chamber Summons for directions for trial of the suit as a Commercial Cause was thereafter served on Singh. On 9th September, 1953, Mr. Tilak as Advocate for Singh addressed a letter to the Attorneys of the plaintiffs requesting them to consent to an "adjournment of the \* \* \* suit" to enable Singh to file his written statement. By consent of the Advocates the Chamber Summons for directions stood adjourned by order of the Court for a fortnight. When the Chamber Summons for directions was taken up for hearing on 24th September, 1953, Mr. Tilak informed the Court that Singh claimed that he was not a partner of the defendant firm, and

orally prayed for an order permitting withdrawal of the appearance filed in Court. The Court declined to accede to the oral request and directed the appropriate proceedings to withdraw the appearance may, if so advised, be taken by Singh. The Court directed that the suit be transferred to the list of Commercial Causes and gave directions for the progress of the suit. When the suit was taken up for hearing before the City Civil Court on 27th November, 1953, Mr. Tilak again appeared and submitted that his client on whom summons was served in the suit, was not a partner of the defendant firm and prayed that he be allowed to withdraw the appearance which was filed without protest. The Court rejected the application for leave to withdraw the appearance and also rejected the application of Mr. Tilak for an adjournment of the suit. Mr. Tilak then withdrew from the suit with leave of the Court, and the suit was heard *ex parte*. The Court recorded the evidence of a witness for the plaintiffs and admitted certain correspondence tendered by the plaintiff and decreed the suit as prayed.

The decree was forwarded by the Registrar of the City Civil Court, Bombay, to the Court of the District Judge, Patna, with a certificate of non-satisfaction. The plaintiffs then applied for leave to execute the decree against Singh under Order 21, rule 50 (2) of the Code of Civil Procedure. Singh contended that he was not a partner of the defendant firm and that he was not liable to satisfy the debts of that firm; that he was not served with the summons in the suit; that he had appeared in the suit in which the decree was passed not as a partner, but in his individual capacity; and that he had informed the Court that he was not a partner of the defendant firm. The plaintiffs then applied for execution of the decree claiming that no order of the Court granting leave to execute the decree was necessary, the District Judge, Patna, by his order dated 12th May, 1955, held that execution could not be directed against Singh relying upon sub-clauses (b) or (c) of rule 50, Order 21, for the question whether he was a partner of the defendant firm was left undecided by the City Civil Court. The learned District Judge further held on the evidence that Singh was not a partner of the defendant firm.

In appeal against the order of the District Judge rejecting the application for execution against Singh, the High Court at Patna held that on the facts proved the plaintiffs were entitled as of right to execute the decree under Order 21, rule 50 (1) (b) against Singh. The High Court accordingly reversed the order passed by the District Judge and directed execution to proceed against Singh. With certificate under Article 133 (1) (a) granted by the High Court, this appeal has been preferred by Singh.

Order 30 of the Code of Civil Procedure deals with the manner in which suits may be filed by or against firms. Two or more persons carrying on business in India may be sued in the name of the firm of which they were partners at the time of the accrual of the cause of action. Where a suit has been filed against the firm summons may be served in the manner prescribed by rule 3. That rule, in so far as it is material, provides—

“Where persons are sued as partners in the name of their firm, the summons shall be served either—

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within India, upon any person having, at the time of service, the control or management of the partnership business there, as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without India:

Provided \* \* \* \* \*

The plaintiffs had sued the partners of M/s. Tirhut Umbrella Works in the firm name, and the summons was served on Singh at Road 8, R Block, Patna. The original summons would normally be with Singh but he did not care to produce it before the District Judge, Patna. The High Court on a review of the circumstances arrived at the conclusion that Singh was served with summons of the suit as a partner of the defendant firm. That conclusion is amply supported by the evidence and the presumption which arises under rule 5 of Order 30 which provides:

"Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner."

It is not possible to say whether the summons was accompanied by the notice contemplated by rule 5, but it is clear by the express words of the rule that in default of such notice the person served shall be deemed to be served as a partner. Singh has in his affidavit sworn in the suit, and also in his testimony at the hearing in the execution proceeding admitted that he was served with a summons in the suit, and Mr. Viswanatha Sastri appearing for Singh has fairly not challenged the finding that Singh must be deemed to have been served as a partner of the defendant firm.

Rule 8 of Order 30 provides :—

"Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining decree against the firm in default of appearance where no partner has appeared."

The rule enables the person served as a partner to appear under protest and to deny that he is a partner of the firm which is sued. Appearance under protest by the person sued renders the service of summons as regards the defendant firm ineffective. The plaintiff may obtain a fresh summons against the firm and serve it in the manner prescribed by Order 30 rule 3 against another person who is alleged to be a partner by the plaintiff or against the person who has the control or management of the partnership business. A decree against the defendant firm so obtained may with leave under Order 21, rule 50 (2) be executed against the firm and also against the person who had been initially served as a partner and who had appeared under protest denying that he was a partner. The plaintiff, however, is not obliged to obtain a fresh summons : he may request the Court to adjudicate upon the plea of denial raised by the person served and appearing under protest. The Court will then proceed to determine the issue raised by that plea. If the Court finds on evidence that the person served was not a partner at the material time, the suit cannot proceed, unless summons is served afresh under rule 3 : if the Court holds that he was a partner, service on him will be regarded as good service on the firm and the suit will proceed against the firm.

In the present case Singh did not enter appearance under protest. He filed an appearance in his individual name in the suit, and obtained an adjournment from the Court to enable him to file his written statement. The appearance so filed must be deemed to be on behalf of the firm. At the hearing of the summons for directions he contended that he was not a partner of the defendant firm and applied for leave to withdraw his appearance which was filed without protest. Unless the Court permitted Singh to withdraw the appearance initially filed, it continued to be an appearance under rule 6 of Order 30, on behalf of the firm. We are not concerned in this case to decide whether the application of Singh for leave to withdraw his appearance was properly rejected. That question could only be raised in a proceeding adopted by Singh in the proper Court challenging the decision of the City Civil Court and not in the proceeding for execution of the decree. Order 21, rule 50 of the Code of Civil Procedure deals with execution of decrees against firms. By clause (1) it is provided :

"Where a decree has been passed against a firm, execution may be granted—

- (a) against any property of the partnership ;
- (b) against any person who has appeared in his own name under rule 6 or rule 7 of Order 30 or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner ;
- (c) against any person who has been individually served as a partner with a summons and has failed to appear.

Provided \* \* \* \* \*

Clause (2) provides :

"Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c) as being a partner

in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined."

By clause (3) it is provided :

"Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

Manifestly relying upon sub-clauses (b) and (c) of sub-rule (1) a plaintiff who has obtained a decree against a firm may execute it against any person who has been individually served with the summons as a partner and has failed to appear and also against any person who has appeared in his own name under rule 6 or rule 7 of Order 30. Singh being a person who had after being served as a partner appeared under rule 6, the decree of the City Civil Court, Bombay, was executable against him.

The plaintiffs did undoubtedly make an application for leave to execute the decree against Singh on the footing that he was a person other than a person referred to in clauses (b) and (c) of the sub-rule (1) of rule 50, Order 21, but that proceeding was plainly the result of an incorrect appreciation of the true position in law. On that account his right under Order 21, rule 50 (1) (b) was not lost. The plaintiffs were entitled to abandon the application for leave under sub-rule (2) and to execute the decree under sub-rule (1).

The record of the City Civil Court, Bombay, tendered before the District Judge clearly establishes that Singh who was served as a partner of the defendant firm filed an appearance under rule 6, Order 30 of the Code of Civil Procedure, and thereafter his application for withdrawal of appearance was rejected and the suit was decreed against the firm. This decree against the firm was, by virtue of sub-rule (1) clause (b) of rule 50, Order 21, liable to be executed against Singh.

The High Court was, therefore, in our judgment, right in directing execution of the decree of the City Civil Court, Bombay against Singh. The appeal fails and is dismissed with costs.

V.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Haji T. J. Abdul Shakoor and others

.. *Appellants \**

*v.*

Bijai Kumar Kapur and others

.. *Respondents.*

*Decree—Construction—Decree in terms of razinama in mortgage suit—Term that "mortgaged properties are hereby sold for the amount of the decree in full satisfaction thereof. The defendants will execute a regular sale within ten days from this date"—Failure of defendants to execute sale deed—If the term can be enforced in execution or whether separate suit is essential therefor—Civil Procedure Code (V of 1908) Order, 23 rule 3.*

A suit to enforce a mortgage was decreed in terms of the memo of compromise the relevant terms whereof were :—(1) That the defendants herein agree to a decree being passed as prayed for. (2) That the mortgaged properties are hereby sold for the amount of the decree in full satisfaction thereof. The defendants will execute a regular sale deed within ten days from this date. The defendants not having executed the regular sale deeds the plaintiffs applied for execution of the decree which the defendants opposed.

*Held :* The terms of the compromise "related" to the suit. The property which was to be conveyed consisted entirely of property included in the mortgage which was therefore liable to be sold in execution of the mortgage decree which was the relief sought in the plaint. The sale price for the conveyance under the razinama was the sum for the recovery of which the suit was laid. Therefore there was nothing which was outside the scope of the suit. Besides all this, the conveyance was the consideration for the compromise. The agreement was lawful and an executable decree could be

passed in terms thereof. It cannot be said on a proper construction of the *razinama* that the mere agreement to convey and not an actual conveyance was intended to operate as a satisfaction of the decree to be passed. The decree-holders are accordingly entitled to execute the term for executing the sale deed.

Appeal from the Judgment and Decree, dated the 2nd June, 1958 of the Mysore High Court in R.A. No. 268 of 1957.

*S. K. Javali, K. P. Bhat and B. R. L. Iyengar*, Advocates, for Appellants.

*S. K. Venkataranga Iyengar and R. Gopalakrishnan*, Advocates, for Respondents.

The Judgment of the Court was delivered by

*Rajagopala Ayyangar, J.*—On 27th March, 1954 the three Kapurs—who are the respondents before us—filed original Suit No. 29 of 1954 before the District Judge, Bangalore, against the 3 appellants who are brothers, for the recovery of over Rs. 50,000 and subsequent interest and costs due on a simple mortgage. Before the suit came on for trial the parties filed a memo of compromise, dated 30th September, 1955 and they prayed that the suit may be decreed in terms thereof. The Court accepted the application and passed a decree as prayed for, the order reading :

“ It is ordered and decreed that the plaintiff's suit be and the same is hereby decreed as per terms of the compromise, the copy of which is hereunto annexed. ”

The terms of the *razinama* ran as follows :

- “ 1. That the defendants herein agree to a decree being passed as prayed for.
2. That the mortgaged properties are hereby sold for the amount of the decree in full satisfaction thereof. The defendants will execute a regular sale deed within ten days from this date.
3. That the mortgaged properties are hereby put in possession of the plaintiff (decree-holder) by the 3rd defendant (judgment-debtor) and judgment-debtors 1 and 2 agreeing to pay rent at Rs. 75 each for the two shops bearing Nos. 12 and 14 respectively, Godown Street, Bangalore City in their actual occupation and by attornment of the other properties in the occupation of the other tenants.
4. That on the judgment debtors or their nominees tendering the aforesaid decree amount through Court or otherwise within the aforesaid one year from the date of the decree, the decree-holders bind themselves to reconvey the properties which are sold to them under this *razinama* at their cost provided it is distinctly agreed that time is essence of the contract and provided also that if the judgment-debtors default in paying the rents as afore said on or before the 15th of any month they will lose the concession hereby offered to them of having reconveyance of the properties in one year's time.
5. Attachment on the properties belonging to the 2nd and 3rd defendants obtained before judgment stands hereby raised.
6. The defendants hereby assure that the properties hereby sold are not subject to any attachment. In the event of any attachment subsisting on the properties it is hereby agreed that the mortgage security shall not be merged by the sale. ”

Broadly stated, the question raised in this appeal relates to the executability of clause 2 of this compromise decree but before examining this contention it is necessary to state a few facts. It would be noticed that under the second sentence of clause 2 the appellants had to execute a regular sale-deed within ten days from 30th September, 1955. They, however, did not do so and thereupon the respondents filed, on 31st October, 1955, Interlocutory Application No. 6 of 1955 (later numbered as Execution Application No. 83 of 1956) for directing the appellants to execute the sale-deed and they annexed to their application a draft sale-deed in which clauses 3 to 6 of the *razinama* were recited. Apparently there were disputes between the parties each accusing the other that it had not conformed to its undertaking under the compromise, but with these we are not now concerned. Thereafter the appellants filed an application in the suit on 16th March, 1956 praying that a sale-deed might be executed in favour of a third party to the proceedings who had agreed to purchase the property on terms of paying the full decreed-amount as provided for by clause 4 of the *razinama*. This application was opposed by the respondents and there were further applications of a similar type which it is not necessary to detail except to point out that they all proceeded on the basis that the compromise-decree was capable of execution without any necessity for a further suit. The appellants did not succeed in these applications. It is sufficient if hereafter attention were confined

to the application by the respondents—EA. 83 of 1956 by which they sought to get the appellants to execute a sale-deed in their favour in accordance with the opening sentence of clause 2 of the compromise. The appellants opposed this application on the technical ground that the relief sought could not be had on execution but only by a separate suit in as much as the same did not "relate to the suit" within Order 23, rule 3, Civil Procedure Code, to whose terms we shall refer presently. This objection was upheld by the learned District Judge of Bangalore and the prayer of the respondents for directing the appellants to execute a sale-deed in their favour was rejected. This order has been reversed by the learned Judges of the High Court on appeal by the respondents and it is the correctness of this judgment that is canvassed in this appeal which comes before us on a certificate of fitness granted by the High Court under Article 133 (1) (a) of the Constitution.

It would be seen from this narration that the point involved in the appeal is very narrow and turns on the question whether the High Court was justified in directing the appellants to execute a sale-deed conveying the suit properties to the respondents in the proceedings in execution of the decree in Original Suit No. 29 of 1954 or whether the respondents could obtain that relief only in an independent suit instituted for that purpose. It is common ground that the decree embodied the entire *razinama* including all its terms. The relevant statutory provision for the passing of decrees by compromise is Order 23, rule 3, Civil Procedure Code, which runs :

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith, so far as it relates to the suit."

We do not, having regard to the facts of this case, consider it necessary to examine the position whether, when a decree has been passed embodying all the terms as part of the decree, an objection as to the executability of any particular term could be raised in execution proceedings, but shall proceed on the basis that it could be. There is no dispute that the agreement was lawful and an executable decree could be passed "so far as it related to the suit". Though in the Courts below most of the argument turned on the import of the expression "so far as it relates to the suit" occurring in rule 3, learned counsel for the appellants did not stress that contention before us, but rather on the construction of the several clauses of the compromise and their inter-relation to which we shall advert presently. We might, however, point out that the learned Judges were right in the view they took that the terms of the compromise "related" to the suit. The property which was to be conveyed consisted entirely of property included in the mortgage and which was therefore liable to be sold in execution of the mortgage decree which was the relief sought in the plaint. The sale price for the conveyance under the *razinama* was the sum for the recovery of which the suit was laid. There was therefore nothing which was outside the scope of the suit. Besides all this, the conveyance was the consideration for the compromise. In these circumstances it is not a matter for surprise that learned Counsel for the appellants laid little emphasis on the point which persuaded the learned District Judge to dismiss the respondents' application.

Learned Counsel for the appellants however raised before us two contentions in the alternative. His first and primary contention was that on a proper construction of the compromise, the consideration therefor was not the actual execution of the conveyance by the judgment-debtor to the decree-holder but merely the agreement to execute such a conveyance. He pointed out that under clause 1 of the compromise the defendants had agreed to a decree being passed as prayed for, which meant that a mortgage decree drawn up in the usual form had to be passed. That decree, it was submitted, was under the promise agreed to be treated as satisfied and full satisfaction to be recorded immediately on the filing of the compromise, and he suggested that the opening words in clause 2 "The mortgaged properties are hereby sold for the amount of the decree in full satisfaction thereof" was a reference to the agreement to execute the convey-



ance. There were other clauses in the compromise—clauses 3 to 6—but these, he submitted, related to the *inter se* rights between the parties. The contention was that these other clauses of the *razinama* including the second limb of clause 2 were intended to be enforced or implemented not by way of execution of the decree in this suit but that the decree to be passed under clause 1 was to be treated as fully satisfied on the filing into Court of the memo. of compromise and the same being recorded by the Court with the result that thereafter no portion of the decree remained alive. We find ourselves wholly unable to accept this argument. No doubt, under clause 1 there was to be a simple mortgage decree as prayed for in the suit, but it would, however, not be a proper construction of the first sentence of clause 2 to say that the mere agreement to convey and not an actual conveyance was intended to operate as a satisfaction of the decree passed or to be passed under clause 1. Learned counsel is, no doubt, right in his submission that the sale of the property to the decree-holders under clause 2 was not to be absolute in the sense of conferring a right to an unconditional conveyance since the title to be obtained under the sale was subject to the conditions contained in clauses 3 to 6 and particularly clause 4 under which it was stipulated that the title to the property might, on the happening of certain contingencies, be divested from the decree-holders to whom it had been conveyed under clause 2. In that sense clauses 2 to 6 might constitute an integrated scheme for adjusting the rights of parties but on that account it would not be open to the construction that the mere agreement to convey contained in clause 2 (subject to the conditions stipulated in clauses 3 to 6) by itself amounted to a satisfaction of the decree.

The other submission of learned counsel was that the learned Judges should not have directed the execution of a conveyance in favour of the respondents without attaching to it the conditions laid down in clauses 3 to 6 and also without an examination of the question whether the appellants were entitled to enforce the reconveyance provided by those clauses. On this matter the learned Judges expressed themselves thus :

“The decree-holder is entitled to execute the decree in respect of clause 2 of the compromise. No opinion is expressed as to the executability of the other clauses of the compromise as that question has not been raised before us.”

The fact, therefore, was that this point about either the inter-relation between clause 2 on the one hand and clauses 3 to 6 on the other or the contention of the appellants that they were entitled to relief under clauses 3 to 6 was not raised before the High Court and the matter was therefore left open. The appellants can in the circumstances obviously have no cause for complaint that the High Court did not deal with it. The question as to whether the appellants are entitled to relief under clauses 3 to 6 or whether they had lost their right to do so, is one which would have to be investigated on facts and cannot therefore be urged before us. We do not, therefore, propose to pronounce upon it either. It would, of course, be open to the appellants to agitate their rights in appropriate proceedings if they are so advised. No other point has been urged before us.

The appeal fails and is dismissed with costs.

K.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, K. SUBBA RAO AND J. R. MUDHOLKAR, JJ.

Bhoju Mandal and others

.. Appellants\*

v.

Debnath Bhagat and others

.. Respondents.

*Transfer of Property Act (IV of 1882), section 58 (c)—Mortgage by conditional sale or sale with a condition of repurchase—Test—Deed—Construction—Reference to similar documents—If can be made.*

The document was executed not only for discharging the mortgage in favour of the vendee but also for paying other debts and for meeting cultivation expenses. The document says in express terms that the property was 'sold and vended' which are certainly words of conveyance and that after the prescribed period and after the amount was paid the vendors would take the vended property from the vendees which are again words of reconveyance, the words used in the document being those usually adopted by village document-writers.

The important factor that out of the larger extent of the property that was mortgaged a lesser extent was transferred for a bigger amount than the mortgage amount would be a clinching circumstance in favour of holding the transaction as a sale. The sum also represented the real value of the land.

The taking over his liability to pay the rent by the executant for a short period subsequent to the execution of the document may be due to the fact that the rent had become due before the execution of the document. This is at best a neutral circumstance. The provision in the document that if due to any defect in title the vendees were dispossessed the consideration amount with interest was charged on the property, is nothing more than an indication of the intention to keep alive the mortgagee's rights under the earlier document, as is the position in law.

In ascertaining the intention of parties under one document a decision on a construction of the terms of another document cannot ordinarily afford any guidance unless the terms are exactly similar to each other.

Appeal by Special Leave from the Judgment and Decree, dated the 31st March, 1958 of the Patna High Court in Appeal from Appellate Decree No. 582 of 1954.

*Jagadish Chandra Sinha and R. R. Biswas*, Advocates, for Appellants.

*Bhawani Lal and P. C. Agarwala*, Advocates, for Respondents Nos. 1 to 16.

The Judgment of the Court was delivered by

*Subba Rao, J.*—The only question in this appeal is whether the suit document is a mortgage by conditional sale or a sale with a condition of re-purchase.

The facts that gave rise to this appeal may be briefly stated : On 2nd February, 1924, the appellants 1 and 2, their father late Matooki Mandal and their uncle late Lila Mandal executed a deed purporting to convey a property of the extent of 12.6 acres in favour of respondents 1 and 2 for a consideration of Rs. 2,800 and put them in possession of the same. In 1950 the appellants instituted Title Suit No. 73 of 1950 in the Court of the Munsif, 1st Court, Bhagalpur, Bihar, for redemption on the ground that the said document was a mortgage by conditional sale. The contesting defendants, i.e., respondents 1 and 2 pleaded that the said document was not a mortgage but an out and out sale and therefore the suit for redemption was not maintainable. The Munsif and on Appeal the Subordinate Judge, Bhagalpur, accepted the contention of the appellant and decreed the suit but on Second Appeal the High Court held that the document was a sale and on that finding the appeal was allowed and the suit was dismissed with costs throughout. The appellants by Special Leave preferred the present appeal against the decree and judgment of the High Court.

The only question in this appeal is whether the said document is a mortgage or sale. As the question turns upon the construction of the provisions of the sale deed, it would be convenient to read the document as the High Court did omitting the unnecessary words :—

1. "We, the executants, executed a registered Sudbharna bond, dated 1st March, 1923, in favour of Deonath Bhagat and Raghunath Bhagat and received the entire consideration money.

2. We, the executants, are badly in need of some money in cash for repayment of debt of Sumeri Kapri and are in great need of some more money in cash for meeting the expenses of cultivation, purchasing bullocks and also for meeting the household expenses and repayment of petty debts to creditors.

3. We, the executants, cannot arrange the aforesaid money in cash without selling some property.

4. Deonath Bhagat and Raghunath Bhagat aforesaid have not up till now entered into possession of the Sudbharna property and they are making a demand for the money and it is absolutely necessary to repay the money to the said creditors.

5. Hence on negotiation for sale of the same property with the said Bhagats by way of conditional sale the said Bhagats agreed to purchase our property and to pay money in cash for repayment of the debts of Sumeri Kapri and for meeting other expenses.

6. Hence we, the executants, have sold and vended 12.6 acres of Nakdi jot land for Rs. 2,800 to Deonath Bhagat and Raghunath Bhagat.

7. We declare that in the month of Baisakh 1334 Fasli we shall on repayment of the said amount in full and in one lump sum to the said Bhagats, take back the vended property from the said Bhagats and that in case of failure of repayment of the consideration money of this deed of sale in full within the stipulated time, this deed of sale will remain in force and we the executants, or our heirs, shall not be competent to demand the return of the vended property.

8. Out of the consideration money of this sale deed Rs. 1,600 due to the said Bhagats under the bond, dated 1st March, 1923 was paid up in full and on receipt of the remaining consideration money the dues of Sumeri Kapri amounting to Rs. 500 was paid up and with the balance of Rs. 700 we met the above expenses.

9. We, the executants, put the said vendees in possession of the vended property and authorise them to remain in possession thereof and appropriate the produce thereof in such manner as they like and the payment of the rent of the vended land from 1332 Fasli remained the concern of the said vendees.

10. If due to a defect in the title the said vendees are dispossessed of the vended property or any portion thereof, we shall be liable to refund the consideration money of the sale deed with interest at the rate of Rs. 3/2 per hundred rupees per month.

11. Whatever rights and interests the said vendees had under the bond, dated 1st March, 1923 remained intact under the sale deed.

12. Hence we have put into writing these few words by way of a deed of absolute sale conditional sale, so that it may be of use when required."

There is a clear legal distinction between the two concepts, a mortgage by conditional sale and a sale with a condition of re-purchase. The former is a mortgage, the relationship of debtor and creditor subsists and the right to redeem remains with the debtor. The latter is an out and out sale whereby the owner transfers all his rights in the property to the purchaser reserving a personal right of re-purchase. The question to which category a document belongs presents a real difficulty which can only be solved by ascertaining the intention of the parties on a consideration of the contents of a document and other relevant circumstances. Decided cases have laid down many tests to ascertain the intentions of the parties but they are only illustrative and not exhaustive. Let us therefore look at the terms of the document extracted above.

The learned counsel for the appellants relied upon the following circumstances:—

1. The consideration of the document went mainly in the discharge of a registered Sudbharna bond, dated 1st March, 1923 given in favour of the respondents 1 and 2. It indicates that relationship of creditor and debtor was continued under the document.

2. There are no words of conveyance in the document.

3. There are no words of re-conveyance after the stipulated date.

4. There is a term that if there was a defect in the title and the vendees were dispossessed the executants would be liable to the refund of the consideration with interest with a charge on the property covered by the document. The term creating a charge on the property transferred, it is said indicates that the executants continued to be the owners of the land despite the document.

5. The executants took upon themselves the liability of the entire rent for 1331 fasli though the document was executed in the Magh of 1331 fasli. The fact that the executants continued to be liable to pay for a period after the execution of the sale deed, it is suggested indicates that the document was not an out and out sale but one in which the appellants continued to have an interest in the land.

6. In the execution portion of the document it is described as "*tamashuk sarti kebala*" and the appellants' counsel says that the said expression means mortgage by conditional sale. If there was any ambiguity in the rest of the document the argument proceeds that the parties clearly expressed their intention by so describing the nature of the document.

It is not accurate to say that the suit document was executed only to discharge the mortgage bond, dated 1st March, 1923. The document itself narrates that the executants were badly in need of money not only for repaying the debt under the said bond but also for repaying the debts of one Sumeri Kapri and for meeting the expenses in connection with cultivation, purchase of bullocks and household. It is, therefore, not a document executed in renewal of an earlier mortgage bond but was brought into existence to meet the pressing demands on the appellants. It is also not correct that the document does not contain words of conveyance or re-conveyance. The document says in express terms that the property 'was sold and vended', which are certainly words of conveyance, and that after the prescribed period and after the amount was paid the appellants would 'take back the vended property' from the respondents, which are again words of re-conveyance. Though the words of 'conveyance' and 're-conveyance' are not expressed in phraseology found in documents prepared by trained draftsmen, they are expressed in words usually adopted by village document-writers. The taking over his liability to pay the rent by the executant for a short period subsequent to the execution of the document may be due to the fact that the rent had become due before the execution of the document or for some other circumstance which is not clear from the document. This is at best a neutral circumstance. The fact that in case of any defect in title the vendees were dispossessed, the consideration amount with interest was charged on the property is nothing more than an indication of the intention to keep alive the mortgagee's rights under the earlier document. The said clause only makes explicit what the respondents would be entitled to in law. The translation of the words '*tamashuk sarti kebala*' as mortgage by conditional sale does not appear to be correct. The learned Subordinate Judge observes that if those words were literally translated, they would mean 'a bond by way of conditional sale'. If that was the meaning the said expression would be consistent both with a mortgage by conditional sale as well as a sale with a right of re-purchase. In Law Lexicon, P. Ramanatha Iyer gives the following meanings to the word '*kebala*' :

"Any deed of conveyance or transfer of right or property, any contract of bargain or sale, a bond, a bill sale, title-deeds, and the like."

Even accepting the widest meaning given to that word, the expression can only mean a bond or a contract by way of conditional sale. So translated the expression is consistent with a mortgage, as well as with a sale and therefore that is a neutral circumstance. On the other hand the executant describes the transaction as a sale and respondents as vendees. The amount paid is described as consideration for the sale. Usual covenant of title is given and there is a provision of re-conveyance in case of payment of the prescribed amount within the time agreed upon. No doubt these recitals would be found in a document which purports to be an ostensible sale and they in themselves are not decisive of the question raised. But there is one factor which dispels any doubt in regard to the construction of the document. The total area of the land mortgaged in the year 1923 was 13.17 acres and the amount advanced thereunder was Rs. 1,600. Only one year thereafter out of the said extent 12.6 acres was transferred by the document in question for a sum of Rs. 2,800, that is if the contention of the appellant was correct, a smaller extent of land was mortgaged for a higher amount. It is improbable that a mortgagee would advance an additional amount and take a mortgage of a smaller extent in discharge of an

earlier mortgage whereunder a larger extent of land was given as security. Unless there are extraordinary reasons for this conduct, this would be a clinching circumstance in favour of holding that a document was a sale. The learned counsel for the appellants realising the importance of this circumstance attempted to explain it away by a suggestion that under the earlier document the respondents were not put in possession of the land and that the reduction of the extent of the mortgaged property under the subsequent document was due to the fact that they secured possession of the lands mortgaged thereunder. This was not put either to the witnesses or suggested in any of the three Courts below. We cannot therefore accept this argument advanced for the first time before us, for there may have been many explanations for the respondents in respect of this suggestion. What is more, it is not disputed that the sum of Rs. 2,800 represents the real value of the land sold to the respondents and it is highly improbable to say the least that a person would advance the amount equivalent to the value of the land mortgaged without keeping a reasonable margin for realising his amount. This is sought to be explained by throwing a suggestion that as the respondents were put in possession, they would be getting the interest and therefore there was no chance of the debt exceeding the value of the property. Even so a mortgagee in lending monies would insist upon a reasonable margin in the value of the property to provide against the possible contingency of the properties going down in value and the amount due to him swelling by the addition of cost, damages, etc., in the event of his filing a suit to recover the same. In our view whatever ambiguity there may be in the document the fact that only a portion of the land already mortgaged was sold for a proper and adequate consideration is a circumstance which stamps the document as an out and out sale.

Reliance is placed by the learned counsel for the appellant on a judgment of this Court in '*Pandit Chunchun Jha v. Sheikh Ebadat Ali and another*'. It may be stated at the outset that for ascertaining the intension of the parties under one document a decision on a construction of the terms of another document cannot ordinarily afford any guidance unless the terms are exactly similar to each other. It is true that some of the terms of the document in that case may be approximated to some of the terms in the present document but the said judgment of this Court really turned upon a crucial circumstance. There is one important recital found in the document in that case which does not appear in the document in question and there is another important recital found here which is not present there. There the document under scrutiny was executed on 15th April, 1930. Before the execution of the document the executants initiated commutation proceedings under section 40 of the Bihar Tenancy Act. Those proceedings continued till 18th February, 1931 i.e., for some ten months after the deed. The executants borrowed Rs. 65-6-0 to enable them to carry on the commutation proceedings even after they executed the document. Bose, J., speaking for the Court advertng to the said circumstance observed at page 183 :

"This, we think, is crucial. Persons who are selling their property would hardly take the trouble to borrow money in order to continue revenue proceedings which could no longer benefit them and could only enure for the good of their transferees."

It is, therefore, obvious that this circumstance clinched the case in favour of the executants. The crucial circumstance in the present case, namely that a smaller extent was sold for a higher amount in discharge of an earlier mortgage of a larger extent for a smaller amount was not present in that case. The said crucial circumstances make the two cases entirely dissimilar and therefore the said judgment of this Court is not of any help in construing the document in question. On a consideration of the cumulative effect of the terms of the document in the context of the surrounding circumstances we hold that the document in question is not a mortgage but a sale with the condition of re-purchase. The conclusion arrived at by the High Court is correct.

The appeal fails and as the Advocate for the respondent is not present in Court, it is dismissed without costs.

V.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

The State of West Bengal

.. *Appellant\**

v.

Hemant Kumar Bhattacharjee and others

.. *Respondents.*

*West Bengal Criminal Law Amendment Act (1949), section 4 and Act XII of 1952, section 12—Scope and effect.*

A wrong decision by a Court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like Review which the law provides. Where the High Court had quashed on 4th April, 1952, the allotment of a case to a Special Judge and proceedings before him after striking down section 4 of the West Bengal Criminal Law Amendment Act (1949) the fact that their decision was on the merits erroneous as seen from a later judgment of the Supreme Court [*Kedar Nath Bajoria v. The State of West Bengal*, (1954) S.C.R. 30 : 1953 S.C.J. 580.] does not render it any the less final and binding between the parties before the Court. Whether the reasons for the decision were sound or not the legal effect of that decision remained the same.

By quashing the proceedings before the Special Judge, the High Court automatically reinvested the Chief Presidency Magistrate with jurisdiction over the case and the offence of which he had taken cognisance. On the terms of section 12 the Special Judge would then have no jurisdiction unless by reason of later decisions binding on the parties effect cannot be given to this position. [By a later decision of the High Court, dated 19th December, 1956 the Special Court had been held to have jurisdiction over the case, section 12 having held not to be in the way.]

To hold that there could be an allotment of a case in respect of an offence for which a complaint before a Magistrate is pending on 9th April, 1952 would be a plain evasion of the bar contained in section 12 of the West Bengal Criminal Law Amendment Act (1952).

The Special Judge in the circumstances of the case has jurisdiction to proceed with the matter.

Appeal by Special Leave from the Judgment and Order, dated the 9th May, 1958, of the Calcutta High Court in Criminal Revision No. 1128 of 1957.

*H. R. Khanna and R.N. Sachthey*, Advocates, for Appellant.

*H. K. Bhattacharjee*, Respondent No. 1 in person.

The Judgment of the Court was delivered by

*Rajagopala Ayyangar, J.*—This is an appeal by Special Leave preferred by the State of West Bengal against the Judgment of the High Court of Calcutta dated 9th May, 1958, in Criminal Revision Case No. 1128 of 1957.

The three respondents are alleged to have committed the offences with which they are charged in September, 1950 and though 12 years have passed by since then no step has been taken beyond the issue of notices to them. This delay has been caused by conflicting views which have been entertained from time to time about the Court having jurisdiction to try the respondents—whether it is the Court of the Chief Presidency Magistrate, Calcutta, or the Judge of the Special Court constituted under the West Bengal Criminal Law Amendment (Special Courts) Act, 1949. The judgment of the High Court now under appeal has held that the Judge of the Special Court had no jurisdiction to proceed with the trial but offences alleged against the respondents had been laid in January, 1951 had alone jurisdiction to try the case. The State which has come up in appeal against this order contends that on a construction of the relevant statutes and other matters to which we shall refer, it was the Special Judge who had the jurisdiction to try the case.

\* Criminal Appeal No. 207 of 1959.

To appreciate the contentions raised in the appeal it would be necessary to state at least in broad outline the several stages of this proceeding.

The first respondent was at the relevant date, which was some time towards the latter part of 1950, the Sub-Postmaster in a Post Office in the town of Calcutta. The Special Police Establishment, Calcutta, received information that in certain Post Offices in Calcutta, including that in which the first respondent was the Sub-Postmaster, systematic misappropriation of Government monies was taking place by, *inter alia*, the affixing of used postage stamps. The police devised a plan by which they had a Foot-Constable appointed as a Packer in the Sub-Post Office in order to watch the happenings there, and thereafter on information furnished by him a raid was conducted in September, 1950 and the first respondent as well as respondents 2 and 3 who were respectively the Money Order Clerk and the Registration Clerk in the said Post Office were arrested.

It is not necessary to set out the details of the charges against the accused except to state that they included offences under section 409 and section 120-B/409 of the Indian Penal Code but we shall proceed to narrate briefly the matters that transpired which have contributed to keep these proceedings pending these 12 years. After the police completed the investigation, a charge-sheet was submitted on 16th January, 1951 to the Chief Presidency Magistrate, Calcutta, charging the three accused with offences under section 120-B read with section 409 of the Indian Penal Code, etc. and section 5 (2) of the Prevention of Corruption Act. The case was registered in his Court as Crime Case No. 136 of 1951 and the Magistrate took cognizance of the offence but before he proceeded any further a notification was issued by the Government of West Bengal on 1st February, 1951 under section 4 (1) of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 (which for convenience we shall refer to as the Act) allotting the case for trial to the Special Judge presiding over the Special Court at Alipore. When the Magistrate was informed of this allotment, he passed an order on 16th February, 1951 in these terms :

"Under Government Notification, dated 1st February, 1951 this case has been allotted to the Special Judge, Alipore. The accused are to appear before him on 5th March, 1951 at 10-30 A.M. Send this record to the Special Judge in the meantime."

Before the Special Judge took any step in proceeding with the case, the first respondent made an application before the High Court under Article 226 of the Constitution impugning the Constitutional validity of section 4 (1) of the Act on the ground that it was violative of Article 14 of the Constitution and that for this reason the Special Judge had no jurisdiction to hear the case, but that the case had to be disposed of by the regular Criminal Courts. This petition as well as certain others which raised the same point were heard by a Full Bench of the Court and by judgment, dated 4th April, 1952 the Writ Petition filed by the first respondent was allowed and section 4 (1) of the Act was struck down as unconstitutional. The learned Judges held that the Special Judge had no jurisdiction to try the case and they directed :

"That the accused be held as under-trial prisoners pending a retrial according to law."

The West Bengal Government thereupon amended the enactment seeking to bring it in accordance with the Constitution and for that purpose Ordinance VIII of 1952 was promulgated on 9th April, 1952 that being also the date on which it was to commence to operate. Immediately thereafter the charge-sheets against the respondents were re-filed in the Court of Special Judge at Alipore, who issued summons on 2nd June, 1952 to the respondents to appear before him. The first respondent thereupon preferred a Revision Petition to the High Court praying that the proceedings before the Special Judge and the summons issued by him be quashed. It is unnecessary to state the grounds of this petition, but what is of relevance for the present purposes is that before the petition came on for hearing the Ordinance lapsed, and was moreover replaced by West Bengal Act XII of 1952 which re-enacted the provisions of the Ordinance and was to come into force on the expiry of the Ordinance. Neither the Ordinance nor the permanent legislation which

replaced it contained any provision providing that on the lapse of the Ordinance anything done or any action taken or commenced in the exercise of powers conferred by the Ordinance shall continue in force after its expiry. Besides the negative feature just now pointed out, Act XII of 1952 further contained a provision in section 12 reading :

"Section 12. *Pending proceedings in other Courts not to be affected* :—Nothing in this Act shall apply to any proceedings pending on the date of the commencement of the West Bengal Criminal Law Amendment (Special Courts) Amending Ordinance, 1952, in any Court other than a Special Court."

The Criminal Revision case filed by the first respondent to quash the proceedings before the Special Judge was disposed of by a Bench of the Court on 24th March, 1953. The learned Judges held that in the absence of a provision in the Ordinance (VIII of 1952) or in the Act replacing it (Act XII of 1952) to keep alive things done or action taken or proceedings had in exercise of powers conferred by or under the Ordinance, there was a termination of proceedings commenced under the Ordinance, and so the summons issued by the Special Judge on 2nd June, 1952 during the pendency of the Ordinance as also the proceedings before him were held to have become dead on the expiry of the Ordinance and so were liable to be quashed. Either because of the view which they entertained on the point just now mentioned and that was considered sufficient to dispose of the case, or because their attention was not drawn to the terms of section 12 of Act XII of 1952, the learned Judges did not pronounce upon the effect of that provision on the jurisdiction of the Special Judge.

Following this order by the High Court the Government again allotted the case to the Special Court and a fresh charge-sheet was submitted to the Court on 18th June, 1953 against the accused. The first respondent again questioned the jurisdiction of the Special Judge and invoked the revisional powers of the High Court. The precise points that he urged on this occasion in support of this petition are not very clear but nothing turns on them because the Revision was withdrawn and was dismissed by an order, dated 24th May, 1954.

When, however, after the termination of the Revision before the High Court the Special Judge issued notice to the accused and commenced proceedings, the first respondent filed a petition before him questioning his jurisdiction to try the case on the ground that by reason of the provision contained in section 12 of Act XII of 1952, it was the Chief Presidency Magistrate alone that had jurisdiction over the case and that it could not legally be allotted by the State Government to the Special Judge for trial. The Special Judge over-ruled this objection and dismissed the petition. The respondent challenged this order by a Criminal Revision Petition filed in the High Court. This petition was dismissed on 12th January, 1956. Several points were urged before the learned Judges which have been dealt with in the judgment, but what is relevant to the present context is the one relating to the applicability of section 12 to the facts of the present case. The learned Judges held that section 12 did not bar the jurisdiction of the Special Court because those proceedings had been initiated long after 9th April, 1952 by the allotment by the State Government notified in the Gazette in December, 1952 and the fresh charge-sheet filed in pursuance thereof on 18th June, 1953. In this connection, the learned Judges pointed out that the original allotment to the Special Judge in February, 1951 had been quashed by the High Court by its order, dated 4th April, 1952 with the result that on the day the Ordinance came into force (9th April, 1952) there was no proceeding pending before the Special Judge, and that the proceedings subsequently initiated by allotment and charge-sheet were fresh proceedings which were not hit by the terms of section 12.

Against this order of the High Court the first respondent filed a petition for Special Leave to appeal this Court urging, *inter alia*, that the construction by the High Court of section 12 of the Act of 1952 was erroneous but this Court dismissed the petition stating that it did not feel called upon to interfere at that stage and adding :



"The petition is dismissed without prejudice to the petitioners raising this point in a proper Court at a proper time."

Purporting apparently to act on the observations of this Court in dismissing the petition the respondents objected to the jurisdiction of the Special Judge as being barred by section 12 when the matter went back again to him and filed a formal petition raising the objection. The learned Special Judge upheld the objection by his order dated 22nd February, 1956 and discharged the respondents.

The Government were apparently not inclined to question the correctness of this order and they did not move the High Court in that behalf. Thereafter, a charge-sheet was presented to the Chief Presidency Magistrate which could only be on the basis that the Government accepted the position that when the allotment to the Special Judge and his assumption of jurisdiction was quashed by the High Court on 4th April, 1952, the proceedings initiated before the Chief Presidency Magistrate by a complaint filed on 16th January, 1951 continued to be pending before him. When the Chief Presidency Magistrate directed the issue of process against the respondents to take their trial before his Court, the first respondent filed a Revision to the High Court objecting to his jurisdiction. The Revision Petition was disposed of by the High Court on 19th December, 1956 by the petition being allowed. The reason for the decision can be gathered from the following passage in the judgment of Das Gupta, J. (as he then was) :

"But for the decision of this Court on 24th March, 1953, I would have no hesitation in holding that the consequence of section 12 of the Act was that the different allotments whether to Mr. J. C. Lodh's Court or to Mr. B. C. Ghose's Court were wrong and neither of these Courts had any jurisdiction in the matter, so that the correct position in law would be that the case was still pending in the Chief Presidency Magistrate's Court, the position that was reached after this Court's order passed on the 4th April, 1952. I cannot see any way however of escaping from the conclusion that by its decision of the 24th March, 1953, this Court must be taken to have held that Sri J. C. Lodh (Special Judge) had jurisdiction in the matter. It seems clear that the effect of section 12 of the Act was not raised before the Court and the argument proceeded on the facts that Mr. Lodh's Court had jurisdiction, the only point being whether having had jurisdiction under the Ordinance, the jurisdiction continued after the Ordinance came to an end and the Act took its place."

The Rule was accordingly made absolute and the order of the Chief Presidency Magistrate directing the issue of process against the respondents was set aside.

Thereafter, the Government again took action under section 4 of the Act by allotting the case to a Special Judge and a fresh charge-sheet was filed in that Court. The respondents again objected to the jurisdiction of the Special Court. That objection being over-ruled the matter was for the sixth time brought up to the High Court by a Criminal Revision Petition. The learned Judges of the High Court accepted the petition and quashed the orders of the Special Judge and held that by reason of the order of the High Court dated 4th April, 1952 quashing the allotment as well as the charge-sheet filed before the Special Judge, the proceedings were pending before the Chief Presidency Magistrate on 9th April, 1952. The reasoning of the learned Judges was identical with that which Das Gupta J., was inclined to take of the effect of section 12 to the facts of the case, but which he considered he was precluded from giving effect to, by reason of an earlier judgment of the Court. It is the correctness of this order of the High Court that is challenged by the State in this appeal. Learned counsel for the appellant principally urged before us four grounds :

(1) Properly understood, the legal effect of the order of the High Court dated 4th April, 1952 was not to revive the proceedings in the Court of the Chief Presidency Magistrate, so as to be pending there on 9th April, 1952.

(2) The order of the High Court, dated 4th April, 1952 quashing the proceedings before the Special Judge on the ground that section 4 was unconstitutional as violative of section 14 of the Constitution was wrong since the law as there laid down has been disapproved by this Court in its decision in *Kedar Nath Bajoria v. The State of West Bengal*<sup>1</sup>.

1. (1953) S.C.J. 580 : (1954) S.C.R. 30.

(3) That there was no identity between the proceedings initiated before the Chief Presidency Magistrate by the complaint and charge-sheet in January, 1951, and the proceedings before the Special Judge which have been directed to be quashed by the learned Judges of the High Court and in consequence of section 12, have been wrongly applied by the learned Judges.

(4) That the earlier decisions of the High Court, dated 12th January, 1956 and 19th December, 1956 were correct and besides bound the Court and so should have been followed.

Before proceeding with these arguments in detail, we can dispose of the second contention very shortly. This argument proceeds on a fundamental misconception as it seeks to equate an incorrect decision with a decision rendered without jurisdiction. A wrong decision by a Court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like review which the law provides. The learned Judges of the High Court who rendered the decision on 4th April, 1952 had ample jurisdiction to decide the case and the fact that their decision was on the merits erroneous as seen from the later judgment of this Court, does not render it any the less final and binding between the parties before the Court. There is, thus, no substance in this contention. The decision of the High Court, dated 4th April, 1952 bound the parties and its legal effect remained the same whether the reasons for the decision be sound or not.

The other points urged by the learned counsel may be considered under two heads :—

1. What is the effect of the order of the High Court dated 4th April, 1952 ? By quashing the proceedings before the Special Judge, did it or did it not automatically re-invest the Chief Presidency Magistrate with jurisdiction over the case and the offence of which he had taken cognizance? If it has this result, then on the terms of section 12, the Special Judge would have no jurisdiction, unless by reason of later decisions binding on the parties, effect cannot be given to this position.

2. Are the present proceedings which have been initiated by an order of allotment passed by Government in respect of which a charge-sheet was filed on 18th June, 1953 hit by the terms of section 12 ?

So far as the first point is concerned, we are in entire agreement with the view that Das Gupta, J., was inclined to take and to which he would have given effect but for the earlier decision of that Court in April, 1953. With reference to this matter, it would be convenient if the effect of the order, dated 4th April, 1952, was considered first and then the further question as to whether the later decisions of the High Court preclude effect being given to that construction of the order which we are disposed to take. The position stands thus :

A charge-sheet was filed by the police before the Chief Presidency Magistrate who had jurisdiction to entertain the complaint and proceed with the enquiry and trial. He took cognizance of the offence and thus became seized of the proceedings. It was at that stage that the Government issued the notification under section 4 of the Act allotting the case to the Special Judge at Alipore and directed a trial by him. That order of allotment and transfer of the proceedings was held to be unconstitutional by the High Court and that decision has become final with the parties. The result would therefore be as if there had never been any allotment of the case to the Special Judge and therefore there had been no assumption of jurisdiction by him, the allotment being *non est*. It is true that when the Chief Presidency Magistrate was appraised of the notification of the Government, allotting the case to the Special Judge, he directed by his order, dated 16th February, 1951 a despatch of the records from his Court to that of the Special Judge. That was obviously merely a ministerial or a mechanical order giving effect to an order of Government which did not exist in the eye of the law and that order cannot have any significance or effect on his previously existing jurisdiction over the case. When the order under section 4 of

the Act was quashed by the High Court on 4th April, 1952 its effect in law was, we are satisfied to restore the position as it was before the allotment, namely, the revival of the jurisdiction of the Chief Presidency Magistrate over the case of which he had in compliance with law taken cognizance. It appears to us to be clear therefore that on the terms of section 12, the proceeding against the respondent was pending in the Court of the Chief Presidency Magistrate on 9th April, 1952 the date of the commencement of the Ordinance.

The question next to be considered is whether any of the proceedings which took place subsequent to the order of the High Court, dated 4th April, 1952 affect this situation. The allotment to the Special Judge in May, 1952, during the continuance of the Ordinance having been set aside by the High Court by its order, dated 24th March, 1953 on the ground that on its strength the proceedings could not be continued after the lapse of the Ordinance, left the position as it was before that allotment. Next we have the allotment in December, 1952, and a fresh charge-sheet on its basis before the Special Judge on 18th June, 1953. No doubt the legality of this allotment was upheld by the High Court by its order, dated 12th January, 1956 when the learned Judges declined to quash the proceedings before the Special Judge and that judgment has become final. As against this however it must be pointed out that this judgment of the High Court was brought up by Special Leave and we have already extracted the observations of this Court in dismissing the petition for Special Leave which appear to favour the view that the respondents were at liberty to raise again objections to the jurisdiction of the Special Judge. No doubt if the respondents had to rely on these observations alone, the plea that the judgment of the High Court continued to bind the parties to the proceedings by reason of the dismissal of the petition for leave under Article 136, would be available to the State. But the matter does not rest there. The 1st respondent notwithstanding the judgment of the High Court, but apparently encouraged by the observations of this Court while dismissing his Special Leave petition, raised an objection before the Special Judge to his jurisdiction based on section 12 of the Act and that Judge upheld it and directed the discharge of the accused indicating as well that the inquiry into and trial for the offences should be by the Chief Presidency Magistrate. This order of the Special Judge, dated 22nd February, 1956 was accepted by the State by not challenging it in Revision before the High Court and consequently it must be held that this later order supersedes the High Court's order, dated 12th January, 1956.

We have next to consider the situation arising from the quashing by the High Court by its order dated 19th December, 1956 of the proceedings before the Presidency Magistrate when he attempted to exercise jurisdiction over the case acceding to the prayer of the State that the proceedings before him be revised, and it is this which in our opinion is crucial for the disposal of this appeal. Das Gupta, J. who spoke for the Court recorded two findings: (1) That unhampered by previous decisions he would have held that the case was pending before the Chief Presidency Magistrate on 9th April, 1952 so as to exclude because of section 12 of the Act, jurisdiction to try being vested in the Special Court; (2) That the previous decision of the Court dated 24th March, 1953 precluded him from giving effect to this opinion since that decision had impliedly if not expressly decided that the Special Court, had jurisdiction over the case. Giving effect to the previous decision the Court quashed the proceedings before the Magistrate.

From what we have stated earlier, as regards the effect of the decision dated 24th March, 1953, it would be seen that the learned Judges had not in their order dated 19th December, 1956 taken into account the events which transpired after the order of the High Court dated 24th March, 1953, and in particular the effect as between the parties, of the order of the Special Judge dated 22nd February, 1956 upholding an objection to his jurisdiction, becoming final by no challenge being made to it by the State. Properly viewed that nullified the effect of the earlier decisions of the High Court taking expressly or impliedly the view that the Special Judge had jurisdiction over the case. But what is relevant to the present purpose is not whether the opinion expressed in the decision of the High Court dated 19th December, 1956

is correct or otherwise, but whether it does not constitute a binding adjudication between the parties as to the forum in which the trial could competently take place. No doubt the learned Judges added in their judgment that they expressed,

"no opinion on the question whether it was still possible for the State to institute legal proceedings against the petitioner on the facts alleged",

but this in our opinion does not detract from the express statement that effect of the previous decision of 1953 was that the proceedings were pending before the Special Judge—subsequent to 9th April, 1952. The position that emerges therefore is that though the effect of the order of the High Court dated 4th April, 1952, was to leave the proceedings against the accused pending before the Chief Presidency Magistrate, so as to attract the ban enacted by section 12 of the Act, still by the decision of the High Court dated 19th December, 1956 which is binding as between the parties, the Special Court had been held to have jurisdiction over the case, section 12 being held not to be in the way. There is thus no escape from the position that effect has to be given to this state of affairs and that the respondent can derive no advantage by canvassing before us the correct result of the order of the High Court dated 4th April, 1952 unhampered by the subsequent decisions which are binding on him. We, therefore, reach the conclusion that the Special Court must be deemed to have jurisdiction over the case, and that the learned Judges whose judgment is now under appeal were in error in reversing the order of the Special Judge.

In this view it would not be necessary to consider the other submission of the learned Counsel for the State but as the same was pressed before us with earnestness we shall express our opinion on it. We need hardly add that this discussion is on the basis that the effect of the order of the High Court dated 19th December, 1956 may be put aside.

The second point urged by learned counsel for the State may be formulated thus :

Assume, that a proceeding was pending in the Court of the Chief Presidency Magistrate on 9th April, 1952. That however does not preclude the State Government from initiating fresh proceedings in respect of the same offences against the accused and allotting that case for trial to the Special Judge under section 4 (2) and from filing a fresh charge-sheet based thereon. It was this that was done when the present proceedings were initiated on 23rd July, 1957 after the failure of the proceedings before the Chief Presidency Magistrate by reason of the order of the High Court dated 19th December, 1956.

A point in this form was not urged before the High Court but we do not consider that the appellant is precluded from raising it before us. We however consider that it cannot prevail. There is no dispute that the charge against the accused is in respect of the same offences regarding which proceedings were initiated before the Chief Presidency Magistrate in January, 1951. West Bengal Act XI of 1952 enacted a new section 4 in the parent Act of 1949 and by the second sub-section enabled the State Government to effect a distribution amongst the Special Courts of cases falling within the Schedule, such cases to be tried by the Special Courts. This is the provision under which the allotment to the Special Judge has been made in July, 1957. But section 12 however enacts that nothing in the Act shall apply to any proceedings pending on the date of the commencement of the Ordinance, i.e., on 9th April, 1952. If effect has to be given to the prohibition contained in section 12, it must necessarily be held that where a proceeding is pending on 9th April, 1952, there cannot be an allotment of that case to a Special Judge under section 4. We consider that to hold that there could be an allotment of a case in respect of an offence for which a complaint before a Magistrate is pending on 9th April, 1952 would be a plain evasion of the bar contained in section 12. The manifest object of section 12 appears to be that where a proceeding is pending in the ordinary Courts the power of the Government to allot the trial for that offence to a Special Court constituted under section 2, of the Amending Act and the allotment to the judge of that Court under section 4 shall not be effected, but that those proceedings shall

continue and be concluded before the ordinary Courts. We consider that to accede to the arguments that notwithstanding the prohibition enacted in section 12, the State Government could still allot a case which deals with the same offence, arising out of identical facts against the same accused to a Special Judge would be a patent infringement of the terms of section 12 and in derogation of the protection which that provision was meant to confer. The mere fact that a different number is given to the allotment or it is effected on a later date is wholly irrelevant for considering whether there is or is not a substantial identity between the proceedings which were pending before the Chief Presidency Magistrate on 9th April, 1952 and the case which was the subject of future allotment. It was not in dispute that the case allotted to the Special Court related to the same occurrence and charged the same accused with substantially the same offences as were involved in the proceedings in the case before the Magistrate. The appellant therefore gains no advantage by a fresh allotment in July, 1957 or the earlier allotments on which reliance was placed. It is precisely such an allotment that is within the prohibition in section 12 and protection which that section affords is not to be nullified by considering the fresh allotment as the initiation of a fresh proceeding. This point has therefore no substance and is rejected.

The result is that the appeal is allowed and the order of the High Court set aside.

We hope that with the decision of this Court, there will be an end to the objections as to forum and the case will be proceeded with expeditiously by the Judge of the Special Court who we have held has jurisdiction to proceed with the matter.

K.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.]

Fateh Mohammad

.. *Appellant\**

v.

The Delhi Administration

.. *Respondent.*

*Foreigners Act (XXXI of 1946), sections 3, 9 and 14—Person entering India on 9th May, 1956, under Pakistani Passport—Visa permitting him to stay for 3 months—Failure to leave on expiry—Notice imposing restrictions under section 3 (2) served on 19th November, 1959—Non-compliance—Prosecution under section 14—Onus under section 9—Not discharged—Finding of fact—No interference in appeal under Article 136 of the Constitution of India, 1950.*

The appellant who entered India on 19th May, 1956 under a Pakistani passport with an endorsed visa permitting him to stay for 3 months failed to leave even after expiry of the period. Notice under section 3 (2) of the Foreigners Act, 1946, imposing restrictions—conditions—on his stay was served on him by the Delhi Administration on 19th November, 1959 after the definition of 'foreigner' was amended by Act XI of 1957. As he did not comply with it he was prosecuted under section 14 of the said Act.

The Magistrate found him to be a 'foreigner' under the amended definition and convicted and sentenced him. The Sessions Judge in appeal held that the onus lay upon him to prove that he was not foreigner, that it was not discharged on the evidence and documents on record and confirmed the conviction and sentence. The High Court in Revision refused to interfere.

On appeal, by Special Leave,

*Held :* The appellant was certainly not a 'foreigner' when he entered India in 1956. In view of the definition as amended in 1957, he had become a foreigner—not being a 'citizen of India' under Article 5 of the Constitution. Inasmuch as he failed to comply with notice imposing certain restrictions and conditions on his stay he had committed an offence and it will be futile for him to contend that he was not a foreigner under the original definition. The legality of an act done by him must be judged by the then existing law.

Whenever a question arises whether a person is or is not a foreigner, the onus of proving he is not a foreigner is on that person by reason of section 9 of the Foreigners Act. The finding of the Magistrate that he had failed to prove he was a citizen of India and was therefore a foreigner was confirmed by the Sessions Judge in appeal on the evidence on record and probabilities of the case and therefore is a finding of fact, the High Court too refused to interfere with that finding in Revision. Thus there is no permissible ground for interference in an appeal under Article 136 of the Constitution.

Appeal by Special Leave from the Judgment and Order dated the 26th May, 1961 of the Punjab High Court Circuit Bench at Delhi in Criminal Revision No. 159-D of 1961.

*Nur-ud-din, Ahmed and Naunit Lal*, Advocates, for Appellant.

*V.D. Mahajan*, Advocate and *P.D. Menon*, Advocate for *R.N. Sachthey*, Advocate for Respondent.

The Judgment of the Court was delivered by

*Subba Rao, J.*—This appeal by Special Leave is directed against the order of the Punjab High Court dismissing the Revision Petition filed against the order of the Additional Sessions Judge, Delhi.

The appellant entered India on 9th May, 1956, on a Pakistan-passport dated 11th February, 1956. He had a *visa* endorsed on the said passport permitting him to stay in India for three months. Under that *visa* he had to leave India on or before 8th August, 1956. As he failed to do so, a notice under section 3 (2) of the Foreigners Act, 1946, as amended in 1957, hereinafter called the Act, was served on him on 19th November, 1959, by the Delhi Administration. By that notice he was asked to report his presence personally to the Foreigners Regional Registration Officer, Taj Barracks, Janpath, New Delhi, between 11 A.M. to 12 NOON daily and enter into a personal bond in the amount of Rs. 5,000 with two sureties in the amount of Rs. 10,000 each for the due observance of the restrictions imposed on his movements. The appellant did not comply with the requirements of the notice. Therefore he was prosecuted under section 14 of the Act for violating the provisions of section 3 in the Court of the Sub-Divisional Magistrate, Delhi. The appellant pleaded in defence that the said notice was not served on him and that he was a citizen of India. The learned Magistrate held on the evidence that the said notice was served on him and that he was not a citizen of India but a foreigner within the meaning of that Act and that he had committed an offence, inasmuch as he did not comply with the provisions of the said notice. On those findings he convicted him under section 14 of the Act and sentenced him to six months' rigorous imprisonment. On appeal the Sessions Judge, Delhi, confirmed the findings of the Magistrate and dismissed the appeal filed by him. He held that the burden was upon the appellant to prove that he was not a foreigner and that he had failed to discharge the same. He also rejected the plea of the appellant, *viz.*, that as on the date he entered India, he was not a foreigner within the meaning of the definition of 'foreigner' as it then stood he could not be convicted, on the ground that he was prosecuted for an offence committed after the definition was amended. The High Court confirmed the conviction of the appellant and the sentence passed against him. Hence the appeal.

The learned counsel Mr. Nur-ud-din appearing for the appellant raised before us the following two points : (1) the appellant was not a foreigner within the meaning of the definition of a foreigner as it existed at the time he entered India, *i.e.*, on 9th May, 1956, and therefore the High Court went wrong in convicting him, and (2) the appellant is not a foreigner even under the amended definition.

To appreciate the first contention it will be convenient to read the relevant provisions of the Foreigners Act, 1946 :

**Section 3:** "The Central Government may by order make provisions, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigners for prohibiting, regulating, or restricting the entry of foreigners into (India) or their departure therefrom or their presence or continued presence therein.

(2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner.....

- |     |   |   |   |
|-----|---|---|---|
| (a) | * | * | * |
| (b) | * | * | * |
| (c) | * | * | * |
| (d) | * | * | * |

(e) shall comply with such conditions as may be prescribed or specified—

(i) requiring him to reside in a particular place :

(ii) imposing any restrictions on his movements :

(iii) to (ix) [\* \* \* \* \* \*].”

(f) shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions :

The definition of a foreigner as it stood in 1953 was :

‘ Foreigner ’ means a person who is not a natural born British subject as defined in sub-sections (1) and (2) of section 1 of the British Nationality and Status of Aliens Act, 1914.

Section 1 (1) of the British Nationality and Status of Aliens Act, 1914, is in these terms :

“ The following persons shall be deemed to be natural-born British subjects, namely :

(a) any person born within His Majesty’s Dominion and allegiance.”

The definition of a foreigner was substituted by the Foreigners Laws (Amendment) Act, 1957 (XI of 1957), section 2 (a). This amendment came into force with effect from 19th January, 1957. Under the said definition, ‘ foreigner ’ means a person who is not a citizen of India. Section 14 is :

“ If any person contravenes the provisions of this Act or of any order made thereunder, or any direction given in pursuance of this Act or such order, he shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine ; and if such person has entered into a bond in pursuance of clause (f) of sub-section (2) of section 3, his bond shall be forfeited ; and any person bound thereby shall pay the penalty thereof or show cause to the satisfaction of the convicting Court why such penalty should not be paid.”

The gist of the foregoing provisions relevant to the present inquiry may be stated thus : Under the definition of a foreigner as it stood in the Act in 1953 before the amendment of 1957, any person born within His Majesty’s Dominion and allegiance was a citizen of India but after the amending Act XI of 1957 which came into effect from 19th January, 1957, a person who is not a citizen of India is a foreigners. After that date if an order is issued by the Central-Government in exercise of powers conferred on it under section 3 of the Act directing a foreigner so defined and prescribing certain conditions for his stay, it is the duty of such a foreigner to obey the said order. If he did not, he would be committing an offence within the meaning of section 14 of the Act.

In the light of the said provisions let us look at the facts of the present case. As aforesaid the appellant entered India in 1956 on a Pakistan passport, the *visa* endorsed on it enabled him to stay in India till 8th August, 1956. The Delhi Administration made an order and served on him on 19th November, 1959, imposing the restrictions on his stay. Admittedly the appellant did not comply with the said restrictions and therefore he committed an offence within the meaning of section 14 of the Act.

It is contended that as the appellant was not a foreigner at the time he made his entry into India, he could not be convicted on the basis he was a foreigner within the meaning of the definition of a foreigner as subsequently amended. There is a fallacy underlying in this argument. The appellant was certainly not a foreigner when he entered India under the definition of a foreigner as it then stood. In view of the amendment of the definition he became a foreigner after 19th January, 1957. He could not be convicted for an offence for an act done by him before the amendment on the basis he was a foreigner ; for instance an act done by him such as his entry into India or his non-compliance with the conditions of an order issued on him before the amendment on the foot that he was a foreigner. But the offence for which he is now charged is an act done by him in derogation of an order issued to him after the amendment. On the date when the Delhi Administration served on him the notice imposing certain restrictions and directing him to comply with certain conditions for his stay he was a foreigner within the meaning of amended definition. On the basis of the existing law he committed an offence and it will be futile for him to contend that he was not a foreigner under the original definition. The legality of the act done by him must be judged on the basis of the existing law as the act was :

done subsequent to the amendment. Reliance is placed upon the decision of this Court in *Fida Hussain v. State of Uttar Pradesh*<sup>1</sup> in support of the contention that as the appellant was not a foreigner when he made the entry, he could not be convicted on the ground he was a foreigner. But the facts of that case are different from those in the present appeal and that decision is clearly distinguishable. There a person was born at Allahabad at the time when it was His Majesty's Dominion. He had left India to Pakistan but returned on a passport granted by the Government of Pakistan on 16th May, 1953. He had a *visa* endorsed on his passport by the Indian authorities permitting him to stay in India for three months and this permission was later extended up to November, 1953. Under paragraph 7 of the Foreigners Order, 1948 issued under section 3 of the Foreigners Act, every foreigner entering India on the authority of a *visa* shall obtain from the appropriate authority a permit indicating the period during which he is authorised to remain in India and shall, unless that period is extended, depart from India before its expiry. As the appellant stayed after 15th November, 1953, without permission given under that order, he was prosecuted for breach of the said order. It would be seen from the said facts that the appellant therein was prosecuted for an offence committed by him before the Amending Act of 1957 came into force on 19th January, 1957. This Court on the said facts held that the appellant therein could not be convicted for the breach of paragraph 7 of the Foreigners Order as he not being a foreigner at that time could not have committed a breach thereof, but clearly this decision cannot apply to an offence committed by a person who falls within the amended definition of 'foreigner' after the Amending Act came into force. Indeed this Court in express terms left open that question at page 1523.

"No question as to the effect of the amended definition on the appellant's status fell for our decision in this case, for we were only concerned with his status in 1953. We would also point out that no order appears to have been made concerning the appellant under section 3 (2) (c) and we are not to be understood as deciding any question as to whether such an order could or could not have been made against the appellant."

What has been left open in that decision is to be considered in the present case. The appellant who is a foreigner under the amended definition has committed a breach of an order served on him after the amended definition of a foreigner came to hold the field. The appellant therefore in disobeying the directions given to him by the Delhi Administration has committed an offence within the meaning of section 14 of the Act.

Even so it is contended that the appellant is an Indian citizen and therefore is not a foreigner within the meaning of the amended definition of a foreigner under the Act. Some of the relevant provisions of the Constitution and the Foreigners Act (XXXI of 1946) may conveniently be extracted. Article 5 of the Constitution says :—

"At the commencement of the Constitution, every person who has his domicile in the territory of India and—

(a) who was born in the territory of India ;

or

(b) either of whose parents was born in the territory of India, or

(c) who has been ordinarily resident to the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India."

Section 9 of the Foreigners Act, 1946, is in these terms :—

"If in any case not falling under section 8 any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner... the onus of proving that such person is not a foreigner... shall, notwithstanding anything contained in the Indian Evidence Act, 1872 (I of 1872) lie upon such person."

Under Article 5 (a) of the Constitution the appellant cannot be a citizen of India unless he was born in the territory of India and had his domicile in the territory



of India at the commencement of the Constitution. In this case the appellant claimed to be a citizen under Article 5 (a) of the Constitution. By reason of section 9 of the Foreigners' Act whenever a question arises whether a person is or is not a foreigner, the onus of proving that he is not a foreigner lies upon him. The burden is therefore upon the appellant to establish that he is a citizen of India in the manner claimed by him and therefore he is not a foreigner. This Court in *Union of India v. Ghaus Mohammad*<sup>1</sup> accepted this legal position and laid down at page 748 thus :

"It does not seem to have realised that the burden of proving that he was not a foreigner, was on the respondent and appears to have placed that burden on the Union. This was a wholly wrong approach to the question."

Rightly throwing the onus on the appellant the Magistrate considered the evidence and came to the conclusion that the appellant had failed to prove that he was a citizen of India and therefore not a foreigner. The learned Additional Sessions Judge after noticing that the onus was on the appellant considered the evidence, both oral and documentary and came to the conclusion that the appellant had failed to discharge the onus. It cannot be and indeed is not suggested that the said finding is vitiated by any error of law, but it is contended that the Additional Sessions Judge was not justified in ignoring the evidence of respectable witnesses who spoke to the fact that the appellant was born in India and continued to reside in India at the date of the commencement of the Constitution and thereafter. The learned Additional Sessions Judge as a Judge of fact considered the evidence in the light of probabilities and the documentary evidence and rejected the same as unworthy of credence. The High Court in Revision refused to interfere with that finding. We do not see any permissible ground for interference with that finding in an appeal under Article 136 of the Constitution.

No other point is raised before us. The appeal fails and is dismissed.

K.G.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, J. L. KAPUR, K. SUBBA RAO AND J. R. MUDHOLKAR, JJ.

Rai Sahib Ramdayal Ghasiram Oil Mills and Partnership firm .. *Appellant \**

*v.*

The Labour Appellate Tribunal and another .. *Respondents.*

*Industrial Disputes Act (XIV of 1947), section 7—State Government referring an industrial dispute to a single member Tribunal—Retirement of the member—Reconstitution of a fresh Tribunal by notification under section 7 (1) of the Act—Whether the reconstituted Tribunal had jurisdiction to adjudicate upon the dispute—Section 25-H (inserted by Act XLIII of 1953)—Applicability.*

No doubt section 7 (1) of the Industrial Disputes Act (XIV of 1947) empowers the Government to constitute a Tribunal for adjudicating upon industrial disputes in accordance with the provisions of the Act. But merely constituting a Tribunal for such a purpose is not enough. It has also to act under section 10 (1) (c) of the Act and make a specific reference to it of each dispute for adjudication. Without such a reference (as in the instant case) when the fresh Tribunal was constituted, the Tribunal does not get any jurisdiction to adjudicate upon any dispute.

Wide though the powers of an Industrial Tribunal are while adjudicating upon industrial disputes, it cannot arrogate to itself powers which the Legislature alone can confer or do something which the Legislature has not permitted to be done. Since section 25-H inserted by Act XLIII of 1953 came into force only from 24th October, 1953, the provisions of this section cannot apply to workmen who had been retrenched before this provision came into force.

Appeal from the Order, dated the 15th October, 1956 of the Bombay High Court in Special Civil Application No. 2832 of 1956.

*Bishan Narain, Senior Advocate (K. L. Metha, Advocate with him), for Appellant.*

1. (1962) 1 S.C.J. 119 : (1962) 1 M.L.J. M.L.J. (Cri.) 84 : (1962) 1 S.C.R. 744.  
(S.C.) 73 : (1962) 1 An.W.R. (S.G.) 73 : (1962)  
\*C.A. No. 593 of 1960.

10th December, 1962.

No appearance for Respondents.

The Judgment of the Court was delivered by

*Mudholkar, J.*—This is an appeal by a certificate from the summary dismissal by the Bombay High Court of a writ petition under Articles 226 and 227 of the Constitution. The relevant facts are these :

Rai Sahib Ramdayal Ghasiram Oil Mills (hereinafter referred to as the Mills) were closed on 1st September, 1952, on the ground that they had sustained heavy losses. The closure was found to be *bona fide* and the workmen were awarded retrenchment benefit. The Mills, however, reopened on 14th November, 1954, though their operations were carried on on a reduced scale for avoiding further losses. Some of the retrenched workmen were re-employed by the Mills but evidently at lower wages than before. It was said on behalf of the Mills that all the former workmen could not be absorbed but it would appear that they had in fact employed some new hands as well. An industrial dispute having been raised by the respondent-union because of the non-absorption of 11 workmen, the State Government constituted an Industrial Tribunal consisting of Mr. Kurian, under section 7 of the Industrial Disputes Act, as it stood on that date, on 13th May, 1955 and referred the following dispute to him :

“Whether the retrenched workmen referred to in the Annexures A, B and C of the Award of the Industrial Tribunal, in the industrial dispute between the workmen and employers of Rai Sahib Ramdayal Ghasiram Rice, Ginning and Oil Mills, Peddapally dated 1st January, 1953 are entitled for reinstatement and compensation for unemployment after reopening of the said Mills.”

It may be mentioned that shortly after the Tribunal was constituted and reference made to it, Mr. Kurian retired in consequence of which the Government of Hyderabad made the following Notification on 2nd June, 1955 :

“In exercise of the powers conferred by sub-section (1) of section 7 of the Industrial Disputes Act, 1947 (XIV of 1947) and in supersession of the Labour Department Notification No. B 189 54/134 dated 15th October, 1954, the Rajapramukh hereby constitutes an Industrial Tribunal consisting of Shri Bhikaji Patil as its sole member for the adjudication of industrial disputes in accordance with the provisions of the said Act, with immediate effect.”

The respondents' case before the Tribunal was that after the reopening of the Mills all the former employees were entitled to be given preference over others and were also entitled to re-employment on the same wages as obtained at the date of closure. This claim was based upon the award made by the Industrial Tribunal on 1st January, 1953 in the dispute which arose between the Mills and the respondents in consequence of the closure of the Mills in September, 1952. Para. 24, clause 6 of the Award on the basis of which this claim was made by the Union runs thus :

“In the event of the factory being reopened within one year from the date of award] becomes enforceable the employers will give first preference to those workmen in Annexures A, B and C, that is, no workmen will be employed in the factory other than those employed at present without giving them first opportunity for employment and that on terms as to basic wage and allowances that were in force on 29th July, 1952.”

The grievance of the respondents was that only a few of the former workers were re-employed and that too at lower wages and some new hands had been recruited disregarding the claim of some former employees. They also claimed the benefit of the provisions of section 25-H of the Industrial Disputes Act which were added to the Act by the Industrial Disputes (Amendment) Act, 1953.

Several contentions were raised by the appellant before the Tribunal but we need only refer to those which are now urged before us. One contention was that the Tribunal as it stood constituted on 2nd June, 1955 had no jurisdiction to adjudicate upon the dispute and the other was that the provisions of section 25-H of the Industrial Disputes Act as amended by Act XLIII of 1953 were not available to the former workmen who had been retrenched. The first contention and other contentions to which we have not made any mention were rejected by the Tribunal but the contention that the provisions of section 25-H were not available to the retrenched workmen was upheld by it. The Tribunal, however, made an order in favour of those workmen in the following terms :

"Though the workers cannot claim statutory benefits they cannot be denied social justice which is the underlying principle of section 25-H and the rights that they had obtained under the previous award of 1952. I, therefore, order that the workers from Annexures A, B and C who are not taken back in service by the employers be re-employed and they should be paid their salaries and allowances from the date of the reopening of the mills, i.e., 14th November, 1954. Their salaries would be the same as they were in force at the time of the closure of the mills."

An appeal was preferred by the appellants from the decision of the Tribunal before the Labour Appellate Tribunal, Bombay. That appeal having been dismissed, the appellants preferred a writ petition before the High Court of Bombay which, as already stated, rejected it *in limine*.

It seems to us that the contention of the appellant that the Industrial Tribunal consisting of Mr. Patil had no jurisdiction to adjudicate upon the dispute is correct and must be upheld. Sub-section (1) of section 7 as it then stood empowered the appropriate Government to constitute one or more Industrial Tribunals for the adjudication of industrial disputes in accordance with the provisions of the Act. Such a Tribunal was to consist of such number of members as the appropriate Government thought fit. Sub-section (2) of section 8 of the Act, as it then stood, provided that where a Tribunal consists of one person only and his services ceased to be available the appropriate Government may appoint another independent person in his place, and the proceedings shall be continued before the person so appointed. That being the legal position, the appropriate thing for the Government to do was to take action under sub-section (2) of section 8 after Mr. Kurian's services ceased to be available. Instead of doing that the Government took action under section 7, sub-section (1) of the Act "in supersession" of its previous notification and constituted a fresh Industrial Tribunal consisting of Mr. Patil as its sole member. We need not consider here whether the old Tribunal still continued to exist and there was merely a vacancy therein and therefore there was no occasion to constitute a fresh Tribunal under sub-section (1) of section 7 because, having constituted a fresh Tribunal, the Government failed to refer the dispute in question to it under sub-section (1) (c) of section 10 of the Act. Apparently, the law advisers and the Government thought that a mere notification under sub-section (1) of section 7 would meet the requirements of law and there was no necessity to make a fresh notification under section 10 (1) (c) referring the particular dispute for adjudication to the Tribunal. No doubt, sub-section (1) of section 7 empowers the Government to constitute a Tribunal for adjudicating upon industrial disputes in accordance with the provisions of the Act. But merely constituting a Tribunal for such a purpose is not enough. It has also to act under section 10 and make a specific reference to it of each dispute for adjudication. Without such a reference the Tribunal does not get any jurisdiction to adjudicate upon any dispute. On this short ground, the appeal must be allowed.

We will, however, say a word about the ground upon which the Tribunal thought it fit to give the retrenched workers the benefit of the provisions of section 25-H on the ground of social justice. Wide though the powers of an Industrial Tribunal are while adjudicating upon industrial disputes, it cannot arrogate to itself powers which the Legislature alone can confer or do something which the Legislature has not permitted to be done. Section 25-H provides for re-employment of retrenched workmen in certain circumstances in preference to newcomers. But Act XLIII of 1953 which enacted this provision clearly provides in sub-section (2) of section 1 thereof that "it shall be deemed to have come into force on the 24th of October, 1953." Clearly, therefore, the provisions of this section cannot apply to workmen who had been retrenched before this provision came into force. The Legislature did not intend the provisions to come into force before 24th October, 1953. When that is the mandate of the Legislature no Tribunal has jurisdiction on the basis of its own conception of social justice to ignore it and apply the provisions or its underlying "principle" to a dispute which arose before the provisions came into force.

For both these reasons, we allow the appeal and quash the award of the Industrial Tribunal. There will be no order as to costs as the respondents have not put in an appearance.

K.L.B.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

The Jay Engineering Works, Ltd. and others

.. Petitioners\*

v.  
The Union of India and others

.. Respondents.

*Employees Provident Funds Act (XIX of 1952), section 2 (b)—“Basic wages”—Piece-rate system fixing quota and norm—Payments when production bonus taken out of definition of basic wages.”*

The bonus scheme established by agreement in the instant case was this. A certain proportion of the production was taken to correspond to the minimum basic wages and dearness allowance fixed by the awards, and this was termed as “quota”. The production above the quota was paid for at piece-rates. But there was a “norm” as the minimum production. If the workmen did not produce the “norm”, he would be guilty of misconduct and would be liable to dismissal, as the agreement provided that any deliberate deviation from production norms would amount to go-slow tactics. The Standing Orders of course provide that go-slow tactics would amount to misconduct and may lead to dismissal of workmen concerned.

*Held*, the real base of the production bonus scheme in force in the petitioner company is the “norm” and not the “quota” and therefore payment upto norm whether made in one form or the other, is the basic wage for the purpose of the Employees’ Provident Funds Act. It is only when payment is made for production above the norm that it can be said that the workman is earning production bonus as generally understood in the industry. Payments for production between “quota” and “norm” cannot be called production bonus in the instant case and taken out of the definition of “basic wage” in section (2) (b) of the Act.

The payment for work done between quota and the norm cannot be treated as any “other similar allowance” appearing in section 2 (b) (ii). The allowances mentioned in that clause are dearness allowance, house-rent allowance, overtime allowance, bonus and commission. Any “other allowance” must be of the same kind.”

Petition under Article 32 of the Constitution of India for the enforcement of Fundamental Rights.

G.P. Pai, Advocate, and J.B. Dadachanji, O.C.Mathur, and Ravinder Narain, Advocates of M/s. J.B. Dadachanji & Co., for Petitioners.

M.S.K. Sastri, R.H. Dhebar and P.D. Menon, Advocates, for Respondents Nos. 1 and 2.

A.S.R. Chari, Senior Advocate, (R. K. Garg, S.C. Agarwala, M.K. Ramamurthi and D.P. Singh, Advocates of M/s. Ramamurthi & Co., with him); for Respondent No. 3.

The Judgment of the Court was delivered by

Wanchoo, J.—This writ petition was heard along with writ petition No. 62 of 1962 (*Bridge & Roof Company (India), Limited v. Union of India*)<sup>1</sup>, as the short question in both of them was whether production bonus was excluded from the term “basic wages” as defined in section 2 (b) of the Employees’ Provident Funds Act, No. XIX of 1952, (hereinafter referred to as the Act). A further question also arose in this writ petition as to the nature of the production bonus scheme in force in the petitioner-company, and the parties were given time to file additional affidavits in that connection. The main point raised in the two writ petitions was decided in *Bridge & Roof Company (India), Limited v. Union of India*<sup>1</sup>. The only question that now remain is whether the production bonus scheme in force in the petitioner-company is of the same type as in *Bridge & Roof Company*<sup>1</sup>. If it is of the same nature the present petition would be governed by that decision and production bonus would be

\*Petition No. 64 of 1962.

12th December, 1962.

1. (1963) 1 S.C.J. 388 : (1963) 1 Comp.L.J. 139 : (1962) 2 L.L.J. 490.

excluded from the term "basic wages" as defined in the Act. The parties have filed additional affidavits and it now remains to determine the nature of production bonus in force in the petitioner-company and to decide whether the decision in the *Bridge & Roof Company*<sup>1</sup>, would apply in the present case, and if so, to what extent.

It appears that some kind of production bonus scheme was started in the petitioner-company in 1947 and that scheme is said to have been more or less on a straight piece-rate system. Then came the major engineering awards in the years 1948, 1950 and 1958, fixing basic minimum wages and its dearness allowance. This was followed by an agreement between the petitioner-company and its workmen in August, 1958 in which the present scheme in force was established even though some kind of production bonus on a more or less straight piece-rate system was in force from as far back as 1947. The scheme which was established by the agreement of 1958 was this. A certain proportion of the production was taken to correspond to the minimum basic wages and dearness allowance fixed by the awards, and this was termed as "quota". The production above the quota was paid for at piece-rates. But there was a "norm" also fixed which was much higher than the "quota" and every workman was normally expected to produce the "norm" as the minimum production. If the workman did not produce the "norm", he would be guilty of misconduct and would be liable to dismissal, as the agreement provided that any deliberate deviation from production norms would amount to go-slow tactics. The Standing Orders of course provide that go-slow tactics would amount to misconduct and may lead to dismissal of workman concerned.

It will be seen therefore that the peculiar feature of the production bonus scheme in force in the petitioner-company is that it has got two bases, namely, (i) the quota, and (ii) the norm, the quota being much lower than the norm. In view of the agreement between the parties and the precise definition of "go-slow" contained in that agreement, it is clear that workmen are expected to give the "norm" as the minimum production and if there is any deliberate deviation therefrom they are liable to be charged with misconduct in the shape of go-slow and may be dismissed for such misconduct. The minimum wages and the dearness allowance fixed by the major engineering awards are payable for production upto the quota and thereafter extra payments are made on piece-rate basis upto the norm and even beyond it where the workmen produce beyond the norm. The question that falls for consideration is whether such a system is a typical production bonus system described in the case of *Bridge & Roof Company*<sup>1</sup>.

The main dispute centres around production between the quota and the norm. The petitioner's case is that the entire payment for production above the quota is payment of production bonus and therefore cannot be taken into account for the purpose of provident fund, in view of the decision in *Bridge & Roof Company*<sup>1</sup>. The workmen, however, contend that the scheme in force in the petitioner-company is a peculiar one which does not correspond to any standard scheme of production bonus as known in standard books on such schemes. It is contended that no scheme dealing with production bonus or incentive wage has two bases of the kind in force in the petitioner-company. The workmen, therefore, contend that in a scheme of the kind prevalent in the petitioner-company production bonus as well understood in industry only starts after the norm and that payment for production between the quota and the norm is nothing more than basic wage as defined in the Act and that the exception of bonus from basic wage will only apply to that part of the payment which is made for production above the norm. The workmen further point out that the straight piece-rate system was in force in the petitioner-company before the major engineering awards fixing minimum basic wages and dearness allowance. When such minimum basic wages and dearness allowance were fixed by the award they became applicable to the petitioner-company also. It was then that the system was evolved of having a quota which would represent production for the minimum basic wages and dearness allowance and the rest of the production was to be paid

1. (1963) 1 S.C.J. 388 : (1963) 1 Comp.L.J. 139 : (1962) 2 L.L.J. 490.

on a piece-rate basis. The change that resulted was that instead of a straight piece-rate system, the petitioner-company introduced the piece-rate system along with a guaranteed time wage. The workmen contend that the quota which was to represent payment for production upto the basic wages and dearness allowance was fixed arbitrarily and had no relation to the productive capacity of the workmen, which is the basis for fixing the base or standard in a typical scheme of production bonus. Therefore, what happened was that the petitioner-company though it fixed the quota, expected much higher production even before the agreement of 1958 for a fair day's work and used to pay extra for this production. This matter was finally established by the agreement of 1958 by which norms were fixed and the workmen were expected to give production upto the norms as a rule and any deliberate deviation from such production amounted to go-slow tactics, resulting in misconduct, which might lead to the dismissal of the workman. The union, therefore, contends that the real base or standard of a typical production bonus scheme in the case of the petitioner-company is not the quota but the norm, and the payment between the quota and the norm can only be basic wages within the meaning of the Act and it is only payment above the "norm" which would be production bonus as understood in industry. It was conceded on behalf of the workmen in arguments that any payment for production above the "norm" would be payment of production bonus and would be covered by the judgment of this Court in *Bridge & Roof Company*<sup>1</sup>.

What is typical production bonus scheme was considered by this Court in *M/s. Titaghur Paper Mills Co., Ltd. v. Its Workmen*<sup>2</sup>, and that has been confirmed in *Bridge & Roof Company*<sup>1</sup>. It was pointed out that the straight piece-rate plan was the simplest of the incentive wage plans. In such a case all payment would be basic wage as defined in section 2 (b) of the Act, even though the worker is working under an incentive wage plan. But the difficulty arises where the straight piece-rate system cannot work. In such cases the system of production bonus by tonnage or by any other standard is introduced. The core of such a plan is that there is a base or a standard above which extra payment is earned for extra production in addition to the basic wages which is the payment for work upto the base or standard. Such a plan typically guarantees time wage up to the time represented by standard performance and gives workers a share in the savings represented by superior performance. The typical scheme thus has only one base or standard and time wages are guaranteed upto that base or standard and any production above that base or standard is production bonus. But it is clear that in such a scheme of production bonus the workers are not bound to produce beyond the base or standard and no disciplinary action can be taken against them for not producing above the base or standard. Learned counsel for the petitioner has been unable to point out any scheme of production bonus which has two bases or standards as is the case in the petitioner-company in the shape of a quota and a norm, the quota being much lower than the norm. What we have to decide is whether in the case of the peculiar system which is in force in the petitioner-company, production bonus, as generally understood, can be said to start immediately after the first base (namely, the quota) or it can only start after the second base (namely, the norm). It was urged on behalf of the petitioner that production bonus schemes have safeguards for both the employer and the employee, and that production upto the norm in addition to the quota in the scheme in force in the petitioner-company is a mere safeguard. Reliance in this connection was placed on a passage in the book "Payment by Results" issued by International Labour Office, Geneva, at page 164, which is as follows :

"No employee will be compelled to produce more than the union has stated was fair, but continued failure of an employee to co-operate in establishing a fair standard or to meet the agreed rate of production of an established standard or the rate of production as stated by the union as fair, without a reason mutually satisfactory to both union and company, will result in dismissal or, if the circumstances warrant unusual treatment, transfer to another department."

1. (1963) 1 S.C.J. 388 : (1963) 1 Comp.L.J. 139 : (1962) 2 L.L.J. 490,

2. (1959) Supp. p. 2 S.C.R. 1012.

That passage appears under the heading "Management Safeguards", and apparently primarily with time studies for the purposes of setting up production standards. Therefore, that passage cannot be taken as an indication that a typical production bonus scheme can fix two bases or standards, at the best the passage only indicates that disciplinary action may be taken in certain cases where the established standard is not reached by a workman without a reason mutually satisfactory to both union and company. We may add that learned counsel relied on this book which deals with a large number of various types of incentive wage plans or production bonus plans; but he was unable to draw our attention to any plan in this book which fixes two bases or standards. It is true that when fixing a base or standard the employers sometimes fix a standard which is below the normal production worked out on the basis of time studies. Not infrequently such base is fixed at 80 per centum of the normal production found on time studies and in some cases it has been known to go as low as 67 per centum. That is however a matter of agreement between the employer and the employee and depends upon various factors. But the reason behind fixing the base or standard somewhat below the normal which might have been found by time studies is to make an allowance for workers who may be little slower than the average and also to allow for some incentive even before the normal is reached so that there may be an effort on the part of the workman to produce not merely the normal but something more than the normal. This is helped by fixing the base or standard somewhat below the normal production as found by time studies and gives the workmen a greater incentive to produce without fail not only upto the normal but also beyond the normal. The fact however that the standard or the base may be fixed somewhat below the normal production found by time studies is of no help to the petitioner, for the scheme in the present case is not a typical production bonus scheme, if the quota is taken to be the base. As we have already indicated, in a typical production bonus scheme the worker is not bound to produce more than the base or standard, though he may do so in order that his earnings may go up. In the scheme in force in the petitioner-company however the worker cannot stop at the quota; he must produce up to the norm on pain of being charged with misconduct in the shape of go-slow and being liable to be dismissed. It seems to us therefore that the real base or standard which is the core of a typical production bonus scheme is, in the case of the petitioner-company, the norm. Any payment for production above the norm would be real production bonus under the scheme in force in the petitioner-company. The production upto the norm is the standard which is expected of a workman in the company and payment upto that production must be basic wages as defined in the Act. It is true that this payment is split up into two parts. The first part consists of basic wages and dearness allowance fixed in the awards for production upto the quota and the latter part is payment at piece-rate for production upto the norm; but the two together in our opinion represent the base or standard of a typical production bonus scheme and so only payment above the norm in the case of the petitioner-company can be properly called production bonus. The mere fact that part of the basic wage as defined in the Act is paid in one form as a time wage and part in another form as a piece-rate wage would make no difference to the whole being basic wage within the meaning of the Act. The real base of the production bonus scheme in force in the petitioner-company is the norm and not the quota and therefore payment upto the norm whether made in one form or the other, is basic wage for the purpose of the Act.

It is however urged on behalf of the petitioner that it is open to the employer to punish a workman for go-slow, even where wages are paid on a piece-rate basis and in this connection reliance was placed on *Mr. Ziaakh v. Firestone Tyre & Rubber Co., Limited*<sup>1</sup>, where it was held that there could be go-slow even where wages are being paid on piece-rate basis. Assuming that to be so, we are of opinion that that does not affect the validity of the conclusion as to base or standard in the present scheme at which we have arrived. It may be possible to punish for go-slow even

where wages are paid on a piece-rate system because the employee deliberately does not produce what he had been normally producing. But in the present case, the position has been crystallised by the agreement and what is go-slow has been precisely defined; usually it is rather a difficult matter for the employer to prove a case of go-slow, more particularly when the piece-rate system of payment is in vogue. Under the agreement however any deliberate deviation from production norms immediately becomes go-slow and the workman is liable to disciplinary action which may even result in dismissal. In these circumstances when go-slow is precisely defined it is obvious that of the two bases to be found in the scheme in the petitioner-company it is the norm which is the real base to be found in all typical production bonus schemes and that it is only when payment is made for production above the "norm" that it can be said that the workman is earning production bonus as generally understood in industry. It would in our opinion be utterly wrong and unrealistic in the present case to call payment for production between the quota and the norm as production bonus when the employee is bound to produce up to the norm practically on pain of dismissal.

It was further urged that norms have been fixed for a small proportion of workmen employed in the petitioner-company and therefore all payments above the quota which is apparently fixed for all workmen should be treated as production bonus in the case of workmen other than this small proportion. This in our opinion is a disingenuous argument and the union's reply shows that though norms have been fixed by agreement only with respect to a small proportion of workmen, in actual practice there are norms for all workmen governed by the scheme, these norms being based on normal performance before the agreement of 1958. It is not disputed that these actual norms are much higher than the quota.

Finally, it was urged that even if the payment for production between the quota and the norm is not production bonus which can be taken out of the definition of basic wages in the Act, it should be treated as payment in the nature of "other similar allowance" appearing in section 2 (b) (ii). We are of opinion that this payment for work done between the quota and the norm cannot be treated as any "other similar allowance." The allowances mentioned in the relevant clause are dearness allowance, house-rent allowance, overtime allowance, bonus and commission. Any "other similar allowance" must be of the same kind. The payment in this case for production between the quota and the norm has nothing of the nature of an allowance; it is a straight payment for the daily work and must be included in the words defining basic wage, *i.e.*, "all emoluments which are earned by an employee while on duty or on leave with wages in accordance with terms of the contract of employment."

In the view we have taken of the scheme in this case, the petition succeeds partly. We direct that the portion of the payment which is made by the petitioner for production above the "norm" would be production bonus and would be covered by the judgment of this Court in *Bridge & Roof Company*<sup>1</sup>, but that portion of the payment which is made by the petitioner for production up to the quota as well as production between the "quota" and the "norm" is basic wage within the meaning of that term in the Act. The petition is therefore partially allowed as indicated above. In the circumstances we pass no order as to costs.

K.S.

*Petition allowed in part.*

1. (1963) 1 S.C.J. 388 : (1963) Comp.L.J. 139 : (1962) 2 L.L.J. 490.



## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Krishanlal Ishwarlal Desai

.. Appellant\*

v.

Bai Vijkor and others

.. Respondents.

*Bombay Rents, Hotels and Lodging House Rates Control Act (LVII of 1947), section 17—Construction—Applicability to cases where landlord has obtained ejectment decree under section 13 (1) (g).*

The period of one month specified in section 17 (1) of the Bombay Rents, Hotels and Lodging House Rates Control Act (1947) applies as much to the case of occupation as to the case of erection of the work contemplated by clauses (g) and (i) respectively of section 13 (1) of that Act.

Where the landlord who gets ejectment of his tenant on the ground that he requires the premises for his own occupation fails to occupy it within one month of delivery of possession, the tenant is entitled to be restored to possession.

Appeal by Special Leave from the Order dated the 11th April, 1962 of the Gujarat High Court in Civil Revision Application No. 335 of 1962.

M. C. Setalvad, Senior Advocate (I. N. Shroff, Advocate, with him), for Appellant.

S. T. Desai, Senior Advocate (J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Respondents.

The Judgment of the Court was delivered by

*Gajendragadkar, J.*—This appeal by Special Leave raises a short question about the construction of section 17 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (LVII of 1947) (hereinafter called the Act). The said question arises in this way. The appellant Krishanlal Ishwarlal Desai is the landlord who owns an open plot of land named Hathi Khada in Kalasawadi Town in the District of Surat. The said plot measures 32,406 sq. ft. This plot was in the possession of the respondents Bai Vijkor and others as tenants. In 1951, the appellant sued the respondents in ejectment. He claimed that under section 13 (1) (g) and (i) of the Act he was entitled to recover possession of the premises consisting of the open plot in question. This claim was resisted by the respondents. The trial Court held that the appellant had not established his case under section 13 (1) (i) but had proved his claim under section 13 (1) (g). Having recorded this finding, the trial Court proceeded to examine the extent of the requirement proved by the appellant. Section 13 (1) (g) provides *inter alia* that notwithstanding anything contained in the Act, a landlord shall be entitled to recover possession of any premises if the Court is satisfied that the premises are reasonably and *bona fide* required by the landlord for occupation by himself. Section 13 (1) (i) provides that the landlord would be similarly entitled to recover possession if the premises being land, they are reasonably and *bona fide* required by the landlord for the erection of a new building. The trial Court found that the requirement of the appellant would be adequately met if he is given a decree for the possession of 2/3rds of the plot in suit. Accordingly, a decree was passed in his favour to that extent on 16th March, 1955.

This decree was challenged both by the appellant and the respondents by cross-appeals in the District Court. The District Court held that the view taken by the trial Court was substantially right and there was no reason to interfere with the decree passed by it. In the result, both the appeals were dismissed on 28th April, 1956.

The appellant then filed an execution application and obtained possession of 2/3rds of the premises in question on 29th June, 1957. It appears that at the trial, the appellant's case was that he wanted the said premises for the purpose of his timber business. Eventually, however, the appellant occupied the said pre-

mises on 24th October, 1957 not for carrying on his timber business but for storing or stocking materials of sanitary works and building contracts which business he had started in partnership on that day. The appellant had constructed a shed for the watchmen to look after the articles which were stored on the open plot.

On 29th July, 1958, the respondents applied under section 17 (1) of the Act to the trial Court to obtain possession of the said premises on the ground that the appellant had failed to occupy the said premises within a period of one month from the date when he recovered possession as required by section 17 (1). The trial Court held that the respondents had failed to make out a case under section 17 (1) and so, their application was dismissed.

The respondents then preferred a revisional application in the District Court. This revisional application was treated as an appeal because the order passed by the trial Court was appealable. The District Court held that the appellant had failed to occupy the premises within the period prescribed by section 17 (1) and so, the respondents were entitled to an order against the appellant for the possession of the said premises. This order was challenged by the appellant by preferring a revisional application before the High Court of Gujarat. The revisional application was however, summarily dismissed. It is this revisional decision of the High Court of Gujarat that has given rise to the present appeal, and the only question which is raised for our decision is about the construction of section 17 (1) of the Act.

We have already seen that section 13 provides for cases where the landlord is entitled to recover possession of the premises from the tenant and that the appellant in fact obtained a decree for possession under section 13 (1) (g) on the ground that 2/3rds of the premises were reasonably and *bona fide* required by him for occupation by himself. The respondent's case is that under section 17 (1) it was obligatory on the appellant to occupy the premises within one month after 29th June, 1957 when possession was delivered to him in execution proceedings; since he had failed to comply with this requirement, they became entitled to obtain back possession of the said premises; and as the present application had been made by them within 13 months from 29th June, 1957 as required by section 17 (1), an order for possession ought to be passed in their favour. The appellant, on the other hand, contends that the stipulation as to the period of one month on which the respondents relied does not apply to the case of occupation which will arise in the case of a decree passed under section 13 (1) (g). The said period applies to the case of a decree passed under section 13 (1) (i). That is how the controversy between the parties raises the question of construction of section 17 (1).

Let us now read section 17 (1). Section 17 (1) reads as under :—

“Where a decree for eviction has been passed by the Court on the ground specified in clause (g) or (i) of sub-section (1) of section 13 and the premises are not occupied or the work of erection is not commenced within a period of one month from the date the landlord recovers possession or the premises are re-let within one year of the said date to any person other than the original tenant, the Court may on the application of the original tenant made within thirteen months of such date order the landlord to place in occupation of the premises on the original terms and conditions, and on such order being made, the landlord and any person who may be in occupation of the premises shall give vacant possession to the original tenant.”

It is clear that when section 17 (1) refers to the requirement that the premises must be occupied by the landlord, the occupation intended by the provision is different from possession, because the first clause of 17 (1) makes a clear distinction between occupation and delivery of possession. The effect of this clause is that when a landlord who has obtained a decree for possession executes the decree and obtains possession of the premises in question he must occupy them in terms of the case made out by him under section 13 (1) (g) and held proved at the trial. Whether or not the occupation by the landlord should be for the same purpose which he set out at the trial or can be for a different purpose, is a question which it is unnecessary to decide in the present appeal. What is, however, clear beyond any doubt is that when the possession is obtained in execution it must be followed by an act of occupation which must inevitably consist of some overt act in that behalf and this overt act was, on the finding of the District Court, done by the

appellant on 24th October, 1957. That means that the appellant occupied the premises beyond the period of one month prescribed by section 17 (1).

Does the stipulation about the period of one month apply to the case of a decree passed under section 13 (1) (g)? That is the next question to consider. It would be noticed that the first clause of section 17 (1) deals with decrees passed under section 13 (1) (g) and (i) and reading the clause, there appears to be no difficulty in holding that the requirement as to one month applies to both categories of decrees. On a fair and reasonable construction of that clause, there appears to be no escape from the conclusion that the period of one month applies as much to the case of occupation as to the case of erection of the work contemplated by clauses (g) and (i) respectively of section 13 (1).

Besides, the scheme of section 17 (1) clearly supports this construction. Section 13 (1) has allowed the landlord to eject the tenants from the premises in their possession for specified reasons and section 17 (1) affords a protection to the tenants where a decree for ejectment has been passed against them under clauses (g) or (i) of section 13 (1). If the Legislature thought it necessary to require the landlord to commence the work of erection if he has obtained a decree for possession under section 13 (1) (i) within one month, there is no reason why the Legislature should not have provided for the same or similar period in respect of occupation which is referable to the decree passed under section 13 (1) (g). Mr. Setalvad contends that the occupation could be effected within a reasonable time, for he suggests that no limitation having been prescribed in that behalf, the general rule would be that it should be done within a reasonable time. We think this construction cannot be accepted because it is extremely unlikely that the Legislature should have provided the period of one month for one category of decrees and should have made no specific provision in that behalf in respect of decrees of the other category. Besides, the construction of the clause according to the rules of ordinary grammar is decisively against the appellant's contention.

The second clause of section 17 (1) refers to a case where the landlord re-lets the premises within one year of the date on which he obtains possession in execution proceedings to any person other than the original tenant. In other words, this clause covers cases where the landlord obtains a decree for possession and instead of using the premises for purposes pleaded by him and on proof of which a decree was passed in his favour he proceeds to re-let them to a stranger; and it provides that if this re-letting takes place within one year of the date specified by it, the original tenant is entitled to claim possession of the said premises. This clause also shows that section 17 (1) is intended to afford protection to the rights of tenants who have been ejected under section 13 (1) (g) and (i).

Similarly, a period of limitation is prescribed for the exercise of the rights conferred on the tenants by the last clause of section 17 (1). This clause provides that the tenants who want to claim the protection of section 17 (1) must apply within 13 months of the date on which possession was delivered to the landlord-decree-holder. The scheme of section 17 (1) thus clearly proves that all the relevant clauses have prescribed respective periods of limitation, and so, it would be idle to suggest that the liability imposed on the landlord to occupy the premises possession of which had been decreed in his favour under section 13 (1) (g) is without any relevant limitation.

There is another consideration which supports this conclusion. Section 17 (2) provides for a penalty against a landlord who contravenes the provisions of section 17 (1). This provision lays down, *inter alia*, that any landlord who recovers possession on the grounds specified under clause (g) or (i) of section 13 (1) and keeps the premises unoccupied or does not commence the work of erection without reasonable excuse within the period of one month from the date on which he recovers possession, shall on conviction be punishable in the manner specified in the said provision. Similar penalty is imposed on a landlord or other person in occupation of the premises who fails to comply with the order of the Court under section 17

(1). It is obvious that when the first clause of section 17 (2) refers to the failure of the landlord either to occupy or to commence erection of the work without reasonable excuse within the period of one month, absence of reasonable excuse and the period of one month apply as much to cases falling under clause (g) as to cases falling under clause (i) of section 13 (1). The plea open to the landlord that he failed to occupy the premises or he failed to commence the work of construction within the specified period because of a reasonable excuse is available to him in both categories of cases and so, absence of reasonable excuse applies equally to both the said categories. If that is so, the period of one month which is the crucial point must govern both the categories of cases. Therefore, in our opinion, the High Court was right in agreeing with the decision of the District Court that the appellant in the present case had failed to comply with the first part of section 17 (1) and so, the respondents were entitled to an order for possession of the premises in question. The appeal accordingly fails and is dismissed with costs.

K.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH AND J. C. SHAH, JJ.

M. Ramappa

.. *Appellant\**

v.

The Government of Andhra Pradesh and another

.. *Respondents.*

*States Re-organisation Act (XXXVII of 1956), sections 122 and 127—Scope and effect—Tribunal not qualified under Hyderabad Public Servants (Tribunal of Enquiry) Act (XXIII of 1950)—Appointment after States Re-organisation Act by the successor State of Abnhra Pradesh—Validity.*

By reason of section 127 and the power granted by section 122 of the States Re-organisation Act 1956, it was competent to the Government of Andhra Pradesh to name an authority under the Hyderabad Public Servants (Tribunal of Enquiry) Act, 1950, even though that authority might not have been qualified under the latter Act. On the notification under section 122 the existing law itself is to have effect in a different manner. Adaptation of the Hyderabad Act under section 120 of the States Re-organisation Act was not a condition precedent to the issuance of the Notification and the Notification having issued, the Hyderabad Act applied accordingly and the appointment of a person qualified under the corresponding Andhra Act as a Tribunal of Enquiry though not under the Hyderabad Act was valid.

Appeal by Special Leave from the Judgment and Order, dated the 13th December, 1960 of the Andhra Pradesh High Court in Writ Petition No. 46 of 1960.†

A. V. Viswanatha Sastri, Senior Advocate (B. Parthasarathi and R. Vasudeva Pillai, Advocates, with him), for Appellant.

D. Narasaraju, Advocate-General for the State of Andhra Pradesh (K. R. Chaudhuri and P. D. Menon, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Hidayatullah, J.—This is an appeal by Special Leave against the judgment and order of the High Court of Andhra Pradesh, dated 13th December, 1960, dismissing Writ Petition No. 46 of 1960. The petitioner is the appellant before us. The respondents to this appeal are the Government of Andhra Pradesh and the Chairman of the Tribunal for Disciplinary Proceedings, Andhra Pradesh. The appellant was a servant in the Hyderabad Revenue Service and in 1956 was holding the post of Deputy Secretary to the Government in the Public Works Department. On a report submitted by the C.I.D. the Government of Andhra Pradesh ordered an inquiry under section 4 of the Hyderabad Public Servants (Tribunal of Enquiry) Act, 1950 (Hyderabad Act XXIII of 1950) by the Tribunal for Disciplinary Proceedings. The Tribunal enquired into 19 charges and submitted its report on 11th July, 1959. The Tribunal found 4 charges proved and in view of the first charge which involved acceptance of a bribe and charge No. 14 which related

\*C.A. No. 356 of 1962.

† (1961) 2 An.W.R. 4.

22nd January, 1963.

to tampering with official records, the Tribunal recommended that the appellant be dismissed from service. After due notice to the appellant the Government of Andhra Pradesh ordered the dismissal of the appellant. The appellant thereupon moved a petition under Article 226 of the Constitution requesting that the order passed by Government be quashed. The appellant, *inter alia*, contended that under the Hyderabad Public Servants (Tribunal of Enquiry) Act, 1950, the Tribunal could only consist of persons who were judicial officers employed as Sessions Judges in the territory of India for a period of not less than 3 years. He contended that though the enquiry had properly commenced before Mr. R. Bhaskara Rao, who functioned as the Disciplinary Proceedings Tribunal upto 19th April, 1959, he was succeeded by Mr. M. Sriramamurthy who was not qualified but who heard the arguments and submitted the report. He contended that Mr. Sriramamurthy had not held the office of a Session Judge for three years. The only question, which was considered by the Andhra Pradesh High Court, was whether in the circumstances Mr. Sriramamurthy was disqualified to act as the Tribunal. The High Court held that in view of the provisions of the States Re-organisation Act and the Notification issued by the Government of Andhra Pradesh on 1st November, 1956, by which the Tribunal for Disciplinary Proceedings in Andhra Pradesh was named as the authority to function under the Hyderabad Public Servants (Tribunal of Enquiry) Act, 1950, Mr. Sriramamurthy was competent to exercise functions exercisable under the Hyderabad Act. The High Court accordingly dismissed the petition.

It is contended by Mr. Viswanatha Sastri that the appointment of Mr. Sriramamurthy was incompetent because he was not qualified to act as the Tribunal of Enquiry under the Hyderabad Act. We are concerned with the Hyderabad Act and the States Re-organisation Act, 1956 (XXXVII of 1956). The relevant provisions of the first Act are sections 3 and 4 and they may now be seen. Section 3 of the Hyderabad Public Servants (Tribunal of Enquiry) Act, 1950, in so far as it is material, reads as follows :—

“ 3. (1) A Tribunal consisting of one or more members shall be constituted for the purpose of this Act.

(2) Every member of the Tribunal shall be a judicial officer who has been employed as a Sessions Judge in the territory of India for a period of not less than three years. . . . . ”

Section 4 reads as follows :—

“ 4. Government may, and in such cases, if any, as may be prescribed, shall refer to the Tribunal for enquiry and report any case involving an allegation of misconduct or inefficiency or disloyalty on the part of a public servant. ”

The corresponding provisions in the State of Andhra before the formation of the State of Andhra Pradesh were the Andhra Civil Services (Disciplinary Tribunal) Rules, 1953, which were made under the Proviso to Article 309 of the Constitution. Under those Rules which came into force on 1st October, 1953, it was provided :

“ 3. (a) The Tribunal shall consist of one Judicial Officer of the status of District and Sessions Judge.”

(Proviso omitted.)

It is admitted that Mr. M. Sriramamurthy held the qualification under this rule.

On 1st November, 1956, the State of Andhra Pradesh was formed by the amalgamation, among others, of portions of Hyderabad State with the State of Andhra. The States Re-organisation Act contemplating the existence of diverse laws on the same subject in the integrated units provided for the conflict of laws. Under section 115 which related to the services it was provided that every person who immediately before the appointed day was serving in connection with the affairs of an existing State, parts of whose territories were transferred to another State, would from that date provisionally continue to serve in connection with the affairs of the successor State to that existing State unless he was required to serve provisionally in connection with the affairs of any other successor State. Under his section the appellant automatically began to serve the successor State, namely,

the State of Andhra Pradesh. Section 120 gave the power to the State Government to adapt laws. It provided that the Government of the succeeding State could make adaptations and modifications of the law of an existing State whether by way of repeal or amendment, as may be necessary or expedient, and after such adaptations, every such law was to have effect until altered, repealed or amended by a competent Legislature or other competent authority. Section 121 gave a special power to Courts, Tribunals and authorities to construe the laws where no provision or insufficient provision had been made for the adaptation of a law to facilitate the application of the law in relation to any State newly formed though without affecting the substance of the matter. Section 122 then provided as follows :—

“122. The Central Government, as respects any Part C State, and the State Government as respects any new State or any transferred territory, may by notification in the Official Gazette, specify the authority, officer or person who, as from the appointed day, shall be competent to exercise such functions exercisable under any law in force on that day as may be mentioned in that notification and such law shall have effect accordingly.”

Finally, section 127 read as follows :—

“127. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law.”

It will, therefore, be seen that the States Re-organisation Act applies even if it is inconsistent with anything in the Hyderabad Public Servants (Tribunal of Enquiry) Act, 1950. By reason of section 127 and the power granted by section 122 it was competent to the Government of Andhra Pradesh to name an authority under the Hyderabad Act even though that authority might not have been qualified under the latter Act. The concluding words of section 122:

“shall be competent to exercise such functions exercisable under any law in force on that day as may be mentioned in that notification and such law shall have effect accordingly,”

show that on the notification issuing under section 122 the existing law itself is to have effect in a different manner.

The argument of Mr. Vishwanatha Sastri that before the Hyderabad Act could be departed from, it had to be adapted under section 120 by substituting an authority different from that named in section 3 thereof might have been effective if section 122 had not concluded in the manner indicated above. Section 122 by its very terms makes the Hyderabad Act speak in accordance with a Notification issued under section 122. That Act after the Notification applies in accordance with the notification and *pro tanto* is adapted by the Notification. In our opinion adaptation of the Hyderabad Act under section 120 was not a condition precedent to the issuance of the Notification and the Notification having issued the Hyderabad Act applied accordingly and the appointment of Mr. Sriramamurthy was therefore valid. We agree with the High Court in its conclusion. The appeal fails and is dismissed with costs.

K. S.

*Appeal dismissed*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Bengal Bhatdee Coal Co., Ltd.

.. *Appellant\**

v.

Ram Probesh Singh and others

.. *Respondents.*

*Industrial Disputes Act (XIV of 1947)—Misconduct of workmen—Dismissal of such workmen after domestic inquiry—When liable to interference with by Industrial Tribunal.*

Where a domestic inquiry is held properly, the tribunal does not sit in appeal on the findings of the domestic tribunal and it can only interfere with the punishment inflicted as a result of the domestic inquiry where there is want of good faith or basic error or violation of the principles of natural justice, or where the findings are perverse or baseless or the case is one of victimisation or unfair labour practice

There is no doubt that though in a case of proved misconduct, normally, the imposition of a penalty may be within the discretion of the management there may be cases where the punishment of dismissal for the misconduct proved may be so unconscionable or so grossly out of proportion to the nature of offence that the tribunal may be able to draw an inference of victimisation merely from the punishment inflicted. Where when a strike (unjustified and illegal) was going on thirteen workmen physically obstructed other workmen who were willing to work from doing their work by sitting down between the tramlines, that was serious misconduct and dismissal would be perfectly justified. In the instant case the tribunal was not justified in coming to the conclusion that this was a case of victimisation because the management decided to dismiss those workmen and was not prepared to let them off with fine or suspension.

The fact that the relations between an employer and the workmen's union were not happy and the workmen concerned were office-bearers or active workers of the union would by itself be no evidence to prove victimisation, for if that were so, it would mean that the office-bearers and active workers of a union with which the employer is not on good terms would have a *carte blanche* to commit any misconduct and get away with it on the ground that relations between the employer and the union were not happy.

Appeal by the Special Leave from the Award, dated the 23rd November, 1960 of the Central Governments Industrial Tribunal, Dhanbad in Reference No. 31 of 1960.

*M. G. Setalvad*, Senior Advocate (*Nonicoomar Chakravarty* and *B. P. Maheshwari*, Advocates, with him), for Appellant.

*M. K. Ramamurthi*, Advocate of *M/s. Ramamurthi & Co.*, for *Dipak Dutta Choudhuri*, Advocate, for Respondents Nos. 1 to 13.

The Judgment of the Court was delivered by

*Wanchoo, J.*—This is an appeal by Special Leave against the order of the Central Government Industrial Tribunal, Dhanbad. The brief facts necessary for present purposes are these. A dispute was referred by the Central Government under section 10 of the Industrial Disputes Act (XIV of 1947) (hereinafter referred to as the Act) with reference to the thirteen workmen involved in this appeal in the following terms :—

"Whether the dismissal of the following thirteen workmen of Bhatdee Colliery was justified? If not, to what relief are they entitled and from which date?"

It appears that the thirteen workmen had physically obstructed the surface trammers working in the colliery on different dates, namely, 20th October, 27th October, and 3rd November, 1959. Some of them had also incited the other workmen to join in this act of obstructing the loyal and willing trammers so that they may be prevented from working. This happened during a strike which was begun on 20th October, 1959, by the Colliery Mazdoor Sangh to which the thirteen workmen in question belonged. In consequence the appellant served charge-sheets on thirteen workmen on 9th November, 1959, charging that

"they physically obstructed the surface trammers on duty at No. 1 and 2 inclines from performing their duties and controlling the movement of the tubs by sitting in-between tramline track and inciting"

on various dates, thus violating regulation 38 (1) (b) of the Coal Mines Regulations. They were asked to explain within 48 hours why disciplinary action should not be taken against them under rule 27 (19) and rule 27 (20) of the Coal Mines Standing Order. The workmen submitted their explanations and an inquiry was held by the Welfare Officer of the appellant. The Welfare Officer found all the thirteen workmen guilty of the charges framed against them and recommended their dismissal. As another Reference was pending before this very Tribunal in November, 1959, the appellant made thirteen applications to the Tribunal under section 33 (2) (b) of the Act for approval of the action taken. Though the workmen submitted their replies in those proceedings they did not contest them thereafter, and the Tribunal approved of the action taken. Thereafter the present Reference was made under section 10 of the Act.

The case put forward by the workmen in the present Reference was that there was no proper inquiry as the workmen were not given a chance to defend themselves. It was further submitted that the dismissals were nothing but victimisation pure and simple for trade union activities.

The Tribunal apparently held that the inquiry was proper, though it has not aid so in so many words in its award. It may be added that it could hardly do

otherwise, for it had already approved of the action taken on applications made under section 33 (2) (b) of the Act. If the inquiry had not been proper, the Tribunal would not have approved of the dismissals. But the Tribunal held that this was a case of victimisation. It therefore set aside the order of dismissal and ordered the reinstatement of the thirteen workmen within one month of its order becoming operative and ordered that they should be treated as on leave without pay during the period of forced unemployment. It did not grant back wages as the workmen had also contributed to their forced unemployment to some extent.

In the present appeal, the appellant contends that there was no evidence to justify the conclusion of the Tribunal that the dismissals were an act of unfair labour practice or victimisation. We are of opinion that this contention of the appellant must prevail. The Tribunal was not unaware of the fact that where a domestic inquiry is held properly, the Tribunal does not sit in appeal on the findings of the domestic Tribunal and it can only interfere with the punishment inflicted as a result of the domestic inquiry where there is want of good faith or basic error or violation of the principles of natural justice, or where the findings are perverse or baseless or the case is one of victimisation or unfair labour practice. We have already indicated that the Tribunal did not find that there was any basic error or violation of the principles of natural justice in the holding of the inquiry; nor did it find that the findings of the inquiry officer were perverse or baseless. It could hardly do so in the face of its own approval of the action taken on applications made to it under section 33 (2) (b) of the Act, for if it had found that the inquiry was not proper, it would not have approved of the action taken against the workmen by the appellant when it was approached under section 33 (2) (b). We must therefore proceed on the assumption that the inquiry was held properly and the inquiry officer who held the inquiry was justified on the evidence before him in coming to the conclusion which he did, namely, that the charges had been proved.

The Tribunal however posed a further question as to victimisation in this way: "But even if I assume that these men were guilty of the offence complained of, let me pause and consider if there is victimisation."

It then proceeded to point out that the workmen concerned had put in ten years' service or more and their previous record of service was good. They were important office-bearers of the union and some of them were also protected workmen. It then referred to previous disputes between the appellant and the union of which these workmen were members and was of the view that "the union and its leaders were eye-sore to the appellant". The Tribunal was, however, conscious that merely because certain workmen were protected workmen they were not thereby given complete immunity for anything that they might do even, though it might be misconduct meriting dismissal. But it pointed out that the misconduct complained of in this case entailed fine, suspension or dismissal of the workmen, and the appellant chose dismissal, which was the extreme penalty. It referred to a decision of the Calcutta High Court in *National Tobacco Company of India, Ltd. v. Fourth Industrial Tribunal*<sup>1</sup> where it was held that in a case where the punishment meted out was unconscionable or grossly out of proportion to the nature of the offence that may itself be a ground for holding that the dismissal was an act of victimisation. It seems to have held that the punishment of dismissal in this case was unconscionable or at any rate grossly out of proportion to the nature of the offence and therefore came to the conclusion that this was a case of victimisation.

Now there is no doubt that though in a case of proved misconduct, normally the imposition of a penalty may be within the discretion of the management there may be cases where the punishment of dismissal for the misconduct proved may be so unconscionable or so grossly out of proportion to the nature of offence that the Tribunal may be able to draw an inference of victimisation merely from the punishment inflicted. But we are of opinion that the present is not such a case and no inference of victimisation can be made merely from the fact that punishment of dismissal was imposed in this case and not either fine or suspension. It is not in

1. (1960) 2 L.L.J. 175.



dispute that a strike was going on during those days when the misconduct was committed. It was the case of the appellant that the strike was unjustified and illegal and it appears that the Regional Labour Commissioner, Central, Dhanbad, agreed with this view of the appellant. It was during such a strike that the misconduct in question took place and the misconduct was that these thirteen workmen physically obstructed other workmen who were willing to work from doing their work by sitting down between the tramlines. This was in our opinion serious misconduct on the part of the thirteen workmen and if it is found—as it has been found proved—punishment of dismissal would be perfectly justified. It cannot therefore be said looking at the nature of the offence that the punishment inflicted in this case was grossly out of proportion or was unconscionable, and the Tribunal was not justified in coming to the conclusion that this was a case of victimisation because the appellant decided to dismiss these workmen and was not prepared to let them off with fine or suspension.

There is practically no other evidence in support of the finding of the Tribunal. It is true that the relations between the appellant and the union to which these workmen belonged were not happy. It is also proved that there was another union in existence in this concern. Perhaps the fact that there were two unions would in itself explain why the relations of the appellant with one of the unions to which these workmen belonged were not happy. But the fact that the relations between an employer and the union were not happy and the workmen concerned were office-bearers or active workers of the union would by itself be no evidence to prove victimisation, for if that were so, it would mean that the office-bearers and active workers of a union with which the employer is not on good terms would have a *carte blanche* to commit any misconduct and get away with it on the ground that relations between the employer and the union were not happy. We are therefore of opinion that the finding of victimisation in this case is based merely on conjectures and surmises. We have already considered the main reason given by the Tribunal, namely the nature of the punishment, and have held that that cannot be said to be unconscionable or grossly out of proportion to the nature of the offence.

Another reason given by the Tribunal in support of the finding of victimisation is also patently wrong. The Tribunal says that in reports made to the Police certain persons were mentioned as having taken part in the misconduct of 27th October, 1959; but in the written statement filed by the appellant two other persons, namely, Ratan Gope and Sohan Gope who were not mentioned in the Police report, were also mentioned as having taken part in the incident of 27th October. The Tribunal thereby concluded that Sohan Gope and Ratan Gope were falsely implicated in the incident of 27th October. Curiously, however, it went on to say that this might be a mistake but added that it meant dismissal of these people and the finding in this respect was not only wrong but perverse. It does appear that by mistake in para. 5 of the appellant's written statement before the Tribunal names of Ratan Gope and Sohan Gope are mentioned as having taken part in the incident of 27th October. But the charge-sheets which were given to them were only about the incident of 20th October. The finding of the domestic inquiry also is with respect to the incident of 20th October. So it seems that there was no justification for the Tribunal to hold that the finding was perverse, because there was no finding that these two persons had taken part in the incident of 27th October. There can be little doubt that there was a mistake in the written statement of the appellant for there was no charge against these two people about the incident of 27th October and no finding about it by the Welfare Officer. The Tribunal therefore was patently wrong in using this mistake as evidence of victimisation. We are therefore of opinion that there is no evidence worth the name in the present case to support the Tribunal's finding as to victimisation and consequent want of good faith. In the circumstances the Tribunal's award must be set aside.

We therefore allow the appeal, set aside the award of the Tribunal and uphold the dismissal of the thirteen workmen concerned. In the circumstances there will be no order as to costs.

K.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Disciplinary Jurisdiction.)

PRESENT:—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH AND J. C. SHAH, JJ.

In the matter of Mr. 'P' an Advocate.\*

*Supreme Court Rules, Order IV-A—Moral turpitude—If essential—"Professional or other misconduct"—Finding by Tribunal of Advocates constituted under Rule 18 of Order IV-A—Value of—Negligence—How far misconduct.*

It is true that mere negligence or error of judgment on the part of the Advocate would not amount to professional misconduct. But different considerations arise where the negligence of the Advocate is gross. In the instant case the Advocate on record did not file the bill of costs in time. It may be held that before condemning an Advocate for misconduct, Courts are inclined to examine the question as to whether such gross negligence involves moral turpitude or delinquency. Wherever conduct proved against an Advocate is contrary to honesty, or opposed to good morals, or is unethical, it may be safely held that it involves moral turpitude. A wilful and callous disregard for the interests of the client may, in a proper case, be characterised as conduct unbefitting an Advocate. The expression "moral turpitude or delinquency" is not to be construed in an unduly narrow and restricted sense in dealing with the question as to whether an Advocate has rendered himself unfit to belong to the honourable profession of law. Besides the rules in Order IV-A of the Supreme Court Rules refer not only to professional misconduct but to other misconduct. An Advocate is liable for "other misconduct" also to disciplinary action. The Tribunal constituted under rule 18 of Order IV-A composed of Advocates are very good judges of what is misconduct in any case. Receipt of fees by Senior Counsel briefed in the case direct from the client is not consistent with professional etiquette and convention about the conduct of Senior Counsel. If Senior Advocates were to deal with the clients direct, it would destroy the very basis of the system of Advocates-on-Record and would make it so difficult for the Supreme Court to assist the growth of a strong, healthy and efficient Junior Bar consisting of Advocates-on-Record and Junior Advocates who prefer only to plead and not to act and plead.

*Sarjoo Prasad*, Senior Advocate, (*A.D. Mathur*, Advocate with him), for the Advocate.

*G.K. Daphtary*, Solicitor-General of India (*R.N. Sachthey*, Advocate, with him), for the Attorney-General for India.

The Judgment of the Court was delivered by

*Gajendragadkar, J.*—Mr. P., who is an Advocate-on-record of this Court and who will hereafter be called the 'Advocate', acted for the Board of Trustees of the Dakhina Parswa Math of Puri through its Executive Officer, respondent No. 2 (b) in Civil Appeal No. 232 of 1954. As such Advocate he entered appearance on 9th November, 1957. The said appeal was heard on the 2nd and 6th of May, 1958, and by the judgment pronounced by this Court on 20th May, 1958, it was dismissed with costs in favour of respondent No. 2 (b). The Advocate had briefed Mr. J. as a Senior Advocate to lead him at the hearing of the appeal. It appears that the client had paid the Advocate Rs. 500 on the eve of the hearing of the appeal and the Senior Advocate was paid Rs. 1,000 direct by the client. The bill of costs and vouchers had to be filed by the Advocate on behalf of his client within six weeks from the date of judgment under Order 40, Rule 12 of the Supreme Court Rules (hereinafter called the 'Rules'). The said period expired during the summer vacation of the Court. After the summer vacation, the Court re-opened on 4th August, 1958. Meanwhile, on 20th May, 1958 after the judgment was delivered by this Court, the Advocate wrote to his client informing him about the result of the appeal and intimating to him that the bill of costs had to be filed. On 28th June, 1958, he again wrote to his client and called for Rs. 60 to meet the necessary expenses in the matter of presenting the bill of costs. This amount was paid to him at Puri on 26th July, 1958 and the Advocate passed a receipt in that behalf. He however, took no further action in the matter until about 9th January, 1959, when it appears that he inspected the Court records in order to be able to prepare a draft bill. A bill was accordingly prepared by him and it was presented in Court on 19th May, 1959. Since the bill was obviously filed beyond the period prescribed by Order 40, Rule 12, the Office returned the bill to the Advocate. In ordinary course, the Advocate should have filed an application requesting that the delay

\* In the matter of Mr. 'P' an Advocate.

made in filing the bill should be condoned, but he seems to have taken no further action in that behalf. Even so, on 18th May, 1960 the Advocate asked for and received Rs. 200 from his client. It appears that Mr. Banamdar was the Executive Officer of respondent No. 2 (b) when the Advocate was engaged by him, but later, Mr. Misra succeeded to the office of the Executive Officer and the amount of Rs. 200 was paid to the Advocate by Mr. Misra; a receipt for this payment had also been passed. It is difficult to understand why the Advocate asked for this amount. During this period the client wrote to the Advocate enquiring about the bill of costs but received no reply. When Mr. Misra realised that the Advocate was taking no action in the matter of presenting the bill of costs and obtaining orders thereon, he gave notice to the Advocate on 9th January, 1961, discharging him from his engagement. On the 12th January, 1961, he also applied to this Court to cancel the Advocate's Vakalat and to condone the delay made in the filing of the bill of costs. On 12th March, 1961 the Advocate agreed that his client can engage Mr. Verma. The applications made by the client for cancelling the Advocate's Vakalat and for condoning the delay made in the filing of the bill of costs came up before the learned Judge in Chambers. They had, however, to be adjourned from time to time in order to enable the Advocate to appear before the learned Chamber Judge. Ultimately, on 9th January, 1962, the learned Judge condoned the delay made in the presentation of the bill of costs without prejudice to the right of the judgment-debtor to plead that the execution in respect of the bill of costs is barred by limitation. He also ordered that the papers should be submitted to the Hon'ble the Chief Justice for taking action against the Advocate for the gross negligence shown by him in the conduct of the proceedings in this case. The Advocate was also directed to hand over all the papers of the case to Mr. Verma.

After the papers were thus placed before the learned Chief Justice, he constituted a Tribunal consisting of three members of the Bar under Order IV-A Rule 18 to enquire into the conduct of the Advocate. The Tribunal then proceeded to hold an enquiry and submitted its report. The issue which the Tribunal tried in these proceedings was whether the Advocate acted with gross negligence in the matter of the taxation of the costs of his client in the appeal in question, and if so, whether such conduct amounts to professional or other misconduct within the meaning of that expression in Order IV-A of the Rules. The report of the Tribunal shows that it has found against the Advocate on both parts of the issue. In its opinion, the conduct of the Advocate amounts to professional misconduct as well as other misconduct within the meaning of the said Order.

On receipt of this Report, the proceedings have been placed before us for final disposal under Order IV-A, rule 21 of the Rules; and the questions which fall for our decision are whether the Tribunal was right in holding that the conduct of the Advocate amounts to professional misconduct and other misconduct and if yes, what is the penalty which should be imposed on the Advocate?

The relevant facts which the Tribunal had to weigh in dealing with the issue referred to it lie within a very narrow compass. It is obvious that in filing the bill of costs on 19th May, 1959, the Advocate was guilty of gross delay. He knew that Order 40, rule 12 required that the bill of costs and vouchers had to be filed within six weeks from the date of judgment and there is no doubt that for filing the bill of costs and vouchers it was unnecessary to obtain any instructions from the client or secure any material from him. The bill of costs incurred by the respondent in the proceedings before this Court which had to be taxed were in this case all costs incurred in this Court and if the Advocate had kept proper accounts, he would have been able to file the bill of costs without any delay. It is true that the Senior Counsel briefed by him in this case was paid his fees of Rs. 1,000 by the client direct which, incidentally, is not consistent with professional etiquette and convention about the conduct of a Senior Counsel. It is to be hoped that this departure from professional etiquette conventionally prescribed for the Senior Advocates is an exception, for if Senior Advocates were to deal with the clients direct, it

would destroy the very basis of the system of Advocates-on-Record and would make it so difficult for this Court to assist the growth of a strong, healthy and efficient Junior Bar consisting of Advocates-on-Record and Junior Advocates who prefer only to plead and not to act and plead. It is, however, clear that the Advocate could have obtained a receipt from the Senior Counsel without any delay and it is not suggested that the delay made by him in filing the bill of costs had anything to do with his inability to obtain such a receipt. In fact, the Senior Counsel had already sent a receipt to his client and there is no doubt whatever that if only the Advocate had approached him for another receipt in that behalf, the Senior Counsel would have immediately given him such a receipt. Therefore, in dealing with the question of delay, we cannot ignore the fact that the delay has been made in filing the bill of costs and vouchers which was entirely a matter within the Advocate's knowledge. It is of utmost importance that Advocates-on-record ought to discharge their duties by their clients with diligence and there should be no occasion for any delay in the filing of the bills of costs and vouchers under Order 40, rule 12.

It is significant that the client repeatedly wrote to the Advocate and enquired about the bill of costs. Four of such letters written by the client to the Advocate have been produced in the proceedings before the Tribunal. The Advocate explained that he sent replies to these letters by post-cards or sometimes orally explained to the client the position when he happened to meet him. The Tribunal was not impressed with this explanation and thought that the conduct of the Advocate in not sending any replies to the queries made by his client rather shows that the Advocate knew that he was at fault and he had really no answer to give in respect of the said queries. It is also clear that after the appeal was decided, the Advocate was paid by his client Rs. 60 obviously with a view to enable him to file the bill of costs. The Tribunal has found that this amount was quite ample under the rules and so, it is not possible to explain the delay made by the Advocate in filing the bill of costs on the ground that he was not put in charge of sufficient funds by his client to meet the expenses in that behalf.

A faint attempt was no doubt made by the Advocate to show that he could not file the bill of costs in time because he did not receive the assistance of the High Court lawyer as to the printing charges, etc. Indeed, it does appear that the Advocate wrote a letter on 20th May, 1958 calling for some information in respect of the printing charges incurred in the preparation of the paper book in this appeal. As the Tribunal has observed, this plea is entirely meaningless, because the taxation of costs of the appeal in this Court has nothing to do with the expenses incurred by the parties for preparing the record in High Court; and as to vouchers, the only voucher which the Advocate had to file was the voucher from the Senior Counsel in respect of the fees of Rs. 1,000 paid to him. Therefore, there is little doubt that the Advocate was guilty of causing gross delay in filing the bill of costs and vouchers as required by the relevant Rule. The fact that the learned Chamber Judge was pleased to condone the delay made in presenting the bill of costs when he was moved by Mr. Verma by a separate application made in that behalf, does not mitigate the default on the part of the Advocate in not filing the said bill of costs in time. Besides, as we have already seen, the delay has been condoned without prejudice to the judgment-debtor's right to plead that the execution is barred by the law of limitation. In case such a plea is raised and allowed, the respondent is likely to lose a large amount of more than Rs. 2,000. Even if the plea is not raised, or if raised, is not allowed and the respondent secures his costs from the appellant, that would be because the learned Chamber Judge took a sympathetic view and did not wish to penalise the party for default of his Advocate. It is in the light of these findings that we have to decide whether the Tribunal was justified in holding that the Advocate is guilty of professional misconduct as well as other misconduct.

It is true that mere negligence or error of judgment on the part of the Advocate would not amount to professional misconduct. Error of judgment cannot

be completely eliminated in all human affairs and mere negligence may not necessarily show that the Advocate who was guilty of it can be charged with misconduct, *vide In re A Vakil*<sup>1</sup> and *in the matter of an Advocate of Agra*<sup>2</sup>. But different considerations arise where the negligence of the Advocate is gross. It may be that before condemning an Advocate for misconduct, Courts are inclined to examine the question as to whether such gross negligence involves moral turpitude or delinquency. In dealing with this aspect of the matter, however, it is of utmost importance to remember that the expression "moral turpitude or delinquency" is not to receive a narrow construction. Wherever conduct proved against an Advocate is contrary to honesty, or opposed to good morals, or is unethical, it may be safely held that it involves moral turpitude. A wilful and callous disregard for the interests of the client may, in a proper case, be characterised as conduct unbecoming an Advocate. In dealing with matters of professional propriety, we cannot ignore the fact that the profession of law is an honourable profession and it occupies a place of pride in the liberal professions of the country. Any conduct which makes a person unworthy to belong to the noble fraternity of lawyers or makes an Advocate unfit to be entrusted with the responsible task of looking after the interests of the litigant, must be regarded as conduct involving moral turpitude. The Advocates-on-record like the other members of the Bar are Officers of the Court and the purity of the administration of justice depends as much on the integrity of the Judges as on the honesty of the Bar. That is why in dealing with the question as to whether an Advocate has rendered himself unfit to belong to the brotherhood at the Bar, the expression "moral turpitude or delinquency" is not to be construed in an unduly narrow and restricted sense.

Besides, it would be noticed that the relevant rules of Order IV-A refer not only to professional misconduct but to other misconduct as well. An Advocate invites disciplinary orders not only if he is guilty of professional misconduct, but also if he is guilty of other misconduct; and this other misconduct which may not be directly concerned with his professional activity as such, may nevertheless be of such a dishonourable or infamous character as to invite the punishment due to professional misconduct itself. An illustration in point would be the conviction of an Advocate for a criminal offence involving moral turpitude, though it may not be connected with his professional work as such. Therefore, in dealing with the case of the Advocate before us, it would not be right to take an unduly narrow view of the concept of moral delinquency or turpitude but to concentrate on the broad issue as to whether by his conduct proved in the present case he has not rendered himself unworthy to be a member of the legal profession.

As early as 1894, Lopes, L.J. attempted to give the definition of misconduct of a medical man in *Allinson v. General Council of Medical Education and Registration*<sup>3</sup>. In that case Lopes, L.J., said :

"The Master of the Rolls has adopted a definition which, with his assistance and that of my brother Davey, I prepared. I will read it again. 'If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency,' then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect'."

This definition was held applicable while dealing with the case of a Solicitor *In re A Solicitor Ex parte the Law Society*<sup>4</sup>. Mr. Justice Darling quoted this definition and added :

"that the Law Society are very good judges of what is professional misconduct as a Solicitor, just as the General Medical Council are very good judges of what is misconduct as a medical man."

With respect, we think the same observation can be made with equal force about the Tribunal which has dealt with this matter and made its report in the present case.

1. 1925) 50 M.L.J. 399 : I.L.R. 49 Mad. 523.  
2. I.L.R. 1940 All. 386.

3. L.R. (1894) 1 Q.B. 750.  
4. L.R. (1912) 1 K.B. 302.

In the matter of *An Advocate*<sup>1</sup> Mukherji, A.C.J. referred to the observations made by Page, C.J. in *In the matter of An Advocate*<sup>2</sup> which showed that the learned Chief Justice thought that :

"in considering whether an Advocate should be struck off the roll of Advocates, the test should be whether the proved misconduct of the Advocate is such that he must be regarded as unworthy to remain a member of the honourable profession to which he has been admitted and unfit to be entrusted with the responsible duties that an Advocate is called upon to perform";

and Mukherji, A.C.J., added that :

"with all respect, I would prefer to take the two conditions laid down as aforesaid disjunctively and apply the test in that way so that on the fulfilment of any one of the conditions the test would be regarded as satisfied."

In other words, according to Mukherji, A.C.J., misconduct which would render the Advocate liable to be removed from the rolls can be either professional misconduct or other misconduct, with the result that in either case, the Advocate ceases to be entitled to belong to the honourable profession of law. The learned Judge also observed that this disjunctive test would prove a sound working rule in the majority of cases and would be applicable to all branches of the profession. It would be noticed that the words used in the relevant rules of Order IV-A are "professional or other misconduct" and that is on the same lines as the relevant provision in section 10 (1) of the Indian Bar Council Act, 1926 (XXXVIII of 1926).

Reverting then to the facts found by the Tribunal in this case, it is clear that the Advocate was paid Rs. 60 expressly for the purpose of filing the bill of costs in time : that the delay made by him in presenting the bill of costs is so unreasonable that the negligence of which he is guilty must be characterised as gross. The explanation given by the Advocate in justification of this delay is clearly fantastic and untrue. The loss which would have resulted to the client is of the order of Rs. 2,000 and it consists of an item of costs awarded to him by this Court in dismissing the appeal filed against him. During the relevant period, his client was repeatedly enquiring as to what had happened about the bill of costs, and the explanation given by the Advocate in that behalf has been rejected by the Tribunal and it must, therefore, be taken to be proved that despite the reminders, the Advocate took no steps to file the bill of costs in time. Even so, the Advocate asked for and received Rs. 200 from Mr. Misra, the successor of Mr. Banamdar, on 18th May, 1960, and as the Tribunal has observed, this demand by the Advocate was wholly unjustified. Having regard to all these circumstances, we do not think it would be possible to accept Mr Sarjoo Prasad's contention that the Tribunal was not justified in making a finding against the Advocate that he was guilty of professional misconduct.

The next question which we have to consider is : what would be the appropriate order to make in this case? Fortunately, cases of professional misconduct are rare in this Court ; but when they are brought to the notice of this Court and it is proved that the allegations made against an Advocate are true, it would be unwise and inexpedient for this Court to take a lenient view of the lapse of the Advocate. The members of the Bar owe it to themselves and to the Court to live up to the best traditions of the Bar, and any serious lapse on the part of any member of the Bar must be severely dealt with. Healthy traditions at the Bar help not only to make the Bar strong and respected, but render valuable and effective assistance to the Courts to deserve and sustain the absolute confidence and faith of the litigating public in the fairness of the administration of justice, for we must always remember that on the ultimate analysis, the real strength of the administration of justice lies in the confidence of the public at large. We are, therefore, reluctant to accede to the plea made before us by Mr. Sarjoo Prasad that we should reprimand the Advocate for his misconduct and pass no further orders against him. Having carefully considered all the relevant circumstances in this case, we are satisfied that in the interests of the profession itself, it is necessary to direct that the name of the Advocate should be removed from the rolls for five years. We also direct that the Advocate should pay the respondent's costs of the enquiry before the Tri-

1. I.L.R. (1935) 63 Cal. 867.

2. I.L.R. (1933) 12 Ran. 110 at 113.

bunal and of the hearing before us. Before we part with this matter, we ought to add that it has been conceded before us both by Mr. Sarjoo Prasad and by the learned Solicitor-General that Part V of the Advocates Act, 1961 (XXV of 1961) has not still been brought into force and so, section 50 (4) of the said Act is still not applicable, and that means that the present proceedings have to be dealt with by the Court in accordance with the existing law.

K.S.

*Advocate directed to be removed  
from the rolls for five years.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—S. K. DAS, A. K. SARKAR AND M. HIDAYATULLAH, JJ.

Chandra Bhan Gosain

.. Petitioner\*

v.

The State of Orissa and others

.. Respondents.

*Practice—Appeal to Supreme Court from order of High Court in a single petition under Article 226 of the Constitution challenging the validity of various assessment orders—Court-fees and other charges payable—If to be as on a single appeal or several appeals in respect of each assessment order.*

Where a person filed a petition under Article 226 of the Constitution challenging the validity of various assessment orders there is only one proceeding. It could not be said that there were as many proceedings as there were assessment orders, for, the petitioner had by a single petition challenged them all together. When an appeal is taken to the Supreme Court from the judgment of the High Court in such a petition, it is impossible to contend that there are more appeals than one. Therefore such an appellant is liable to pay one set of Court-fee and other charges as in a single appeal.

*Lajwanti Sial's case* (Petition for Special Leave No. 673 of 1959 and *Kishinchand Chellaram's case*, Civil Appeals Nos. 462 to 465 of 1960) distinguished.

Appeal against the Order of the Deputy Registrar dated 28th March, 1962 in Civil Appeals Nos. 41 to 49 of 1962.

A. Ranganadham Chetty, Senior Advocate, (B. D. Dhawan, S. K. Mehta and K. L. Mehta, Advocates, with him) for Petitioner.

C. K. Daphtary, Attorney-General for India, (R. Ganapathy Iyer and R. N. Sachithy Advocates, with him) for Respondents.

The Order of the Court was delivered by

*Sarkar, J.*—This is an appeal against the order of the Deputy Registrar directing the present case to be registered as nine appeals and requiring the appellant to pay nine sets of Court-fees. The Deputy Registrar had relied on two cases of this Court, namely, *Lajwanti Sial's Case*<sup>1</sup> and *Kishinchand Chellaram's Case*<sup>2</sup>. We do not think that these precedents cover the present case.

In *Lajwanti's Case*<sup>1</sup>, there were a number of applications under section 66 (2) of the Income-tax Act for reference of the same question. There were in fact a number of separate References but they were dealt with by one judgment from which the appeal to this Court arose. That was really a case of five appeals for the common judgment must be taken to have been delivered in each of the different Reference Cases.

*Kishinchand Chellaram's Case*<sup>2</sup>, is also not helpful because, there, four applications by four different assesseees had been made for Reference of three identical questions arising in each assessment case under section 66 (1) of the Income-tax Act. Though it appears that there was one order of Reference to the High Court and the High Court treated the case as a single case of Reference, it could be said that there were in fact a number of References.

The present case however originated out of one petition under Article 226 of the Constitution challenging the validity of various assessment orders. Obviously here, there was only one proceeding. It could not be said that there were as many

\* C.M.P. No. 1398 of 1962.

1. Petition for Special Leave No. 673 of 1959.

2. (1963). 1 S.C.J. 153 : (1963) 2 S.C.R. 268 : (1963) 1 I.T.J. 5.

5th April, 1963.

proceedings as there were assessment orders for the petitioner had by a single petition challenged them all together. When an appeal is taken to this Court from the judgment of the High Court in such a petition, it is impossible to contend that there are more appeals than one. Therefore, the appellant before us is liable only to pay one set of Court-fee and other charges as in a single appeal. Action may be taken accordingly by the office, if necessary by refunding the excess charges made.

K.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

Moti Singh and another

.. *Appellants\**

v.

The State of Uttar Pradesh

.. *Respondent.*

*Criminal trial—Evidence—Dying declaration—Admissibility—Conditions for—Previous statements of witnesses—If can be used as independent evidence in support of other prosecution evidence—Evidence Act (I of 1872) section 32—Scope.*

*Practice—Concurrent finding of murder based on inadmissible evidence—Interference by Supreme Court.*

*Penal Code (XLV of 1860), section 302—Charge of murder—Necessity to prove death on account of the injuries caused by the accused.*

Statements recorded by a Magistrate at the Hospital of persons subsequently examined as prosecution witnesses could be used only in either corroborating or contradicting the statements of those persons as witnesses in the Court. If those witnesses were not to be believed, their previous statements could not be used as independent evidence in support of the other prosecution evidence.

It is necessary for proving the charge of murder that the victim had died on account of the injuries received and any finding to that effect, in the absence of evidence can be looked into by the Supreme Court and reversed, even through the Courts below have confirmed that finding.

When the victim is not proved to have died as a result of the injuries received in the incident, his dying declaration cannot be said to be the statement as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death.

Appeals by Special Leave from the Judgment and Order, dated the 2nd February, 1962 of the Allahabad High Court in Criminal Appeals Nos. 157 and 158 of 1961 and Criminal Revision No. 384 of 1961.

A. S. R. Chari, Senior Advocate, (Ravinder Narain, J. B. Dadachanji and O. C. Mathur, Advocates of M/s. Dadachanji & Co., with him), for Appellants.

G. G. Mathur and C. P. Lal, Advocates, for Respondent.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—Moti Singh and Jagdamba Prasad, appellants, together with five other persons, were convicted by the Sessions Judge of Unnao of offences under sections 148, 302 read with 149 and 307 read with 149 Indian Penal Code. Each of them was sentenced to life imprisonment under section 302 read with section 149, Indian Penal Code.

On appeal, the High Court acquitted the other five persons of the various offences. The conviction of the appellants under section 148, Indian Penal Code was also set aside, but their conviction for the offences under sections 302 and 307 read with section 149 were altered to conviction for offences under sections 302 and 307 read with section 34, Indian Penal Code. On the application of Krishna Kumar, brother of one of the persons who had been murdered, the High Court enhanced the sentence of the appellants for the offence of murder, to death. Moti Singh and Jagdamba Prasad have preferred these appeals respectively, after obtaining Special Leave from this Court.

\* Cr. A. Nos. 146 and 147 of 1962.



It is not necessary to detail the facts of the incident in which several persons lost their lives and for participation in which incident the appellants were convicted, as we are of opinion that the conviction cannot be maintained on the basis of the evidence on record as appreciated by the High Court.

All the eye-witnesses of the incident deposed in practically identical terms about the progress of the incident in which it was alleged that the members of the accused party fired with guns and pistols both from inside and outside the room of one side of the passage and also from the *seori* (cattle shed) on the other side of the passage when the victim party passed along the passage. The High Court felt doubtful about the firing of the shots, from the cattle shed, and consequently acquitted Sheo Shankar Jagjiwan and Shankar Dayal who were said to be mainly the persons who had fired from that place.

The High Court, however, believed the prosecution version of the firing from the room and later from the platform. It appears that the High Court believed this version because the prosecution witnesses stated so and because the statements Exhibits *Kha 5*, *Kha 8* and *Kha 75* mentioned about the shots being fired from those places. Statement Exhibit *Kha 75* does not say so. It says that firing took place from the front and that these people fired shots with guns. Statements Exhibits *Kha 5* and *Kha 8* were made by Ram Shankar and Jageshwar, who were examined as Court-witnesses 1 and 2 respectively. Ram Shankar and Jageshwar have been disbelieved by the Sessions Judge and it appears that the High Court did not take any more favourable view of their deposition in Court. It however seems to have relied on their statements, Exhibits *Kha 5* and *Kha 8* respectively, recorded by a Magistrate at the Hospital. In this it was in error. Those statements could have been used only in either corroborating or contradicting the statements of these witnesses in Court. If those witnesses were not to be believed, their previous statements could not be used as independent evidence in support of other prosecution evidence.

In considering the complicity of individual accused in the firing from the room and later from the *chabutra*, the High Court said that Raj Kumar, P.W. 11 and Chandra Kumar, P.W. 15, were partisan witnesses whose evidence had to be examined with caution, that Shyam Lal, P.W. 12 and Gopi Singh, P.W. 14, were not quite independent witnesses, and that there was nothing particular against Lal Singh, P.W. 17, and Sardar (P.W. 16) who had received gun shot injuries. It further said :

"While considering the evidence of the prosecution witnesses we have to bear in mind the rule that the evidence has to be examined with caution."

It also considered it necessary to refer to the statements, Exhibits *Kha 5* and *Kha 8* which, as already stated, could not be used as substantive evidence, and the statement Exhibit *Kha 75* of Gaya Charan, deceased.

The High Court fully relied on the alleged dying declaration, Exhibit *Kha 75* of Gaya Charan and considered it to be a complete account of the occurrence and the assailants as seen by him. The view of the High Court about this statement of Gaya Charan may be quoted :

"The dying declaration Exhibit *Ka 75* (*Kha 75*) of Gaya Charan appears to be a complete account of the occurrence and the assailants as seen by him, for he stated: 'Lallan, Chandu, Raj Narain, Sardar, Sri Prakash were going to the bazar. Shots were fired from front. Jagdamba, Phunnar, Moti and one man whom I know by face fired gunshots on us.' The statement does not show that Gaya Charan did not see all the assailants who fired gunshots. It is therefore not possible to hold that any accused not mentioned in the dying declaration of Gaya Charan had also fired shots. At the same time we see no reason to hold that the dying declaration of Gaya Charan is not true. Jageshwar identified the accused Jagdamba among the assailants. The evidence of the eye-witnesses has therefore to be judged in the light of the statements Exhibits *Kha 5* and *Kha 8* of Ram Shankar and Jageshwar and the dying declaration Exhibit *Kha 75* of Gaya Charan."

Now the evidence relied on by the High Court for the conviction of Jagdamba Prasad consists of the statements of the prosecution witnesses, the statement of Jageshwar Exhibit *Kha 8* and the alleged dying declaration of Gaya Charan

Exhibit *Kha* 75. It also took into consideration the fact that he remained absconding till his arrest on 30th September 1960, the incident having taken place on 9th February, 1960.

The evidence relied on for the conviction of Moti Singh consists of the dying declaration Exhibit *Kha* 75 of Gaya Charan and, presumably, also of the statements of the prosecution witnesses, as the High Court has not specifically stated so. It has said :

"We have also no doubt about the participation of the accused Moti in the firing of shots from the east of the galiara. He is named in the dying declaration Exhibit *Kha* 75, of Gaya Charan."

With regard to the criticism for the accused about the indefiniteness of the description of Moti in the dying declaration of Gaya Charan when there were three persons by the name of Moti in the village, the High Court said :

"We have no doubt that he is mentioned in the dying declaration."

How they arrived at that conclusion is not clear from the judgment. The three persons with the name of Moti belonged to different castes. The caste of Moti is not mentioned in the dying declaration of Gaya Charan. It is therefore, not possible to state with any confidence that Gaya Charan must have referred to Moti Singh, the appellant, by the name Moti.

In acquitting Sheo Darshan Singh, the High Court said that though there were strong circumstances against him, he was not mentioned in the dying declaration of Gaya Charan and that therefore his presence among the assailants became doubtful. In acquitting Avadh Behari it again said that his name was not mentioned in the dying declaration of Gaya Charan.

Again, in fixing the number of persons who had taken part in the firing from the room and the platform, the High Court relied on Exhibit *Kha* 75 the alleged dying declaration of Gaya Charan as the deciding factor. It said :

"The number of assailants mentioned in the dying declaration Exhibit *Kha* 75 is only four. It is doubtful if the assailants were more than four in number. No offence under section 148 was therefore committed and section 149, Indian Penal Code, is not applicable."

It is clear from the above that the High Court mainly relied on the alleged dying declaration of Gaya Charan for determining that Moti Singh and Jagdamba Prasad, appellants, fired from the room and the platform and that if their names had not been mentioned in this statement of Gaya Charan, they too would have got the benefit of doubt just as Sheo Darshan Singh and Avadh Behari got. There is no other factor for making a distinction between the cases of these two appellants and those two accused as all the prosecution witnesses had named all the accused as assailants of the victim party. It follows that if this alleged dying declaration of Gaya Charan be inadmissible in evidence as urged for the appellants, the appeals have to be allowed and the conviction of the appellants set aside.

The incident took place on 9th February, 1960. Gaya Charan's injuries were examined by Dr. Bhatnagar the same day. He found two gun shot wounds of entry  $1/4" \times 1/4"$  up to the depth of abdomen and considered those injuries to be caused by gun shot and to be dangerous to life. Gaya Charan left the hospital. He was either discharged on the injuries healing up or he left the hospital before they healed up. There is nothing on the record to show in what circumstances he left the hospital. He died on 1st March, 1960.

Sub-Inspector Puttu Lal, P.W. 24, has deposed that it was known on 1st March, 1960, that Gaya Charan had died in Kanpur and that when he reached the Bhairoon Ghat he learnt that the dead body of Gaya Charan had been burnt a couple of hours before. There is no evidence on record as to what caused Gaya Charan's death. In this state of evidence the finding of the Sessions Judge that Gaya Charan must have died on account of the injuries received in the incident cannot be held to be a good finding. What he says in this connection is :

"Gaya Charan had a gunshot wound of entry on the left hypochondrium region and one gunshot wound of entry on the right lumbar region. Both the injuries were dangerous to life, according

to the Doctor. Gaya Charan must have died of these injuries and the mere fact, that no *post mortem* could be conducted on his dead body before his cremation, does not show that we cannot rely on his dying declaration."

The mere fact that the two gun-shot injuries were dangerous to life is not sufficient for holding that Gaya Charan's death which took place about three weeks after the incident must have been on account of those injuries.

In this connection our attention was drawn to the fact that Ram Shankar who was also injured in that incident had received one gunshot wound  $1/4" \times 1/4"$  up to the depth of his abdomen  $1/2"$  above the right end of upper border of xiphoid process, and that injury was also considered by the Doctor to be dangerous to life, but fortunately Ram Shankar did not succumb to the injury. The High Court did not refer to this question as it appears the admissibility of the alleged dying declaration of Gaya Charan was not raised before it. That however does not mean that we cannot look into the finding of fact about Gaya Charan having died on account of the injuries received in the incident. It is necessary for proving the charge of murder of Gaya Charan that he had died on account of the injuries received and any finding to that effect, in the absence of evidence, can be looked into by this Court even though the Courts below have confirmed that finding. We find that there is no evidence to support that finding and hold that Gaya Charan is not proved to have died due to the injuries received in the incident.

The effect of this finding is that the alleged dying declaration of Gaya Charan, Exhibit *Kha* 75, cannot be admissible in evidence. Clause (1) of section 32 of the Evidence Act makes a statement of a person who has died relevant only when that statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. When Gaya Charan is not proved to have died as a result of the injuries received in the incident, his statement cannot be said to be the statement as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death. This is obvious and is not disputed for the respondent State.

The result then is that the statement of Gaya Charan Exhibit *Kha* 75 is inadmissible in evidence. It was the mainstay of the judgment of the High Court upholding the finding of the Sessions Judge that Moti Singh and Jagdamba Prasad, appellants, were among the persons who had fired from the room and the platform. When this evidence is to be ignored as inadmissible, the remaining evidence on the record, according to the view of the High Court, was insufficient to establish beyond reasonable doubt that these two persons were among the assailants. The appellants deserve the benefit of that doubt. They would have got it if the High Court had not erroneously relied on the statement Exhibit *Kha* 75.

We therefore hold that Moti Singh and Jagdamba Prasad have not been proved to have taken part in that incident on 9th February, 1960, which led to the deaths of Lallan and Matrumal and the causing of hurt to several other persons. We accordingly allow the appeals, set aside the order of the High Court and acquit Moti Singh and Jagdamba Prasad of the offences they were convicted of. We direct that they be released forthwith, if not required to be detained under any other process of law.

K. S.

*Appeal allowed.*

# THE SUPREME COURT OF INDIA. (Criminal Appellate Jurisdiction.)

PRESENT :—S. J. IMAN, K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.  
Krishna Govind Patil

.. Appellant\*

v.

The State of Maharashtra

.. Respondent.

*Penal Code (XLV of 1860), section 302 read with section 34—Charge of offence under against four named persons—Acquittal of three out of the four—Conviction of the remaining accused alone—If permissible.*

Common intention within the meaning of section 34 of the Indian Penal Code implied a pre-arranged plan and that the criminal act was done pursuant to the pre-arranged plan. The said plan may develop on the spot during the course of the commission of the offence ; but the crucial circumstance is that the said plan must precede the act constituting the offence. If that be so, before a Court can convict a person under section 302 read with section 34 of the Indian Penal Code, it should come to the definite conclusion that the said person had a prior concert with one or more other persons, named or unnamed, for committing the said offence.

When accused were acquitted either on the ground that the evidence was not acceptable or by giving benefit of the doubt to them, the result in law would be the same ; it would mean that they did not take part in the offence. The effect of an acquittal of three of the four named persons charged with the offence under section 302 read with section 34 of the Penal Code is that they did not act conjointly with the remaining accused and that remaining accused could not have acted conjointly with them. Accordingly the remaining accused cannot be convicted on the basis of section 34, Indian Penal Code. *Mohan Singh v. State of Punjab*. A.I.R. 1963 S.C. 178 considered and explained.

Appeal by Special Leave from the Judgment and Order dated the 20th February, 1962, of the Bombay High Court in Criminal Appeal No. 1405 of 1961.

*C.L. Sareen*, Advocate, (*Amicus curiae*), for Appellant.

*H.R. Khanna* and *R.H. Dhebar*, Advocates, for Respondent.

The Judgment of the Court was delivered by

*Subba Rao, J.*—This appeal by Special Leave is directed against the judgment of a Division Bench of the Bombay High Court setting aside the order of acquittal made by the Additional Sessions Judge, Kolaba, and convicting the appellant under section 302, read with section 34, of the Indian Penal Code and sentencing him to imprisonment for life.

The case of the prosecution may be briefly stated. In the year 1959, two persons by name Ramachandra Budhya and Govind Dhaya were murdered by some people. In all 11 accused, including one Deoram Maruti Patil, were brought to trial ; and out of them 8 accused, including the said Deoram Maruti Patil, were acquitted. During that trial Deoram Maruti Patil's uncle, by name Vishwanath, actively helped Deoram Maruti Patil in the conduct of his defence. Accused 1 and 2 in the present case are the sons of Govind Dhaya and accused 3 and 4 are the nephews of Ramachandra Budhya. They bore a grudge against Vishwanath for helping Deoram Maruti Patil and bringing about his acquittal. On 19th August, 1960, Vishwanath and one Mahadeo Pandu Patil left their village at about 8-30 P.M., in order to go to Pezari en route to Alibag. When they were walking along a bund, accused 1 to 4 came from behind, armed with long sticks and the stick carried by accused 1 had a blade attached to it. They belaboured the deceased resulting in his death.

The four accused had to stand their trial for the murder of Vishwanath before the Court of the Additional Sessions Judge, Kolaba. The charge against them was that they, in view of their common grudge against the deceased, combined together and did away with the deceased. The said four persons were charged under section 302, read with section 34, of the Indian Penal Code, for committing the murder of the deceased in furtherance of their common intention. All of them were also charged separately for the substantive offence under section 302 of the Indian Penal Code. All the accused pleaded not guilty to the charge. While accused 1, 3 and 4 pleaded *alibi*, accused 2 raised a plea of private defence. The prosecution examined

eye-witnesses, who deposed that the four accused overtook the deceased when he was going to village Pezari and felled him down by giving him lathi blows. None of the witnesses spoke to the presence of any other person, named or unnamed, who took part in the assault of the deceased. The learned Additional Sessions Judge found that the prosecution witnesses were not speaking the truth and that the version given by accused 2 was the probable one. In the result he acquitted all the accused.

The State preferred an appeal to the High Court against the said order of acquittal under section 302, read with section 34, of the Indian Penal Code; but no appeal was preferred against the order of acquittal under section 302 of the Indian Penal Code. The judgment of the High Court discloses that the learned Judges were inclined to believe the evidence of the witnesses, other than Kashinath and Shridar. But they dismissed the appeal against accused 1, 3 and 4 on the ground that the appeal was against an order of acquittal. But in regard to accused 2, they held that he was one of the participants in the assault and there was no basis for his plea of private defence. Having come to that conclusion, the learned Judges convicted accused 2 under section 302, read with section 34, of the Indian Penal Code. As regards the persons who participated in the assault along with accused 2, it would be appropriate to quote the words of the High Court itself:

"Some of the other accused were undoubtedly concerned with the incident along with accused No. 2. Since it is possible that the story as given by the prosecution witnesses, and particularly by Mahadeo, was exaggerated, it is not safe to hold that each one of the other accused was also a participant in the offence. In view of the possibility that one or more of the other accused i.e., accused Nos. 1, 3 and 4 might not have participated in the offence, we do not propose to interfere with the acquittal of these accused. But we are satisfied that accused No. 2 along with one or more of the other accused committed this offence and that accused No. 2 was, therefore, clearly guilty under section 302 read with section 34, Indian Penal Code."

To put it in other words, they acquitted accused 1, 3 and 4 on the ground that it was doubtful whether any one of them participated in the commission of the offence and convicted accused 2 on the ground that one or more of them might have participated in the offence. Accused 2 has filed the present appeal against the judgment of the High Court.

The argument of learned counsel for the appellant may be put thus: The learned Additional Sessions Judge acquitted the accused under section 302 of the Indian Penal Code and also under section 302, read with section 34, of the said Code. The appeal in the High Court was confined only to the acquittal of the accused under section 302, read with section 34, of the Indian Penal Code. The charge as well as the evidence was only directed against the four named accused as the participants in the common intention to commit the murder of the deceased. The High Court having acquitted accused 1, 3 and 4, inconsistently convicted accused 2 for having committed the murder of the deceased jointly with the three accused who had been acquitted. To put it differently, the argument is that when three of the four named accused, who were charged under section 302, read with section 34 of the Indian Penal Code, were acquitted, the Court could not convict only one of the accused on the basis of constructive liability.

Learned counsel for the respondent counters this argument by stating that though the charge as well as the evidence was directed against the 4 named accused, a Court could come to the conclusion that 3 of the 4 named accused are not identified but more than one had taken part in the commission of the offence and that in the present case on a fair reading of the entire judgment we should hold that the High Court found that though accused 1, 3 and 4 were not identified, 3 unidentified persons must have taken part in the murder.

Section 34 of the Indian Penal Code, reads:

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." It is well settled that common intention within the meaning of the section implied a pre-arranged plan and that the criminal act was done pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of the commission of the offence; but the crucial circumstance is that the said plan must precede

the act constituting the offence. If that be so, before a Court can convict a person under section 302, read with section 34, of the Indian Penal Code, it should come to a definite conclusion that the said person had a prior concert with one or more other persons, named or unnamed, for committing the said offence. A few illustrations will bring out the impact of section 34 on different situations.

(1) *A, B, C and D* are charged under section 302, read with section 34, of the Indian Penal Code, for committing the murder of *E*. The evidence is directed to establish that the said four persons have taken part in the murder.

(2) *A, B, C and D* and unnamed others are charged under the said sections. But evidence is adduced to prove that the said persons, along with others, named or unnamed, participated jointly in the commission of that offence.

(3) *A, B, C and D* are charged under the said sections. But the evidence is directed to prove that *A, B, C and D*, along with 3 others, have jointly committed the offence.

As regards the third illustration, a Court is certainly entitled to come to the conclusion that one of the named accused is guilty of murder under section 302, read with section 34, of the Indian Penal Code, though the other three named accused are acquitted, if it accepts the evidence that the said accused acted in concert along with persons, named or unnamed, other than those acquitted, in the commission of the offence. In the second illustration the Court can come to the same conclusion and convict one of the named accused if it is satisfied that no prejudice has been caused to the accused by the defect in the charge. But in the first illustration the Court certainly can convict two or more of the named accused if it accepts the evidence that they acted conjointly in committing the offence. But what is the position if the Court acquits 3 of the 4 accused either because it rejects the prosecution evidence or because it gives the benefit of doubt to the said accused? Can it hold, in the absence of a charge as well as evidence, that though the three accused are acquitted, some other unidentified persons acted conjointly along with one of the named persons? If the Court could do so, it would be making out a new case for the prosecution: it would be deciding contrary to the evidence adduced in the case. A Court cannot obviously make out a case for the prosecution which is not disclosed either in the charge or in regard to which there is no basis in the evidence. There must be some foundation in the evidence that persons other than those named have taken part in the commission of the offence and if there is such a basis the case will be covered by the third illustration.

In support of the contention that a Court, even in the first illustration, can acquit 3 of the 4 accused named in the charge on the ground that their identity has not been established, and convict one of them on the ground that more than one took part in the commission of the offence, reliance is placed upon the decision of this Court in *Mohan Singh v. State of Punjab*<sup>1</sup>. There, the appellants, along with three others, were charged with having committed offences under section 302, read with section 149, as well as section 323, read with section 149, of the Indian Penal Code. The Sessions Judge acquitted two of them, with the result 3 of them were convicted. One of the accused was convicted under section 302 and section 147 and two of the accused were convicted under section 302, read with section 149 and section 147, of the Indian Penal Code. The High Court confirmed their convictions. On appeal by Special Leave to this Court, two of the accused convicted under section 302, read with sections 149 and 147, of the Indian Penal Code, contended, *inter alia*, that as two of the five accused were acquitted, their conviction under section 302, read with sections 149 and 147, was bad in law. This Court held on the evidence that the said two accused had done the act pursuant to a pre-arranged plan and therefore they could be convicted under section 302, read with section 34, of the Indian Penal Code. But in the course of the judgment different situations that might arise in the context of the question now raised were noticed. Adverting to one of the situations similar to that now before us, this Court observed:

1. A.I.R. 1963 S.C. 174, 179.

“ Cases may also arise where in the charge, the prosecution names five or more persons and alleges, that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the Court less than five persons to be tried then section 149 cannot be invoked. Even in such cases, it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial Court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under section 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under section 149 because on the evidence the Court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five. It is true that in the last category of cases, the Court will have to be very careful in reaching the said conclusion. But there is no legal bar which prevents the Court from reaching such a conclusion.”

It will be seen from the said observations that this Court was visualizing a case where there was evidence on the record from which the Court can come to such a conclusion. It may be that the charge discloses only named persons ; it may also be that the prosecution witnesses named only the said accused ; but there may be other evidence, such as that given by the Court-witnesses, defence witnesses or circumstantial pieces of evidence, which may disclose the existence of named or unnamed persons, other than those charged or deposed to by the prosecution witnesses, and the Court, on the basis of the said evidence, may come to the conclusion that others, named or unnamed, acted conjointly along with one of the accused charged. But such a conclusion is really based on evidence. The observations of this Court really apply to a case covered by the third illustration given by us.

But the present case falls outside the said three illustrations. The High Court gave conflicting findings. While it acquitted accused 1, 3 and 4 under section 302, read with section 34 of the Indian Penal Code, it convicted accused 2 under section 302, read with section 34, of the said Code, for having committed the offence jointly with the acquitted persons. That is a legally impossible position. When accused were acquitted either on the ground that the evidence was not acceptable or by giving benefit of doubt to them, the result in law would be the same : it would mean that they did not take part in the offence. The effect of the acquittal of accused 1, 3 and 4 is that they did not conjointly act with accused 2 in committing the murder. If they did not act conjointly with accused 2, accused 2 could not have acted conjointly with them. Realizing this mutually destructive findings of the High Court, learned counsel for the State attempted to sustain the finding of the High Court by persuading us to hold that if the said finding was read in the context of the whole judgment, it would be clear that the learned Judges meant to hold that persons other than the acquitted accused conjointly acted with the convicted accused. We have gone through the entire judgment carefully with the learned counsel. But the observations of the learned Judges as regards the “ other participants ” in the crime must in the context refer only to the “ one or other of the said three acquitted accused participated in the offence committed by accused 2. ” There is not a single observation in the judgment to indicate that persons other than the said accused participated in the offence, nor is there any evidence in that regard. We, therefore, hold that the judgment of the High Court cannot stand. We are satisfied that on the findings arrived at by the High Court, the conviction of accused 2 is clearly wrong.

In the result, we allow the appeal, set aside the conviction of the appellant and direct him to be set at liberty.

K.S.

*Appeal allowed.*

## THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRACADKAR, K. N. WANCHOO, M. HIDAYATULLAH,  
K. C. DAS GUPTA AND J. C. SHAH, JJ.

Krishnachandra and others

.. Appellants \*

v.

The State of Madhya Pradesh

.. Respondent.

*Constitution of India (1950), Articles 19 and 21—If infringed by Madhya Bharat Gambling Act (LI of 1949), sections 6 and 8.*

Considering that gambling is an evil and it is rampant, that gaming houses flourish as profitable business and that detection of gambling is extremely difficult, the law to root out gambling cannot but be in the public interest. Such a law must of necessity provide for special procedure, but so long as it is not arbitrary and contains adequate safeguards it cannot be successfully assailed. The United State of Gwalior, Indore and Malwa (Madhya Bharat) Gambling Act (1949) contains sufficient safeguards to ensure that there is no danger to any one except to those who are proved to the satisfaction of the Court to keep a gaming house or who can be presumed unless the contrary be proved to be there for the purpose of gaming. Sections 6 and 8 of the Act are constitutional and cannot be challenged under Articles 19 and 21 of the Constitution of India (1950).

Appeal by Special Leave from the Judgment and Order, dated the 14th December, 1960 of the Madhya Pradesh High Court (Gwalior Bench) at Gwalior in Criminal Revision No. 91 of 1959.

C. L. Sareen and R. L. Kohli, Advocates, for Appellants.

I. N. Shroff, Advocate, for Respondent.

The Judgment of the Court was delivered by

*Hidayatullah, J.*—This is an appeal by Special Leave against an order of the Madhya Pradesh High Court (Gwalior Bench), by which a Criminal Revision filed by the three appellants was dismissed. The three appellants with five others were tried for offences under section 4 of The United State of Gwalior, Indore and Malwa (Madhya Bharat), Gambling Act, Samvat 2006, (Madhya Bharat Act No. LI of 1949 (Samvat 2006)). Krishnachandra, the first appellant, was also tried under section 3 of the Act. All the original accused except one were convicted under section 4 of the Act and sentenced to one month's simple imprisonment. Krishnachandra was convicted in addition under section 3 of the Act and sentenced to one month's simple imprisonment. The sentences in Krishnachandra's case were ordered to run concurrently.

All these persons appealed unsuccessfully to the Court of Session. The three appellants then filed a petition for Revision in the High Court. The High Court also issued a notice under section 439 of the Code of Criminal Procedure to these appellants to show cause why the sentences passed on them should not be enhanced. The High Court by its order, dated 14th December, 1960, dismissed the Revision Petition filed by the appellants and in addition to the sentence of imprisonment imposed a fine of Rs. 200 on each count or counts for which they were originally convicted. The appellants asked for a certificate to appeal to this Court but it was refused by the High Court. The appellants, however, obtained Special Leave from this Court and have filed the present appeal.

Only one point has been argued before us and it is that section 6 of the Gambling Act is *ultra vires* the Constitution and is against the principles of natural justice and the fundamentals of criminal jurisprudence. A similar contention has also been raised about section 8 of the Act. The Madhya Bharat Act is almost a replica of the corresponding Indian statute. Though it differs slightly in its wording, the purport and intent is almost the same. There are three definitions in section 2 of the Act which control the later provisions. The expression "gaming" is defined to include "wagering and betting" and the *Explanation* attached to the definition provides:—

\* Cr. A. No. 47 of 1961.



"Any transaction by which a person in any capacity whatever employs another in any capacity whatever, or engages for another in any capacity whatever, to wager or bet with another person, and the collection or soliciting of bets, receipt or distribution of winnings or prizes in money or otherwise in respect of wagering or betting or any act which is intended to aid or facilitate wagering or betting, or such collection soliciting, receipt or distribution, shall be deemed to be 'gaming.'"

"Gaming house" is defined to mean—

"Any house, room, tent, enclosure, space, vehicle, vessel or any place whatsoever in which gaming takes place or in which instruments of gaming are kept or used for gaming."

The expression "instruments of gaming" includes—

"any article used or intended to be used as a subject or means of gaming, any document used or intended to be used as a register or record or evidence of any gaming, the proceeds of any gaming, and any winnings or prizes in money or otherwise distributed or intended to be distributed in respect of any gaming ;"

These definitions show that a gaming house is a place in which gaming takes place or in which instruments of gaming are kept for use for gaming, that is, for wagering or betting *etc.* or for the purpose of facilitating wagering or betting *etc.* Two offences have been created by the Act affecting respectively the keeper of a gaming house and persons found gaming or present for the purpose of gaming, in a gaming house. Section 3 which creates the offence affecting the keeper of a gaming house provided as follows :—

"3. Whoever—

(a) opens, keeps or uses any house, room or place for the purpose of a gaming house ;

(b) being the owner or occupier of any such house, room or place knowingly or wilfully permits the same to be opened, occupied, kept or used by any other person for the purpose aforesaid ;

(c) has the care or management of, or in any manner assists in conducting the business of, any such house, room or place opened, occupied, kept or used for the purpose aforesaid ;

(d) advances or furnishes money for the purpose of gaming with persons frequenting any such house, room or place ;

shall on conviction be punishable with imprisonment which may extend to six months and with fine :"

A proviso provides for enhanced penalties for the first, second, third or subsequent offences. Section 4 which makes gaming in a gaming house an offence provides:

"4. Whoever is found in any gaming house, gaming, or present for the purpose of gaming shall, on conviction, be punishable with imprisonment, which may extend to six months and with fine."

A special presumption is provided as follows :—

"Any person found in any gaming house during any gaming therein shall be presumed, until the contrary is proved to have been there for the purpose of gaming."

A proviso provides for enhanced penalties in the same way as in section 3.

Section 5 gives powers to certain Officers to enter or to authorise Police Officers (not below the rank of a Sub-Inspector) to enter and search a gaming house but the power is exercisable only if the Officer concerned

"is satisfied, upon credible information, and after such inquiry as he may think necessary, that there are good grounds to believe that any house, room, tent, enclosure, space, vehicle, vessel or place is used as a gaming house."

Section 6 which is impugned in this appeal then provides as follows :—

"6. When any instrument of gaming has been seized in any house, room, tent, enclosure, space, vehicle, vessel or place entered or searched under the provisions of last preceding section, or about the person of any of those who are found therein and in the case of any other thing so seized, if the Court is satisfied that the Officer who entered or searched such house, room, tent enclosure, space, vehicle, vessel, or place had reasonable grounds for suspecting that the thing so seized was an instrument of gaming, the seizure of such instrument or thing shall be evidence, until the contrary is made to appear that such house, tent, enclosure, space, vehicle, vessel or place is used as a gaming house and that the persons found therein were then present for the purpose of gaming although no gaming was actually seen by the Magistrate or Police Officer."

Section 8 creates a special rule of evidence and it provides :—

"8. It shall not be necessary, in order to convict any person of any offence against any of the provisions of sections 3 and 4 to prove that any person found gaming was playing for any money, wager or stake."

It has been amply proved in the present case that on a search being made instruments of gaming were found in the house and a presumption under section 6 was therefore drawn against the persons present there.

The impugned sections are challenged under Articles 19 and 21 of the Constitution. The former Article is said to be violated because the sections unreasonably impair the right of assembly and the right to hold and enjoy property. It is not contended that gambling in the form of betting or wagering or as explained in the *Explanation* to section 2 (d) is not an evil from which society needs to be protected. What is complained of is the manner in which the offences of keeping a gaming house and gaming in a gaming house may be proved against the respective offenders. It is contended that this proof largely depends upon the suspicion of an Officer and the discovery on search of innocent articles like playing cards and dice and that added to these unreasonable provisions, the burden of proof, which should always lie on the prosecution, is reversed and the alleged offender is required to clear himself of the alleged guilt. It is submitted that the sections are unconstitutional as they offend Articles 19 and 13 of the Constitution. It is further submitted that in these circumstances there is a breach of Article 21 as well.

The argument based on Article 21 need not be separately noticed because if the impugned provisions are found to be constitutional, the curtailment of liberty would not be except according to the procedure established by law. So the only point to consider is whether the impugned provisions of the Act are so unreasonable as to lose the protection of clauses (3), (4) and (5) of Article 19. The Act is a pre-Constitution measure and it can only be declared void under Article 13. The Act is not challenged on the ground that it was beyond the competence of the Legislature which passed it or that it has ceased to be law otherwise than by the alleged breach of Articles 19 and 21. Once it is conceded that gambling is an evil, and it is rightly so conceded here, the interest of public order, morality or the general public require that it be eradicated and the only question which survives is whether the law made to do this is unreasonable in its restrictions upon the guaranteed rights. In this connection what must be established by the appellants is that an object which is legitimate in itself has been achieved in a manner which amounts to an unreasonable curtailment of the guaranteed liberties.

In order to find out whether the impugned provisions can be regarded as unreasonable in the sense explained it is necessary to consider them in some detail. We begin with the definitions. "Gaming" is defined to include wagering and betting which are the commonest forms of gambling but the definition leaves room for inclusion in the term other forms which gambling might take. There is nothing in the definition to make it unreasonable or to offend against any of the guaranteed rights. Next comes the definition of "gaming house". A house becomes a gaming house if gaming takes place there or instruments of gaming are kept there or used for gaming. The definition is no doubt wide and there is not only a long list of places which come within the expression 'gaming house' but the term includes any place whatsoever which answers the rest of the description. But here again there is nothing which is unreasonable or which does not subserve the central purpose. "Instruments of gaming" are next defined to include articles used or intended to be used as a subject or means of gaming, also documents, registers, records, proceeds of gaming and prize money etc. The words "used or intended to be used as a subject or means of gaming" outline the circumstances in which the possession of articles becomes incriminatory under the Act.

Having defined gaming house and instruments of gaming, the Act provides safeguards against victimisation of innocent persons by putting in certain checks when it proceeds to provide for the detection and prosecution of offenders against the Act. The offences are the keeping of a gaming house (section 3), gaming in a gaming house (section 4) and gaming in places to which public have access (section 12). We are not concerned with the last. Section 5 confers the powers to enter and autho-

rise police to enter and search places believed to be gaming houses. This power is given to a District Magistrate, a Sub-Divisional Magistrate or a Police Officer not below the rank of a Sub-Inspector. The Officer must be satisfied, upon credible information and after such inquiry as he may think necessary that there are good grounds for belief that any place is used as a gaming house before he makes a search. On entry the Officer is empowered to take the persons present there into custody and to search them and to search the place and seize all things reasonably suspected to have been used for the purpose of gaming. Pausing here, it is clear that the power is given to Superior Officers who are expected to act reasonably and after due satisfaction. But the matter does not end there. After the arrests and seizures have been made the Officer who entered the place and seized the articles has to satisfy the Court that his suspicions were based on reasonable grounds and it is only then that the burden is shifted to the accused to prove his innocence. Though the word used in section 6 is "suspecting" in actual proof this suspicion must be demonstrated to be reasonably based. The safeguards, thus, are (a) the existence of credible information, (b) the seizure of articles suspected to be instruments of gaming which bear out the information on which action is taken, and (c) proof to the satisfaction of the Court that there are reasonable grounds for holding that the articles seized are instruments of gaming. Once the house is shown to the satisfaction of the Court to be a gaming house the law leaves any one found in it during any gaming, to explain his presence on pain of being presumed to be there for gaming.

Considering the fact that gambling is an evil and it is rampant, that gaming houses flourish as profitable business and that detection of gambling is extremely difficult, the law to root out gambling cannot but be in the public interest. Such a law must of necessity provide for special procedure but so long as it is not arbitrary and contains adequate safeguards it cannot be successfully assailed. In our opinion the Act with which we are concerned contains sufficient safeguards to ensure that there is no danger to any one except to those who are proved to the satisfaction of the Court to keep a gaming house or who can be presumed unless the contrary be proved to be there for the purpose of gaming. We are satisfied that the impugned provisions are constitutional. The appeal fails and is dismissed.

K.S.

*Appeal dismissed.*

## THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice* P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Firm of Illuri Subbayya Chetty & Sons

.. *Appellant \**

v.

The State of Andhra Pradesh

.. *Respondent.*

*Madras General Sales Tax Act (IX of 1939), section 18-A—Scope and effect—Suit is barred even if assessment is incorrect and any challenge has to be by appeal or revision only.*

Where an order of assessment has been made by an appropriate authority under the provisions of the Madras General Sales Tax Act, any challenge to its correctness and any attempt either to have it set aside or modified must be made before the appellate or the revisional forum prescribed by the relevant provisions of the Act. A suit instituted for that purpose would be barred under section 18-A of the Act. The expression "any assessment made under this Act" is wide enough to cover all assessments made by the appropriate authorities under the Act whether the said assessments are correct or not. It is the activity of the assessing officer acting as such officer which is intended to be protected and as soon as it is shown that in exercising his jurisdiction and authority under the Act, an assessing officer has made an order of assessment, that clearly falls within the scope of section 18-A.

Appeal by Special Leave from the Judgment and Order, dated the 16th November, 1960 of the Andhra Pradesh High Court in A.S. No. 397 of 1957.†

A. Ranganadham Chetty, Senior Advocate (A. Vedavalli and A. V. Rangam, Advocates, with him), for Appellant.

\*C.A. No. 315 of 1962.

25th January, 1963.

† (1961) 2 An.W.R. 15 (F.B.)

*D. Narasaraaju*, Advocate-General for the State of Andhra Pradesh (*T. V. R. Tatachari* and *P. D. Menon*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

*Gajendragadkar, J.*—The short question which arises in this appeal is whether the suit instituted by the appellant Firm of *Illuri Subbayya Chetty & Sons*, in the Court of the Subordinate Judge at Kurnool, seeking to recover Rs. 8,349 from the respondent, the State of Andhra Pradesh, on the ground that the said amount had been illegally recovered from it under the Madras General Sales Tax Act, 1939 (No. IX of 1939) (hereinafter called the Act) for the years 1952-54 is competent or not; and this question has to be determined in the light of the scope and effect of section 18-A of the Act.

The appellant is a firm of merchants carrying on commission agency and other business at Kurnool and as such, it purchases and sells ground-nuts and other goods on behalf of principals for commission. For the year 1952-53, the Sales-Tax Authorities included in the appellant's taxable turnover an amount of Rs. 3,45,488-12-10 representing ground-nut sales and collected the tax on the total turnover from it in September, 1953 when the amount of the said tax was determined and duly adjusted. The said turnover of Rs. 3,45,488-12-10 in fact represented sales of ground-nuts and not purchases and tax was recovered from the appellant on the said amount illegally inasmuch as it is only on purchase of ground-nuts that the tax is leviable. As a result of this illegal levy, the appellant had to pay Rs. 5,398-4-3 for the said year. Similarly, for the subsequent year 1953-54 the appellant had to pay an illegal tax of Rs. 1,159-11-9. In its plaint, the appellant claimed to recover this amount together with interest at 12% per annum and that is how the claim was valued at Rs. 8,349.

This claim was resisted by the respondent on two grounds. It was urged that the suit was incompetent having regard to the provisions of section 18-A of the Act; and on the merits it was alleged that the transactions in regard to ground-nuts on which sales tax was levied and recovered from the appellant were transactions of purchase and not of sale. In this connection, the respondent referred to the fact that the appellant itself had included the transactions in question in the return submitted by it in Form A and that it was making payments tentatively every month to be adjusted after the final assessment was made at the end of the year. Accordingly, the final adjustment was made in September and the total amount due from the appellant duly recovered. Thus the appellant having voluntarily made the return and paid the taxes, it was not open to him to contend that the transactions in regard to groundnuts were not taxable under the Act. Besides, the appellant had not preferred an appeal either to the Deputy Commissioner of Commercial Taxes or to the Sales Tax Appellate Tribunal; and so, it had not availed itself of the remedies provided by the Act.

On these pleadings, the trial Court framed three principal issues. The first issue was whether the suit was barred by section 18-A of the Act; the second was whether there had been excess collection of sales tax for the two years in question and if so, how much? and the third issue was whether the appellant was estopped from questioning the validity of the assessment? According to the trial Court, the respondent had failed to prove its pleas against the appellant's claim and so, it recorded findings in favour of the appellant on all the three issues. In the result, a decree followed in favour of the appellant for the recovery of Rs. 6,558 with interest at 6% per annum from 12th November, 1955 till the date of payment.

This decree was challenged by the respondent by preferring an appeal before the High Court of Andhra Pradesh. It appeared that the decision of the said High Court in the case of *State of Andhra Pradesh v. Shri Krishna Coconut Co.*<sup>1</sup> was in favour of the view taken by the trial Court; but the respondent urged before the High Court that the said decision was erroneous in law and required reconsideration. That is

why the respondent's appeal was placed before a Full Bench of the High Court. The Full Bench has upheld the contentions raised by the respondent. It has held that in view of the provisions of section 18-A of the Act, the suit is incompetent. Alternatively, it has found that on the merits, the claim made by the appellant was not justified. The result of these findings was that the respondent's appeal was allowed and the appellant's suit was dismissed with costs. The appellant had filed cross-objections claiming additional interest on the decretal amount, but since its suit was held to be incompetent by the High Court, its cross-objections failed and were dismissed with costs. It is against this decree that the appellant has come to this Court by Special Leave.

Mr. Ranganadham Chetty for the appellant contends that the High Court was in error in coming to the conclusion that the appellant's suit was incompetent because he argues that the High Court has misjudged the effect of the provisions of section 18-A. In dealing with the question whether Civil Courts' jurisdiction to entertain a suit is barred or not, it is necessary to bear in mind the fact that there is a general presumption that there must be a remedy in the ordinary Civil Courts to a citizen claiming that an amount has been recovered from him illegally and that such a remedy can be held to be barred only on very clear and unmistakable indications to the contrary. The exclusion of the jurisdiction of Civil Courts to entertain civil causes will not be assumed unless the relevant statute contains an express provision to that effect, or leads to a necessary and inevitable implication of that nature. The mere fact that a special statute provides for certain remedies may not by itself necessarily exclude the jurisdiction of the Civil Courts to deal with a case brought before it in respect of some of the matters covered by the said statute.

It is, therefore, necessary to enquire whether section 18-A expressly or by necessary implication excludes the jurisdiction of the civil Court to entertain a suit like the present. Section 18-A provides that no suit or other proceeding shall, except as expressly provided in this Act, be instituted in any Court to set aside or modify any assessment made under this Act. It is common ground that there is no express provision made in the Act under which the present suit can be said to have been filed, and so, it falls under the prohibition contained in this section. The prohibition is express and unambiguous and there can be no doubt on a fair construction of the section that a suit cannot be entertained by a Civil Court if, by instituting the suit, the plaintiff wants to set aside or modify any assessment made under this Act. There is, therefore, no difficulty in holding that this section excludes the jurisdiction of the civil Courts in respect of the suits covered by it.

It is, however, urged by Mr. Chetty that if an order of assessment has been made illegally by the appropriate authority purporting to exercise its powers under the Act, such an assessment cannot be said to be an assessment made under this Act. He contends that the words used are "any assessment made under this Act" and the section does not cover cases of assessment which are purported to have been made under this Act. In support of this argument he has referred us to the provisions of section 17 (1) and section 18 where any act done or purporting to be done under this Act is referred to. It would, however, be noticed that having regard to the subject-matter of the provisions contained in sections 17 (1) and 18 it was obviously necessary to refer not only to acts done, but also to acts purporting to be done under this Act. Section 17 (1) is intended to bar certain proceedings and section 18 is intended to afford an indemnity and that is the reason why the Legislature had to adopt the usual formula by referring to acts done or purporting to be done. It was wholly unnecessary to refer to cases of assessment purporting to have been made under this Act while enacting section 18-A, because all assessments made under this Act would attract the provisions of section 18-A and that is all that the Legislature intends section 18-A to cover.

The expression "any assessment made under this Act" is, in our opinion, wide enough to cover all assessments made by the appropriate authorities under this Act whether the said assessments are correct or not. It is the activity of the assessing officer acting as such officer which is intended to be protected and as soon as it is shown that in exercising his jurisdiction and authority under this Act, an assessing

is not necessary for us to consider whether this assumption is well founded or not. But the presence of the alternative machinery by way of appeals which a particular statute provides to a party aggrieved by the assessment order on the merits, is a relevant consideration and that consideration is satisfied by the Act with which we are concerned in the present appeal.

The clause "assessment made under this Act" which occurs in section 18-A also occurs in section 67 with which the Privy Council was concerned, and in construing the said clause, the Privy Council observed that the phrase "made under this Act" describes the provenance of the assessment : it does not relate to its accuracy in point of law. The use of the machinery provided by the Act, not the result of that use, is the test. These two Privy Council's decisions support the conclusion that having regard to the scheme of the Act, section 18-A must be deemed to exclude the jurisdiction of civil Courts to entertain claims like the present.

In the result, we must hold that the view taken by the High Court is right and so, the appeal fails and is dismissed. There would be no order as to costs.

K.S.

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*Appeal dismissed.*

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## NOTICE

(1963) 2 S.C.J. ends with this part. Index for the volume will be issued in due course. Part I of (1964) 1 S.C.J. will be published on 5th January, 1964 and be sent by V.P.P. to subscribers whose subscriptions are not received by that date.

5th December, 1963.

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Manager,

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